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Indirect Tax

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GST Chat

All You Need to Know

Issue 7.2016
In this issue
GST issues

1. GST Technical updates
2. Denial of refund of input tax credit

Legal Issues

3. Legal corner – Exploring the legal relationship between principal and agent

Related links:
Other tax information

Contact us:
Deloitte Contacts

Greetings from the Deloitte Malaysia Indirect Tax team

Welcome dear reader to another edition of GST Chat.

As with every other month there have been more updates with regards to GST and its business implications at large. This month saw Royal Malaysian Customs Department ('RMCD') revise the Accounting Software guide, the import guide as well as the General guide.

In other developments the price control measures that were introduced prior to GST that were due to lapse in June have now been extended for a further six months to 31 December. Many businesses were hoping for a shift away from a strict analysis of net profit margin to a more subjective assessment based on an intention to undertake profiteering activities. Unfortunately this is not to be, and businesses should continue to monitor profit margins in light of these rules. Please reach out to our team if you require further details or information.
Here are some other news and interesting developments from the past month:

- A dates importer has filed a suit before the Malaysian High Court against the RMCD and the Ministry of Finance ("MOF"). The basis of the suit is that the defendants, being RMCD and MOF had sought to impose GST on the importation of dates and this was a victimisation of the plaintiff;

- The SME Association of Malaysia had reported that their members had seen a fall in income by at least 20% since the introduction of GST in 2015.

Happy Reading!!

Till we meet again.

Kind regards,

Tan Eng Yew
GST and Customs Country Leader – Deloitte Malaysia

1. GST technical updates

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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 or on any party that follows the practices recommended by the guides.

Revised Guide

General Guide – as at 12 July 2016

Paragraph 66

A new paragraph 66 on 'goods written-off' has been added to the revised General Guide.

- If the written-off goods are disposed of other than by sale, a GST registered person is required to keep the related documents as proof of write-off and disposal. For example, if such goods has been destroyed, a certificate of destruction has to be signed by the company's chairman or director which is to be kept for audit purpose. Documents required to be kept by the GST registered person for the written-off goods are as follow:

a) audited report / financial statement and management report;
b) audited accounts reporting the written-off goods;
c) evidence that the asset has no commercial value;
d) evidence that the asset is spoiled / unusable / expired;
e) approved letter by relevant body for disposal / destruction (if any) e.g.: Certificate from Ministry of Health Malaysia, Environmental Department or Department of Chemistry Malaysia;
f) destruction certificate signed by company's chairman / director (refer to **Appendix 1** of the revised general guide);
g) other documents as proof the asset has been disposed / destroyed.

- Input tax credit is allowable for damaged or obsolete goods and supporting documents need to be furnished to RMCD upon request.

Deloitte's comment

The above addition further clarifies that scrap sales are subject to GST and explains the documentary evidence that RMCD requires in the event the written-off goods are disposed other than by sale.

Example 18: Late payment of tax

The revised Example 18 illustrates that penalty is on amount of total tax due as opposed to tax underpaid.

Example 18: Late payment of tax

Due Date	*GST*			*On due date*	
	Tax due (RM)	*Tax paid Before due date (RM)*	*Balance (RM)*	*Rate of penalty %*	*Penalty due (RM)*
31.01.2016	*10,000*	*-*	*10,000*		
01.03.2016	*10,000*	*5,000*	*5,000*	*5%*	*500*
31.03.2016	*10,000*	*3,000*	*2,000*	*15%*	*1,500*
30.04.2016	*10,000*	*1,000*	*1,000*	*25%*	*2,500*
Prosecution	*1,000*				

Amount of penalty due on is calculated as below:-

01.03.2016 : RM10,000 x 5% = RM500

31.03.2016: RM10,000 x 15% = RM1,500

30.04.2016: RM10.000 x 25% = RM2.500

Deloitte's view

We do not agree with the RMCD's interpretation that penalties are to be calculated on the tax due and not on unpaid tax. The words "tax due and payable" in (a), (b) and (c) should not be read in isolation to the opening words of Section 41(8) which refers to "tax due and payable **is not paid**"

Guide on Import – as at 24 June 2016

Paragraph 16 is amended as below:-

Services acquired from overseas which is directly related to financial services and benefits a person who belongs in Malaysia, even though the services are consumed overseas, it is to be treated as imported services.

