



Malaysia | Tax, Indirect Tax | April 2016



# Indirect Tax Perspective $\Rightarrow$ everything

## GST Chat All you need to know

## Issue 4.2016

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# Greetings from the Deloitte Malaysia Indirect Tax team

Hello Everyone! Welcome to the April edition of GST Chat.

With this edition we officially mark the first anniversary of the introduction of GST in Malaysia. To mark this milestone we have devoted some space to reflect on the year that passed but also what we would like to see during the year ahead.

A year on, some of the intricacies and nuances of the GST Law are starting to be explored, especially as there is greater audit and dispute activity. As our Law borrows heavily in concepts and in some cases wording from other countries, some of the interpretations and analysis from abroad may be relevant to Malaysia.

Keeping this mind, we are introducing a new section ‘Legal Corner’ to our GST Chat. The section will cover key cases and technical developments from abroad and consider how they may apply in the Malaysian context. The contributions will be from Deloitte Malaysia’s Appeals and Dispute Resolution team headed by Chandran Ramasamy. We hope you enjoy the new addition.

Here is some other news and interesting developments from the past month:



- Stepping up from its success from 2015, the Labuan branch of the Royal Malaysian Customs Department (RMCD) is optimistic that they are able to collect more than the RM800 million collected last year;
- Customs has expressed satisfaction at how GST was implemented on the basis that compliance among traders stands at 95% percent.
- Customs has organized a 'Let's Ask for GST Receipt' competition, which features a number of prizes. The competition is aimed at raising awareness amongst traders and consumers on the importance of issuing & keeping GST tax invoices.

We hope you find this month's edition insightful and maybe you can reflect back on your businesses evolution this past year with the introduction of GST. We would welcome your thoughts and feedback. Until then, best regards from us, the Deloitte Indirect Tax Team.

Kind regards,

**Tan Eng Yew**

GST and Customs Country Leader – Deloitte  
Malaysia

# 1. GST technical updates



**Terrence Mooi**  
**(Senior Manager)**  
**Ipoh Office**

Please note that the guides issued by RMCD are merely stating the general views adopted by RMCD. They are not rulings and are neither binding on the RMCD nor on any party that follows the practices recommended by the Guides. As a result, while potentially useful for obtaining an understanding of RMCD's thinking on the topic, it is essential that you undertake a proper analysis of the situation in question taking into account your particular facts. As the Guides typically deal with generalized situations, and use fairly simplistic case studies, you should consider any differences between your factual situation, and that in the Guides with great care, as minor differences could give rise to significant changes to the outcome.

## **Revised Guides**

### **[Guide on Retailing](#)**

The summary of changes/additions/consolidation as compared to the previous version are as follows:

- An addition was made in the section dealing with price discounts to cover scenarios where the retailer is compensated for the discount by a third party (i.e. the manufacturer). In this case the retailer needs to account for GST on the **full** sale amount and not on the discounted value. A tax invoice is issued to the customer for the full amount;

#### **Deloitte Comment**

The view expressed by RMCD will be challenging to retailers to comply and could be confusing for consumers. It also calls into question concerns that the retailer may have regarding possibly confidential arrangements that it may have between itself and the third party.

There is precedence in other jurisdictions that such payments and rebates from manufacturers may in fact be either not subject to GST or may be a payment for a supply made by the retailer to the manufacturer. Retailers should consider this update and assess whether they are able to comply from a systems and administrative perspective. They should also review current rebate arrangements and assess whether any GST issues arise as a consequence. Finally, they should

consider the impact this change may have for commercial relationships that are currently in place.

- An additional compliance requirement has been imposed for discount vouchers and discount cards, in that they must now clearly state the words “*discount voucher*” and set out the amount of the discount either in percentage or monetary terms;

#### Deloitte Comment

It is unclear from the guidance what the implication will be if the vouchers do not meet the above requirements. However, where possible the retailers should make best efforts to comply with this requirement.

