Application No. 32 of 2020

**IN THE ANTI-MONEY LAUNDERING AND COUNTER-TERRORIST FINANCING REVIEW TRIBUNAL**

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IN THE MATTER of a Decision made by the Commissioner of Customs and Excise pursuant to section 31 of the Anti-Money Laundering and Counter-Terrorist Financing Ordinance, Cap. 615

and

IN THE MATTER of section 59 of the Anti-Money Laundering and Counter-Terrorist Financing Ordinance, Cap. 615

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BETWEEN

JOINT ACHIEVE EXCHANGE STORE — Applicant

and

COMMISSIONER OF CUSTOMS AND EXCISE — Respondent

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Tribunal: Mr. Shieh Wing-tai Paul, SC, Chairman

Date of Ruling: 4 July 2022

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**RULING ON COSTS**

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1. This is my ruling on costs, which the parties have agreed to be dealt with on paper, following settlement of the underlying application for review. The Applicant is Joint Achieve Exchange Store ("**the Applicant**") which is the trading name of Mr Ng Siu Ben. The Respondent is the Commissioner of Customs and Excise ("**the Respondent**"). The subject matter of the review concerned a decision by the Respondent dated 2020.08.11 ("**the Decision**") refusing an application by the Applicant to renew its existing Money Service Operator Licence.

2. The basic chronology of events is as follows:

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| 2016.08.29 | The Applicant was granted a Money Service Operator ("**MSO**") Licence. |
| 2018.09.12 | The MSO Licence was renewed for two years. |
| 2020.01.08 | Guidelines for Submission of Business Plan and Guidelines for Submission of AML Policy were published by the Respondent. |
| 2020.07.23 | The Applicant submitted an application to renew its MSO Licence. |
| 2020.08.11 | The Respondent requested the Applicant to attend a meeting on 2020.08.13 with original documents. |
| 2020.08.13 | The requested meeting took place. The Applicant submitted the settled version of the Business Plan and AML Policy. In the meeting with the Respondent, no queries were raised by the Respondent as to the original documents provided. |
| 2020.09.10 | The Decision was made. |
| 2020.09.16 | The Applicant applied for review of the Decision. |
| 2020.09.25 | The Respondent filed his Brief Summary. |
| 2020.11.02 | The Applicant filed witness statements of Ng Siu Ben and Cheng Yiu Mo, and applied for stay of the Decision pending review. |
| 2020.11.17 | Tribunal made directions on the stay application. |

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| 2020.11.25 | The Department of Justice ("**DOJ**") proposed a stay of proceedings for 56 days, which was later granted by consent on 2020.11.26. |
| 2020.12.07 | Letter from DOJ (without prejudice save as to costs) enquiring whether the Applicant intended to submit an updated Business Plan and AML Policy to address the deficiencies outlined in §§3(m) to (r) of the Brief Summary. |
| 2020.12-2021.05 | Settlement correspondence between the parties. |
| 2021.06.02 | Applicant submitted the Revised Business Plan and AML Policy for the Respondent's consideration. |
| 2021.08.23 | The Tribunal made an order ("**the Order**") that the Decision be withdraw, that the MSO Licence be renewed and valid until 2022.11.25 subject to the Applicant's submission and compliance with the Revised Business Plan and AML Policy submitted on 2021.06.02, that the application for review be withdrawn and the issue of costs be determined by way of paper disposal. |

3. The following principles are applicable in determining costs:

(1) The Tribunal has jurisdiction to award costs relating to a review and the application for review (section 65(1)(b) of the Anti-Money Laundering and Counter-Terrorist Financing Ordinance (cap615)). ("**the Ordinance**")

(2) Under section 65(3) of the Ordinance, Order 62 of the Rules of the High Court apply to the power to award costs.

(3) Under RHC Order 62, costs are in the discretion of the court or tribunal concerned.

(4) While the matter is one of discretion, the normal order is that costs should follow the event except where in the circumstances of the case some other order should be made as to the whole or any part of the costs. (Order 62 rule 3(2)).

(5) Under Order 62 rule 5(2), in the exercise of its discretion the Tribunal shall take into account (among other things) the conduct of all the parties before and during the proceedings.

Discussion

4. If one were to look for what the "event" is for a review application, the natural answer would be that the "event" is the outcome; in other words whether the application is "allowed" and the Applicant gets what it sets out to achieve.

5. Applying that reasoning to the facts of this case, the Applicant would contend (as it does) that it succeeded in the application because the outcome of the application was that the Applicant obtained a renewal of its licence and the Decision was withdrawn.

6. However, even on the basis that the "event" is whether the Applicant obtains a renewal and that the Applicant can be said to have "succeeded", that does not necessarily mean that the Applicant should get the costs of the application. "Costs follow the event" is only the presumptive starting point for the exercise of the discretion as to costs. There are other facts that should be taken into account, notably the conduct of the parties before the application.