Deloitte's comment

We have taken the view that if a corporate entity established in Malaysia is the legal recipient of the services and payer then generally the services would be subject to reverse charge. This is because that particular entity has a presence in Malaysia and nowhere else and so the services are consumed in Malaysia. We have viewed the exceptions to this rule to be in terms of employee expenses where the employee recovers travel, food, training expenses etc. that are clearly consumed outside of Malaysia.

Generally we have seen in practice if a payment is made to an offshore entity by the local entity for a service that would be taxable if made in Malaysia a reverse charge would be applied.

It is unclear why RMCD have singled out financial services in the Guide. We had formed the view this was more likely to make it clear that services such as account and transaction fees and similar on accounts held overseas and overseas brokers fees on offshore securities transactions.

Guide on Accounting Software Enhancement towards GST Compliance – as at 20 July 2016

The RMCD has made its first amendment to this guide since the guide was issued as at 11 September 2014. Several new paragraphs are added for clarity and to be consistent with facts reflected in the other guides while several revisions could possibly impact your current IT configuration.

- Paragraph 14 under Supply Listings explains that accounting software must have the control to record all supplies based on Malaysia Standard Industry Codes (MSIC) which the users have registered according to their business industry. For example, if the users have 3 different MSIC numbers, then the accounting software must be able to differentiate the supplies according to the type of registered MSIC number into field (19) of GST-03 return.

- Paragraph 17 illustrates that the supplier's amount before GST and the GST amount from foreign currency to Malaysia Ringgit (MYR) equivalent should not be converted using the company's own exchange rate for accounting purposes as the rate may differ from the exchange rate adopted by the supplier.

- An entirely new section of twenty-two (22) Frequently Asked Questions are added which includes queries on accounting software/Point-of-sale (POS), several additional recommended tax codes for purchase and supply, GST Audit File (GAF), GST Taxpayer Access Point (TAP) File and GST-03 return. The Q&A section

provides clarity to certain issues and reiterates the common questions asked. Several points to note are as follows:

- It is not compulsory for accounting software/P.O.S to obtain RMCD approval. However, software developers must fulfill all requirements and scenarios in the GST law. As such, the accounting software/P.O.S developer is recommended to apply for the testing and evaluation session by Unit Perisian Perakaunan, Bahagian GST, Ibu Pejabat RMCD Putrajaya.

- Software users that purchases software from the list of vendor in the RMCD website can make an official complaint to Unit Perisian Perakaunan with relevant issue(s) and supporting document(s) if their vendors are not responsive towards complaints lodged. Unit Perisian Perakaunan will respond to the official complaint and raise the problem to the relevant vendor/ individual/ company/ developer of the software for action until there is mutual resolution. If there is serious issues on the accounting software/P.O.S, Unit Perisian Perakaunan may request the accounting software/P.O.S developer to re-examine their accounting software testing and evaluation session, or revoke their approval and verification.

- Several additional recommended tax codes are added to the existing purchase and supply tax codes in Q7 and Q8.

- Payment of salary/allowance/bonus by employer to employee is not treated as a supply. It is advisable not to assign a tax code for the employee's salary/allowance/bonus expenses. You can record such expenses in your company's ledgers account.

- Contribution by an employer and an employee (individual) to a pension, provident or social security fund is treated as neither a supply of goods nor a supply of services under Second Schedule, GST Act 2014. It is not advisable to assign a tax code for these expenses.

- Due to system constrains, a company may apply to RMCD for designing a standard format of GAF that differs from the GAF format as prescribed in this guide. Moreover, any software developer that wants to customize a different GAF format and utilize it for GAF auditing purposes by auditors or RMCD officers, advisory and approval from the Unit Perisian Perakaunan, Putrajaya may be sought.

