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GST Chat
All you need to know

Issue 2.2016

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Greetings from the Deloitte Malaysia Indirect Tax team

Hello everyone! We hope that you had a great Chinese New Year with your family and friends, and may the year of the Monkey bring you good health and lasting prosperity.

In view of declining global oil prices, the Prime Minister Datuk Seri Najib Tun Razak in his capacity as Minister of Finance released a revised Budget on 28 January 2016. There were no major changes impacting the GST, and a detailed analysis of the Budget changes can be found in our monthly tax publication "Tax Expresso" at the following link.

Whilst the GST was not directly impacted by the Budget, the drop in the oil price and the general economic conditions have put significant stress on the Government's revenues. The GST collections have mitigated some of this impact but there will be greater pressure to increase collections. We are already seeing signs of increased audit activity and a recent public case of penalties being imposed suggest the 'honeymoon period' is well and truly over.

In this month's edition we cover a number of recent updates to GST guides released by the Royal Malaysian Customs Department (RMCD), and also have a piece on the issues impacting the Oil & Gas industry.

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

- RMCD will be sending their officers abroad to mature GST jurisdictions such as the UK, Australia and South Africa, as a measure to enhance their officers' capabilities in dealing with fraud.
- Apart from the current GST legislation which requires companies to display GST inclusive prices, the government has made a preliminary proposal to introduce Single Pricing Policy, where businesses are required to display the exact price to be paid. The display price should include all service charges, taxes and any other previously hidden charges.

We hope you find our February edition useful and we always welcome your thoughts and feedback. Till next month, 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

Kane Bong
(GST Manager)
[Deloitte Kuching
& Kota Kinabalu]

We would like to highlight once again that guides issued by RMCD are only stating the general views adopted by RMCD. They are not rulings and are neither binding on the RMCD or the taxpayer.
As a general comment, the changes in the guides were largely minor, such as rearranging the order of the paragraphs, some edits to the examples and the insertion of new examples for further clarity.

Guide on Free Industrial Zone (FIZ) and Licensed Manufacturing Warehouse (LMW)

The summary of changes/addition as compared to the draft guide are as follows:

- A new paragraph has been inserted to reflect the relief given under sec 56(3) (a) of the GST Act – Companies operating in a FIZ **at ports/airports** is relieved from payment of GST on importation.

- An additional paragraph is inserted to include the relief given under section 56(3)(b) for supply of goods between:

  a) companies operating in the same FIZ either at port or not;
  b) a company operating in a FIZ at port to a company doing commercial activities operating in the same free zone;
  c) a company operating in a FIZ either at port or not, to a company operating in another FIZ either at port or not;
  d) a company operating in a FIZ either at port or not to a company having LMW status and vice versa; or
  e) a company having LMW status to another company having LMW status.

Deloitte Comment

The amendments made to the guide are to reflect the gazetted relief by the Minister of Finance 2/2015. The relief is given to a supply of goods made by a company in LMW to another company in LMW. It is not clear whether relief is only applicable on of **movement of goods from an LMW to another LMW** or it extends to all supplies of goods to an LMW company by an LMW company regardless of the movement of goods. In the absence of anything to the contrary, in our view GST would still be applicable on transactions involving movement of goods outside an LMW even where those supplies were made to a company with LMW status.

Guide on Free Commercial Zone (FCZ)

This guide is revised against its previous 22 July 2014 version. Below are the points in its revision.

- Para 15, 16 and 17 are added to include the RMCD's decision given under item 4 of the Director General's Decision 4/2015 where the GST treatment and documentation requirements are provided for goods sold to an overseas party but were sent to a third party within the FCZ for further manufacturing/services to be provided.
- Para 20 is added to include the relief given under section 56(3)(a) *(refer Relief by Minister of Finance 1/2015)*
- Para 24 is revised to include 'company operating in FIZ or having LMW status' for goods removed from FCZ to a company in Principal Customs Area (PCA).

Deloitte Comment

The updates to the guides simply reflect changes made to the Relief Order in July 2015 to cover the movement of goods in and out of various duty zones to be relieved from GST (subject to certain conditions) and this reduces cash flow issues.

Guide on Supply

This guide has been updated three times since December 2015 against the previous July 2015 version. We have rounded up the major changes as below:

- Example 15 was added under paragraph 36 to clarify that supply of goods and services together constitute mixed supplies and the GST treatment may differ for both goods and services.
- Paragraphs 59 and 60 on disbursement and reimbursements have been revised to include that **all the stipulated criteria** should be met in order to treat a recovery transaction as a disbursement or reimbursement.
- Amendments were made in paragraph 68(b) (i) and (ii) involving to zero rate supply of services on board ship and aircraft. In accordance with Item 8 of the First Schedule of the GST (Zero-Rated Supply) Order 2014.
- New subparagraphs and example were added to paragraph 68(c) - Supply of Imported Services:
  - Services related to financial services acquired from a supplier who belongs in a country other than Malaysia and benefits a recipient who belongs in Malaysia is treated as an imported service for GST purposes (even) if such services are consumed outside Malaysia.
  - Services which are acquired from outside Malaysia which is directly connected to goods located outside Malaysia and consumed outside Malaysia is treated as a supply not within the scope of GST.
- In paragraph 75(q), the time of supply for imported services has been amended as per new provisions.