- Sale of discount vouchers for consideration are subject to GST;

There was also the re-arranging and consolidation of some parts of the guide, including:

- Structuring of the guide to separate the examples and guidance into the different types of vouchers (monetary, non-monetary, tokens, stamps and loyalty points);
- The loyalty program model has been illustrated on a transaction basis rather than an event basis.
- Direct selling transactions has been included as part of retailing activities. ‘Stockist’ has been deleted because their function is to be viewed as part of the Direct Selling Company. ‘Distributor’ has been streamlined into 2 categories i.e. as commission agent and independent reseller. Incentives derived by them have been viewed as separate supplies. In the event a distributor ceases their direct selling business, the price paid to reacquire unsold goods would be GST-inclusive.

#### Deloitte Comment

The revised guide should be viewed as providing comprehensive guidance for the retailing business model which highlights various type of supply for GST purposes such as selling of discount vouchers/discount card, monetary voucher, etc.

### Land and Property Guide

Due to the extensive developments in this area, we will be releasing a detailed update on the Property Guide in a separate alert. This is an important issue and has wide ranging implications.

### Guide on Employee Benefits

In an earlier draft of the Guide it provided that GST needed to be accounted for on all safety equipment given away for free to employees. Under the revised Guide it provides that if the company retains the ownership of safety equipment (i.e. equipment is capitalized) then no GST should be accounted for even if the equipment is provided to employees.

### Deloitte Comment

Businesses will now have to capitalize and maintain a fixed asset register for all safety equipment/business assets used by employees if they do not want to account for output tax on these goods.

In any internal policy on the retention of safety equipment, it may become necessary to identify that the costs associated with recovering equipment from ex-employees in order to destroy it, exceeds the value of the used equipment, with the result that efforts to ensure recovery will be commensurate with the value of the used equipment.

- GST implication on the reimbursement of accommodation cost - the reimbursement is treated as an exempt supply.

### Deloitte Comment

In this case, it is observed that the RMCD are taking the stance that reimbursement would follow the nature of the underlying supply. We agree with this interpretation and would suggest that businesses that provide such accommodation revisit the treatment that has been applied to date to ensure that it is in alignment with the current treatment.

### Other Guides

In addition to the above, the following guides have also been revised, but no major changes were noted:-

[Guide on Entertainment Industry](#)

[Guide on Fund Management](#)

[Guide on Travel Industry](#)

[Guide on Designated Areas \(DA\)](#)

You should however review any of the Guides that are applicable to your business, and feel free to raise any concerns or issues with the treatment that you detect with us should you need further clarification.

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## 2. GST – A year in retrospect



**Bruce Hamilton**  
(Director)  
Kuala Lumpur Office

The year since the introduction of GST in Malaysia has gone better than expected. But it has also highlighted concerns that were never anticipated and have a significant impact.

What have we learned from experience, and how can business work with the authorities to address their concerns?

The implementation of GST benefitted from the early preparation by Customs, which assisted with the overall success. During the lead up, Customs prepared taxpayers by issuing a variety of 'Guides' dealing with their views of how GST should be applied in Malaysia, and these served for most SME's as a useful indicator of what to expect.

Customs then commenced running 'intensive' courses for accountants to train them on applying the legislation. This equipped them with the basic skills required to assist their clients, so that they could deal with queries and calls for assistance from less sophisticated businesses. They also assisted business associations to address members' issues and to understand their concerns.

Soon after 1 April 2015, Customs started to issue Director General's or 'DG Decisions' – mostly dealing with practical/ technical issues where 'solutions' were considered to be of a more general application. This had the potential to be very useful, particularly where, in practice, the treatment does not always match expectations created by the Guides. This has occurred as many Guides were in need of update to keep up with changes following the introduction of the GST Law and the practice adopted by Customs.

While the DG Decisions can be useful, unfortunately they tend to apply to very specific situations and to date, the decisions give no information on the rationale for the decision (and the facts provided are not comprehensive).