7. In the context of adversarial litigation (which this is not), an oft-encountered scenario where a successful appellant is deprived of his costs of the appeal is where the appeal only succeeded because the appellant adduced or relied on some new evidence or information which was not before the original decision maker. In such a case, it could be said that the original decision was rightly made and the appellant should not get any costs of the appeal until such time as the appellant had informed the respondent of the new evidence which "won the case" for it. This is because it is only after the respondent learns of such new evidence and still continues to resist the appeal that it can be said that the respondent's unjustified continued resistance of the appeal has led to costs being incurred.

8. Applying this to the present case, the Respondent can (and indeed does) argue that the original renewal application was flawed and rightly refused, and shortly after the Applicant has submitted its revised Business Plan and AML Policy, the Respondent accepted them without unreasonably resisting the application. The Respondent therefore should not be held responsible for any of the Applicant's costs which were incurred because of its original flawed application.

9. I can see the strength of this argument, but there is one very important difference between a case in the context of adversarial application, and a case (such as the present) of a decision in an administrative setting.

10. In the context of a piece of adversarial litigation, both sides would have a chance to put forward their legal and factual contentions and the original decision maker (say, a judge) will rule on such matters as the parties had put before him (after hearing opposing submissions, where parties have had the opportunity to point out the flaws and defects of the other side and each had a chance to deal with such criticisms).

11. In the context of an administrative decision like the present, the position is slightly different. The Respondent is not an "adversary" of the Applicant. He does not adjudicate on "competing" cases either. He often engages in a more interactive process with an Applicant in the following sense: Sometimes an application – when submitted – may not be in a "pristine" condition ready to be approved. Some relevant item of information may be missing. A document may have room for improvement. The relevant authority could ask for clarification or information, or point out the flaw and ask for that to be remedied. There are a number of ways in which it can be done. It can be by a meeting, or in writing, or the relevant authority may set out its initial or provisional views and give the Applicant one further chance to provide supplemental information or document before an application is rejected.

12. Each case depends on its circumstances and in the absence of more detailed submissions, and I would be slow to lay down any form of dogmatic guidelines (of more general application) as to how an authority should handle an application which was thought to be flawed. What I say below focusses only on the facts of this case.

13. On the facts of this case:

(1) There was a meeting between representatives of the Applicant and Respondent on 2020.08.13. Upon production of original documents, no question was raised or asked about any alleged defects in the contents of the documents.

(2) After the said meeting, the Decision was made within a month. During that month the Respondent had not communicated any comments, queries or criticism about the Applicant's Business Plan or AML Policy.

(3) The first time that the Respondent made known its criticisms or comments on those documents was when he provided the Brief Summary *after* the Decision was made and after the Applicant has made the application for review.

(4) I have considered the comments made by the Respondent in the Brief Summary, and the responses made by Mr Cheng Yiu Mo (witness for the Applicant) in his witness statement to those comments. I will not rehearse those in detail. Suffice it for me to say that:

(a) The comments in the Brief Summary are matters going to the drafting and level of detail in the two documents in question.

(b) These are matters that are – by their very nature - capable of being addressed and cured by appropriate revisions to the documents.

(c) I do not engage in hindsight and in reaching my view above and I do not place weight on the fact that the criticisms were indeed subsequently addressed to the Respondent's satisfaction by the Applicant's revised documents. However, the fact that they were so remedied subsequently gave me assurance that my view

was correct namely that their nature was such that they could indeed be remedied as a matter of drafting.

(d) The Respondent accepted the Applicant's revised documents shortly after their submission, without the need for further rounds of comments, criticisms or queries.

(e) There is no evidence that there was any legitimate reasons or factors (whether by way of law, policy, resources or otherwise) why the Respondent's criticisms could not have been communicated to the Applicant before the Respondent made his decision to refuse the renewal application.

(f) Had an opportunity been given to the Applicant, the Applicant would have been able to address the queries (as it demonstrated that it could). There would then have been no refusal to renew, and the Applicant would not have to incur the costs of making and preparing for the application.

14. In my view, therefore, the costs of the review application could have been avoided if the Respondent had provided an opportunity to the Applicant to address its concerns and queries.