Deloitte Comment

It is pertinent to note that reverse charge applies on services such as financial services acquired and consumed outside Malaysia but benefits a recipient who belongs in Malaysia. It shows that RMCD is applying the definition of "used, utilized and enjoyed" as stated in General Guide rather than only looking at the physical location of performance of service.

Guide on Designated Areas (DA)

- Paragraph 17 was added to treat any services rendered by a branch of a PCA company and supplied within DA are not subject to GST. The following conditions must be met:
  - The supply of services relates to services performed directly in connection with land or any improvement to such land and goods (in the DA);
  - The services is performed in the DA and benefits the person in the DA; and
  - The invoice is issued by the branch in the DA.

- Question and Answer 34 were added to explain the GST treatment for leasing of vessels (dry or wet leasing) by lessor in DA for lessee in DA or PCA.

Other Guides

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

- Guide on Import
- Guide on Property Management: Joint Management Bodies (JMBs) & Management Corporations (MCs)
- Guide on Venture Capital
- Guide on Money Services Business
- Guide on Pawnbroking
- Guide on Tourist Refund Scheme
- Guide on Construction Industry

Clarification on GST relief provisions for higher education institutions established under the Universities and University Colleges Act 1971 ('UUCA')

It was mentioned in our previous edition of GST Chat that due to GST (Relief)(Amendment)(No 2) Order 2015 issued on 14 December 2015 (PUA 291/2015), higher educational institutions established under the UUCA may no longer enjoy GST relief when acquiring certain teaching aids.

We wish to clarify that the GST relief provision under item 5(c) in the First Schedule of the GST (Relief) Order 2014 no longer applies to these educational institutions as they are considered as public higher educational institutions, while item 5(c) describes GST relief for private educational institutions. Therefore as public higher educational institutions are under the UUCA, the GST relief was provided under item 4 in the First Schedule of the GST (Relief) Order 2014 with a wider scope of relief covering "equipment and materials" in general.

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2. Marketing services to foreign principals – To tax or not to tax?

Shaishav Udani
(GST Associate Director)
[Deloitte Kuala Lumpur]

It is common practice for foreign companies with no operations in Malaysia to use a branch or a marketing company to promote and market the sale of those products in Malaysia. The question remains whether the provision of those services in fact 6% GST or are in effect exports taxed at 0%?

We have seen inconsistency in the market place with some businesses choosing to tax whilst others not. The issue arises from the requirement that the services provided to the offshore principal must not be 'directly in connection' with land or goods in Malaysia or 'directly benefit' a person in Malaysia in order for it to be taxed at 0%. Currently, there is no Malaysian guidance available on how these tests should be applied, and it has largely been decided by individual businesses with (or without) the help of their tax advisors.

In the absence of local guidance, there is a need to look abroad, and the Singapore authorities have provided some guidance on the issue (the Singapore GST uses the same tests). Some of the areas to consider are:

- the beneficiary(s) of the services stated in the contract to the exclusion of others
- flow of services/benefits to identify all the beneficiaries of services
- spin-off benefits arising out of the services provided
- Nexus between the supply of services and the goods or land
- Physical contact, attributes with the goods or land

Ultimately the treatment turns on the particular facts of the case. I was involved in a recent case for marketing services where we able to reach agreement with RMCD that the services were in fact taxed at 0%. In this particular case, RMCD accepted that the marketing services were for the benefit of the overseas principal and were not directly connected with goods in Malaysia. Ultimately, these are case by case decisions, and we recommend you look at your particular circumstances before choosing not to tax.

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3. GST Impact on the Oil and Gas (O&G) industry

Bruce Hamilton
(GST Tax Director)
[Deloitte Kuala Lumpur]

Looking at the recent mini-Budget, it is clear that Government had some challenges to address. It has also limited the Government's options for addressing some of the concerns around the treatment of GST in practice, when applied to industries like the O&G industry.

The Mini-Budget was announced so as to address the fact that oil prices have reduced from an average of approximately USD50 per barrel at the time of Budget 2016 to close to USD30 per barrel at the time of writing. In the Mini-Budget, it appears that the additional revenue has been found almost exclusively from collection of GST as, since 1 April 2015, it has collected over RM51 billion in revenue, compared to a collection of RM32.7 billion in 2014 before the introduction of GST.

The first indication of the impact on the O&G industry was identified when GST refunds resulted in a review by the RMCD, and lengthy delays (often 3-4 months) before being paid out. In some cases, these claims appear to have brought problems over the treatment of GST in certain situations to a head. This is because the treatment applied was not necessarily what taxpayers had anticipated.