- There are several tax codes that are amended and added wherein Appendix 2 of the Guide provides further details of the description.

Please click here for a detailed understanding of the Guide.

Deloitte’s comment

The RMCD has made significant amount of revisions in this Guide and have recommended a number of new requirements. It is important to the note that this is provided for guidance purposes and for ease of RMCD audit. It is not mandatory under the GST Law to meet these requirements and it is only necessary that for you to substantiate what is reported in the GST Return and provide a sufficient audit trail.

Back to top

2. Denial of refund of input tax credit

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While starting up a new business or enterprise, companies are required to incur large amounts of capital expenditure. With the implementation of GST, businesses have to bear an additional 6% on such capital expenditure. As GST is a value added tax, ideally speaking, this additional 6% is claimable as an input tax credit ('ITC') and should refunded to businesses which are in a refund position (i.e. input GST more than output GST). However, this ideal situation is best described as a contradiction to the harsh business reality. This assumes special importance for sectors like construction, manufacturing, oil & gas and any other business activity which requires a large initial capital investment to be made over a period of more than one year and where returns are not forthcoming immediately.

In the context of Malaysian GST, it is observed that the Royal Malaysian Customs Department ('RMCD') is increasingly denying refunds to businesses on grounds that they have not made any taxable supplies within 12 months from the date of registration. The RMCD have formed a view that ITC ought to be accumulated and carried forward until the business starts making taxable supplies.

The above view adopted by the RMCD results in significant cash flow issues for businesses which are already financially constrained in the wake of a slow economy. In terms of the GST Act there is no provision which requires a business to commence making taxable supplies within 12 months to be eligible to claim the refund of ITC. However, as mentioned above, this is the harsh reality.

Businesses may take the following steps to avoid or resolve such denials of refund of ITC:

Step 1: Engage RMCD at an early stage – It is advisable that businesses be upfront about their business plans and inform RMCD about the relevant aspects of the business such as proposed business activity, project cost and estimated date of completion. This information provides the RMCD with some comfort and assures them that the business is legitimate and committed to make taxable supplies in the near future.

Step 2: Incase, the RMCD has already made a decision to deny / withhold the refund of ITC, businesses may consider the following 2 legal options:

Option 1: File a review application under Section 124 of the GST Act, to the review unit of the RMCD explaining the facts and technical grounds on which refund of ITC should be granted. However, since the RMCD has already taken a view, it is unlikely that the review unit of the RMCD would take an opposing view and grant the refund of ITC.
Option 2: File an appeal before the GST Appeal Tribunal under Section 126 of the GST Act. A business having a significant balance of accumulated ITC should strongly consider approaching the GST Tribunal for resolving the dispute in a fast and timely manner.

For further information, please feel free to reach out to our dedicated tax Appeals & Dispute Resolution team on the contact numbers given below:

3. Legal corner – Exploring the legal relationship between principal and agent

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In today's complex and ever-changing business environment, it has become challenging for businesses to keep up with routine and exceptional business intricacies. Consequently, businesses have grown increasingly dependent on the services of various agents. Agents allow businesses to leverage the knowledge / efforts of the agent in relation to various business activities such as, appointing a clearing and forwarding agent for customs clearance of goods, appointing a portfolio manager to manage company finances, appointing an agent to secure a loan or capital, marketing business products etc.

Before entering into a relationship of agency, businesses ought to be mindful that the principal could be held liable for the acts done by their agent which are within the scope of his authority. This is also legally known as the principle of vicarious liability where the principal is made liable for the actions of his agent / servant. This principle is premised upon the concept that the agent is acting on behalf of the principal and therefore his actions are binding on the principal. Therefore, entering into a relationship of agency would entail a degree of risk and potential exposure due to acts committed by its agent.