The DG Decisions would be more useful if they provided more explanation as to the underlying rationale behind the decision, as this would assist taxpayers in applying them more broadly. This would also reduce the need for taxpayers to seek further guidance or appeal decisions where the additional guidance would have assisted in their understanding of how to apply the GST.

An early issue for many businesses was the treatment of voluntary registrations where an entity is clearly conducting a business, but would take longer than 12 months before making taxable supplies.

Initially the DG denied applications for voluntary registration where it was clear that there were no immediate taxable supplies. Where registration was accepted (generally only if taxable supplies are going to be made within 12 months of the registration), Customs imposed a restriction on business claiming back GST incurred until the entity had commenced making taxable supplies. This impacts on activities as diverse as property and infrastructure construction, oil and gas exploration and support activities, and plantation development etc. where it may be years before they are able to make taxable supplies. This issue is still being addressed.

Clearly, as has been the case in other countries introducing GST, Customs officials are still learning about the intricacies of how different industries transact in practice. This is to be expected, and we have seen Customs connecting with their counterparts in foreign jurisdictions in building their knowledge, primarily of audit practices, but equally it would be beneficial for them to build their knowledge of 'acceptable' industry practices.

Clearly, one year on, things are improving but there is still more that can be done to make our GST system more efficient and user-friendly. From the perspective of taxpayers, it is still essential that they constantly review the treatment applied to transactions and consider the outcome that will occur when (not 'if') they are audited by Customs.

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## 3. GST – What lies ahead



**Senthuran Elalingam**  
**Asia Pacific Indirect Tax Clients,**  
**Markets & Industries Leader**  
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What are we likely to expect and hope for in the coming years in relation to the GST? As we look forward, it is useful to look back at recent events and how things have developed in other countries. Here are some likely developments:

### **Greater Audit Scrutiny**

RMCD have been given an increased revenue target of RM 39 billion for this year (up from RM 27 billion) and increased penalty powers. There is already evidence of a shift from education to audit, and whilst we are all now used to the refund desk audits, we are likely to see more comprehensive and specific issues audits. These can cover areas such as long adjustments, claiming residual input tax, zero-rating of transactions and the claiming of relief. There is also likely to be a focus on systems and process to assess whether GST is being paid or claimed in the right month and whether the appropriate documentation is in place.

Although we have not seen the requirement for a GST Audit File or GAF being mandated just yet, it is likely to be on the radar for RMCD. Once implemented it would allow for more sophisticated e-Audits that would allow Customs to conduct 'real time' analysis of transaction data.

As we move into a greater emphasis on audits, the hope is for a more balanced approach from RMCD, rather than the focus being on businesses wanting to comply. RMCD should be focusing on more serious offenders. Some steps that can encourage compliance would be clearer guidelines on penalties in the case of voluntary disclosures, and allowing taxpayers to correct minor errors in subsequent GST Returns. These concepts exist in other established jurisdictions and would be a welcome addition to Malaysia.

### **Changing Views**

We have already seen significant re-writes to the guidance in general, and some amendments to the Law. This is likely to continue over the next few years as a consequence of greater audit and dispute activity, and as RMCD become more aware of business issues.

At present the guidance is held in many different sources and forms, from the published RMCD Guides and the Director General decisions, to the less circulated industry and accounting body papers / FAQs, RMCD presentations and training materials. RMCD are

already going through an expansive process of consolidating the guidance into its detailed collection of Guides, but the process will take time and so it is incumbent on taxpayers (and their advisors) to be across all the different material that is out there. It would also be of assistance to taxpayers if the Guides were given some official standing, e.g. as rulings, so that taxpayers would be protected if they could prove that they have relied upon those Guides.

Some things that may ease the burden for taxpayers would be to have a more comprehensive and published industry issues register that is available on the RMCD website. This would remove the need to go to multiple sources. The publication of rulings or specific guidance issued to taxpayers in a sanitised form (and with the approval of the taxpayer) can also ease the administrative burden for both RMCD and taxpayers, and has been fairly successful in other jurisdictions.