The first of these arose as a result of requests for refund of the net GST paid where businesses were seeking to recover the GST incurred in carrying on their business functions for legitimate reasons. For some, it was because they were making zero rated export supplies, and they ultimately received the refunds claimed. For others, however, the issue became more complex. Businesses most affected included those in the upstream sector, and the oilfield services sector involving construction, refurbishment or repair of significant plant and equipment. Most had registered for GST on the basis that they were entitled to do so as they were engaged in a business with the intention of making taxable supplies. RMCD has, unfortunately taken a different view. If businesses do not make taxable supplies exceeding the registration threshold, then they may apply to register voluntarily. But in registering voluntarily, acceptance of the registration request is at the discretion of the Director General of Customs, and may be subject to certain requirements.
The position at time of writing of Customs is that if a business is not able to evidence that it will make taxable supplies **within** 12 months of applying for voluntary registration, it is not be allowed to register. This will virtually eliminate the entity's ability to claim refunds of GST incurred prior to registration. This will effectively add GST to the costs of any such projects which could render some projects non-viable, particularly in the current oil price environment.

In the same vein, where oilfield service providers are tendering internationally for fabrication and similar projects lasting longer than 12 months to be undertaken in Malaysia, they are faced with a choice that is unfortunate at best, and could result in the loss of any competitive edge, and consequently a lot of international work, at worst. If they are using a new special purpose entity for the contract, and it will not allow them to progress bill, they may not be allowed to register for GST voluntarily so that they can claim input tax credits.

As a result, any GST incurred will become an additional cost to the service provider. If, however, the contract permits them to progress bill, then they can register for GST and claim input tax credits, but will be required to charge GST at 6 percent to the overseas clients. This is because the supply of the services may not be allowed to be zero rated because the time of supply for GST will occur when the goods that are the subject of the services are in Malaysia. The fact that the goods may be moved overseas at the completion of the contract does not assist. For overseas recipients of the services (that may not be entitled to register themselves) this means that GST becomes an additional cost if passed on to them. If the price paid is treated as GST-inclusive, it is a blow to the profitability of the Service provider.

Clearly these issues will need to be resolved for the medium and long term. There are options that have been raised with the Government, but whether they will be acted upon remains to be seen. Hopefully Budget 2017 (due in the latter part of this year) will bring better news.

Look out for our upcoming editions as we will be covering new issues and covering any new developments relating to Malaysian GST. If you have any GST/Indirect tax related concerns and are interested in discussing or learning more about any specific issue, please do not hesitate to reach out us. We would be happy to assist you with any query.

We hope that you have enjoyed this edition of the GST Chat and for now. See you again in next month's edition!

For our past events related to indirect taxes, please click here.

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Contact Us

Kuala Lumpur Office

Robert Tsang
South East Asia Indirect Tax Leader
robtsang@deloitte.com
(+65) 6530 5523

Tan Eng Yew
Country GST & Customs Leader
etan@deloitte.com
(+60 3) 7610 8870

Fan Kah Seong
Executive Director
kfan@deloitte.com
(+60 3) 7610 8859

Senthuran Elalingam
Asia Pacific Indirect Tax Clients, Markets & Industries Leader
selalingam@deloitte.com
(+60 3) 7610 8879

Wong Poh Geng
Director
powong@deloitte.com
(+60 3) 7610 8834

Bruce Hamilton
Director
bruhamilton@deloitte.com
(+60 3) 7610 8844

Bonny Wei Teik Teo
Associate Director
bteo@deloitte.com
(+60 3) 7610 8683

Irene Lee Ah Kam
Associate Director
irlee@deloitte.com
(+60 3) 7610 8825

Ha Kok Fei
Associate Director
kha@deloitte.com
(+60 3) 7610 8190

Shaishav Udani
Associate Director
sudani@deloitte.com
(+60 3) 7610 8683

Name	Title	Email Address	Telephone
Wendy Poh Lynn Chin	Senior Manager	wechin@deloitte.com	(+60 3) 7610 8163
Vivek Mehta	Manager	vivekmehta@deloitte.com	(+60 3) 7610 8575
Diamond Khanted	Manager	dkhanted@deloitte.com	(+60 3) 7610 8618
Jeet Oza	Manager	jeoza@deloitte.com	(+60 3) 7610 7827
Nicholas Lee	Manager	nichlee@deloitte.com	(+60 3) 7610 8361
Sachin Vishwanath	Manager	savishwanath@deloitte.com	(+60 3) 7610 8395
Leong Wan Chi	Assistant Manager	wanleong@deloitte.com	(+60 3) 7610 8549
Nyana Pragasam	Assistant Manager	nnadarajan@deloitte.com	(+60 3) 7610 8299

Other branches

Name	Title	Email Address	Telephone
Johor Bahru **Susie Tan**	Senior Manager	susietan@deloitte.com	(+60 7) 222 5988
Penang **Evelyn Lee**	Director	evelee@deloitte.com	(+60 4) 218 9913
Melaka **Terence Ng**	Associate Director	terenceng@deloitte.com	(+60 6) 281 1077
Ipoh **Terrence Mooi**	Senior Manager	tmooi@deloitte.com	(+60 5) 254 0288
Kuching & Kota Kinabalu **Kane Bong**	Manager	kbong@deloitte.com	(+60 8) 246 3311

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Deloitte
Level 16, Menara LGB
1, Jalan Wan Kadir
Taman Tun Dr. Ismail
60000 Kuala Lumpur
Malaysia