It is a well settled legal principle that vicarious liability would be applicable for all acts done by the agent in the course of his agency and authority. It therefore logically follows that the principal cannot and rightly so, should not be made liable for acts committed by an agent which are beyond the scope of his agency / authority.

However, with respect to situations where the liability of a third party is involved, it has become increasingly difficult to interpret and determine as to whether an act committed by the agent was within the scope of his authority or not, especially in cases of fraud or negligence. In such cases, it is obvious that no principal would ever authorize its agent to commit a negligent or fraudulent act. However, does that mean that the principal can use that as a legal defense to absolve himself of any liability towards a third party?

The answer to the above question is not a static or rigid one but is a dynamic proposition which should be applied, given the facts and circumstances of each individual case. This has led to multiple and divergent judicial views being expressed by different judicial bodies across the common law jurisdictions.

Amongst the above views, a noteworthy view was given by the Supreme Court of New Zealand in the case of Nathan v Dollars & Sense Ltd [2008] NZSC 20. The said case, consolidates various legal views taken in the past and also provides keen insight into the principal agent relationship between themselves and vis-à-vis third parties.

The Supreme Court in the context of agency and third party liability stated that "A legitimate advantage of using an agent may be that the principal does not need to inform itself about what is done on its behalf, but that ignorance should not be able to be used as a shield against liability to a third party"

Having stated the above, the Supreme Court held that the true test for determining whether an act done by an agent, is within the scope of agency / authority or not is to see whether the act committed "was sufficiently connected with the authorized act so that it could be treated as a mode of performing it and therefore done within the agency". The Supreme Court also clarified, that the said 'connection' may be sufficient to bind the agent even if the act committed by the agent was criminal in nature and done with the fraudulent intent of the agent alone. Therefore, vis-à-vis a third party, a principal could be held liable to a third party for unauthorized acts committed by an agent.

While the above decision was in the context of forgery of a signature committed by an agent on a mortgage deed for his own gain, the broad principle laid down by the Supreme Court can prove to be a useful legal guide to determine whether any unauthorized act committed by an agent is treated to be within the scope of the agency or not. This may also prove to be very useful in the context of tax issues relating to customs duty and GST.

Recently, it has been observed that the RMCD has through its investigations and audits unearthed several cases of fraudulent mis-declarations in import declarations made by the licensed Customs (forwarding) agents appointed by the importer. In such situations RMCD is likely to apply the principle of vicarious liability to hold the principal liable for any short payment of customs duty that may have resulted due to the deliberate mis-declaration by the agent. The customs laws also have a broad deeming provision to customs offences committed by the agent to the principal. Interestingly, however, there is no such deeming provision to impute the civil liability to the principal for the agent's underpayment of customs duty (GST on imported goods is also treated as customs duty) and reliance would have to be placed on the

principle of vicarious liability to hold the principal liable. Nevertheless, given that the customs laws have widely defined the term “importer” to include the principal, the agent or any other person holding himself to be the importer, it should be within the powers of Customs to hold the agent liable for any underpayment of customs duty .From a pure standpoint of fairness, it seems unjust that the fraudulent agent who had gained the benefit of underpaying customs duty is not held accountable. Whilst fairness per se is not a legal principle, there is a legal principle of “procedural fairness”, which courts have held to apply to administrative actions of the Government, depending on the circumstances of the case. The argument could be made that, in the circumstances where the agent had defrauded both his principal and Customs of the customs duty, Customs should bring the full force of the customs law on the agent e.g. to demand the customs duty underpaid from the agent and to prevent the directors of the agent-company from leaving Malaysia till the demand is settled..
This would go a far way to restore the integrity of the Customs agency system that is vital to the smooth running of import/export trade transactions of businesses.

For knowing more on defending your tax treatments or GST dispute resolution, please feel free to reach out to us. Our team of legally trained tax professionals would be happy to assist you.
For our events related to indirect taxes, please click here.

We invite you to explore other tax related information at:
http://www2.deloitte.com/my/en/services/tax.html

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Back to top

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Back to top

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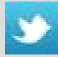

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