15. For the Respondent it may be argued that instead of incurring the costs of an application for review, the Applicant could simply have made a fresh application supported by revised and better versions of the AML Policy and Business Plan, in which case the costs of the application would not be incurred. That may be so; however, the process of appeal (in the form of a hearing *de novo*) exists for a reason and once the appeal mechanism has been invoked, it has to be addressed in accordance with principles of law and procedural fairness. I do not wish a mindset to be developed on the part of the decision maker (and I am not suggesting that this was the case here) whereby applications were readily rejected on insubstantial grounds or without any attempt to point out any perceived defects to an applicant, in the belief that the Applicant can always try again. On the other hand, this is not to provide a *carte*

*blanche* for applicants to submit sloppy and half-baked applications in the hope that the decision maker will "hold their hands" and teach them what to say in minute details. Everything depends on the individual facts and notions of fairness and reasonableness.

16. The Respondent argued that if the Business Plan and the AML Policy had been rectified to the satisfaction of the Respondent there and then when the Respondent had spelt out his criticisms in the Brief Summary, the Licence could have been renewed accordingly, and there would be no need to incur any subsequent costs. That may well be so, but that is a point which goes to whether costs to be subject to any discount. It does not alter the basic point of principle, namely that the Applicant was put to the expenses of making the application because the Respondent had not afforded it an opportunity to address his queries before refusing the renewal application.

17. I am therefore of the view that as a matter of principle, the Respondent should bear the Applicant's costs of making and preparing for the application.

Quantum and discount

18. It is appropriate for me to indicate what category of costs can be recovered and whether the whole or only part of the Applicant's costs should be borne by the Respondent. Hopefully that will provide some guidance to the parties in trying to come to an agreement (failing which the matter be restored to me for precise quantification).

19. First, I am of the view that the costs of preparing for the revised AML Policy and Business Plan are not recoverable as part of the costs of the review application. This is because if the Respondent had allowed the Applicant a chance to address his queries before the Decision and the Applicant had submitted those revised documents as part of the process of applying for renewal, then the Applicant's costs of preparing those documents would have been absorbed and borne by the Applicant anyway. There is no reason why, just because the matter has taken the form of an application for review, the same costs can be offloaded to the Respondent.

20. Another point which had caused me some concern is that the initial position of the Applicant upon seeing the Brief Summary was not to present the revised documents, but to engage in a debate as to whether the criticisms in the Brief Summary were justified by filing Mr Cheng's witness statement. The revised documents were only supplied after the Department of Justice had proactively asked whether the Applicant would be submitting any revised documents. While the Applicant maintained its submission that the Respondent's objections were of "low merit", the fact is that the case was eventually settled on the basis of the revised documents which were only supplied later. If I had to rule on the matter I would be inclined to hold that the original objections had merit (which is a different point from whether the original objection ought to have rejected forthwith). I attach some weight to this point in favour of the Respondent.

21. That said, the Respondent /Department of Justice did not ask for the revised documents immediately upon filing the Brief Summary either. They only raised this after the Applicant had filed its witness statements, including that of Mr Cheng which addressed the points contained in the Brief Summary. As a matter of timing, it is likely that the decision to ask for revised documents was prompted by the evidence prepared by the Applicant. I take this into account in favour of the Applicant.

22. A number of finer and further points can be made on each side. Without meaning to be exhaustive, and on top of the points mentioned above, for the Applicant it can be said that had the Respondent dealt with the matter not by way of an outright rejection but by way of seeking further or revised documents in a facilitative manner, the Applicant would have been more amenable to co-operate by providing the revised documents instead of arguing with the Respondent about the legitimacy of the queries (as the Applicant did, once it got into an "appeal" mindset) and this background should be taken into account in considering the Applicant's initial position in the application. For the Respondent it may be said that even after he had made its "without prejudice save as to costs" offer, the Applicant did not immediately provide the revised documents, but had incurred what may be regarded as unnecessary costs in arguing over the terms of the settlement (when it could have been reached earlier and by simpler means) before finally providing them upon being chased by the Respondent.

23. Discretion in costs is not a matter of mechanical or scientific exercise. I have borne in mind all the circumstances of the case including who can be said to have secured a favourable outcome, the procedure leading to the initial refusal, and also the conduct of the parties *after* the Brief Summary had been produced. My view is that while the Applicant should in principle obtain costs of the application, its conduct in not offering the revised documents at an earlier opportunity justifies a discount of his costs.

24. I saw in a letter (without prejudice save as to costs) from the Applicant's solicitors dated 2021.03.04 that it was prepared to offer a discount of 10%. In my view such discount is too low. In the exercise of my discretion and in view of the matters I have rehearsed above, I order such discount to be 50%.

25. Therefore the Applicant is to have 50% of his costs of making and preparing for the application, such costs not to include the costs of preparing for the revised AML Policy and Business Plan.

THE AMLCTF REVIEW TRIBUNAL
打擊洗錢及恐怖分子資金籌集覆核審裁處

Shieh Wing-tai Paul, SC
Chairman
Anti-Money Laundering and
Counter-Terrorist Financing Review Tribunal