### **Self-Assurance**

Singapore was one of the pioneers with its Assisted Compliance Assurance Program (ACAP), but we have seen others, including Australia go down this path. Self-assurance would bring in requirements for taxpayers to self-review and regulate their GST risks and controls in a similar manner to the RMCD.

This may require taxpayers to update their internal processes and document the implementation of additional reviews and tests. As there can be significant administrative costs, the revenue authorities would normally provide some level of benefits such as priority access to rulings and reduction on penalties for errors.

In considering the focus of our neighbours, it is quite possible that RMCD may also take this approach to encourage compliance. However, this needs to be balanced by ensuring that taxpayers are given sufficient encouragement to participate, and replication of the concessions in relation to penalties and rulings would be welcome should we go down this path. Most businesses would see any reduction in the red tape that they have to deal with as a good incentive to take up these sorts of programs.

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## 4. Legal corner – Locating the illusive ‘fixed establishment’



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**Jeet Oza**  
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With the integration of modern technology in today’s business environment, more economic activities are being done remotely through the internet / telephone etc. This change is visible in financial services, e-commerce, information technology, software etc.

As an example, there are several multi-national businesses which may be incorporated / based abroad, but are making supplies to end customers in Malaysia. Such supplies are made via intermediate parties or facilitating parties which include a subsidiary, branch office, a third party agent’s office or the site of the customer itself where, the services are required to be performed on site.

In this context, it has become increasingly difficult to determine the location or the place from which such services are deemed to be supplied for the purposes of applying GST, and there is potential for two or more jurisdictions to seek to tax the same transaction.

In Malaysia, GST is chargeable on taxable services supplied in Malaysia. In terms of the Malaysia GST, services are deemed to be supplied in Malaysia if the supplier of the service ‘belongs’ in Malaysia. The GST Law provides that a supplier shall belong in Malaysia if he has a ‘business establishment’ or a ‘fixed establishment’ in Malaysia.

The uncertainty and complexity of the impact on treatment of international transactions stems from the fact that the terms ‘business establishment’ or ‘fixed establishment’ have not been defined in the GST Act. Further, as the GST legislation is of recent origin in Malaysia, there is no judicial precedent or guidance issued on this subject and many ‘grey areas’ are still left open to interpretation of various parties. As a result, multi-national businesses and their local intermediate parties are left in a dilemma when seeking to determine if the services provided by them would be considered to be provided from Malaysia or outside Malaysia.

Having said that, GST or VAT has been in vogue in other, more mature tax jurisdictions for quite a while now. For example, in UK, the UK VAT Act also contains similar provisions regarding the determination of the place of supply for services. Needless to say, even in the UK, this subject has been a fertile area for uncertainty and disputes resulting in several dissenting views which could be possibly adopted. However, over time the said provisions have been put through judicial scrutiny on several occasions.

The Court of Appeals UK has had the opportunity to review all the previous decisions given by various lower courts and consolidate the legal position on this subject. The Court of Appeals UK, in HMRC v Zurich Insurance Company [2006] STC 1964 held that for determining whether a premise amounts to a 'fixed establishment' or not, amongst other factual circumstances, it is most important to ascertain that the premise or establishment is of a certain minimum size and contains **both** the human and technical resources necessary for the provision of the services on permanent or perpetual basis. We have also seen RMCD adopt this test in its most recent version of the General Guide.

Though each case stands on its own set of facts, the above test laid down by the Court of Appeals is being increasingly adopted by lower courts and tax authorities in other tax jurisdictions. The above case was most recently applied by the UK VAT Tribunal in the case of Healthcare Leasing Limited v Commissioners for HMRC – (20260) [LON/2006/0763] where it was held that an intermediary / facilitating agent assisting its principal in entering into lease agreements with overseas buyers would not be treated as a fixed establishment as it did not have the permanent human and technical infrastructure to actually provide the lease.

As we are also seeing many countries adopt new GST rules to address the increase in cross-border digital transactions, it is possible that we will see more development in this area in the near future.

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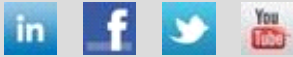
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