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Indirect Tax

GST Chat
All you need to know

Issue 07.2017
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Greetings from Deloitte Malaysia's Indirect Tax Team

Hello everyone and welcome to the July instalment of GST Chat.

As we enter the month of July, we leave behind the festivities of the previous month and continue forward by looking at the latest updates to the GST legislation as well as the changes to the GST guides.

The most significant development of the past month was the release of the relief order covering R&D services to non-residents and various services on goods that are for export. This change was the result of a significant consultation period between the impacted industries and the authorities, and is positive in the sense, that it shows that the authorities are willing to work with business to reduce the cost of GST. We discuss the technical aspects of these changes further below.

On another interesting note, we understand that RMCD are leaning towards the view that where a Malaysian entity chooses to 'bear' the cost of withholding tax on a service fee paid to a non-resident, reverse charge GST should apply on the amount borne (i.e. the service fee should be 'grossed up' by the amount borne). Since the introduction of the new withholding tax rules, this scenario has become more common, and businesses should take note.

Below are some other recent news and developments that may be of interest to you:

- The Government has announced that Malaysians are exempted to pay the enacted Tourism Tax for stay in hotels rated 3 stars and below. The commencement of the tax has been postponed as the RMCD require more time to implement the collection system, as declared by the Tourism Minister, Datuk Seri Nazri Aziz.

- A businessman in Kuching was barred from leaving the country over his company's overdue GST payment of less than RM 3,000.

I hope you will find this month's GST chat helpful and we look forward to be in touch with you should you have any queries.

Kind regards,

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1. GST (Provision of Information) Regulations 2017

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More information is now available in relation to the 'Electronic Information System' (EIS) or more commonly called 'dongle' for collection of GST data.

In the latter part of June 2017, the GST (Provision of Information) Regulations 2017 was enacted and came into force on the 1 July 2017.

The regulation provides further guidance in relation to what the 'device' means and the function of its software such as receiving, transmitting, storing, and reporting of data. Furthermore, the regulation establishes the particulars required for the GST registered person to provide to the RMCD. In particular, it includes details such as the address of the business premises including branches and the accounting system used or any other information as deemed required. Any changes to the business operation such as an address or a replacement of electronic machine would require the business to immediately notify the RMCD of said changes.

Businesses who operates within the Retail (hardware, grocery, bookstore and pharmacy), Entertainment (any business providing services of entertainment) and Food & Beverages (Restaurants) industry are likely to be most affected by this regulation. The RMCD would notify and arrange an installation of the said device with those effected. Enrolled businesses are then required to store the device and maintain it during the course of business.

Deloitte Comments

Upon coming into effect on the 1 July 2017, we were informed that the RMCD are commencing implementation in phases, starting with the Klang Valley region and moving on to other areas. This is not surprising as the RMCD had previously conducted pilot testing on the EIS in this region.

From the industries selected, it is clear that the focus is on those industries that operate in the cash economy and that would pose greater risks in relation to under-declared sales.

We would advise businesses who are effected to comply at the earliest possible once notified by the RMCD. This is to avoid business disruptions and possible penalty imposed for failure to comply with the new requirements.

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2. Minister's Relief 1/2017

The above mentioned Relief was issued (please refer to this link for a copy of the relief document) by the Ministry of Finance (MoF) under Section 56(3) of the GST Act 2014. Suppliers are relieved from charging GST for services supplied under contracts with their customers which do not belong in Malaysia (subject to specific conditions) for the following categories of supplies:

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Group 1: Handling or storage services
This covers a specific list of supplies relating to handling and storage services which are supplied directly in connection with goods for export.

GST relief may also apply to other services (in addition to the above) which are subcontracted by the supplier to third parties – though subject to conditions.

Group 2: Services of manufacturing activities and activities in installation, repair, cleaning, restoration and modification of goods and certain activities specific to oil and gas industry, activities in construction, building and modifications of ship and aircraft
This applies to the supply of services by a company licensed under section 65A of the Customs Act, 1967 or operating in a free zone, directly in connection with goods for export to an overseas customer who belongs in a country other than Malaysia who is outside Malaysia at the time the services are performed.

Group 3: Research & Development ('R&D') services
This is specific to the supply of services directly in connection with goods involved in R&D of a new product or the enhancement of an existing product to an overseas customer who belongs in a country other than Malaysia who is outside Malaysia at the time the services are performed.

Group 4: Supply of tools or machines, or services related to such tools or machines
This applies to the supply of tools or machines and services directly in connection with such tools or machines relating to manufacturing goods which are to be exported to an overseas customer who belongs in a country other than Malaysia who is outside Malaysia at the time the services are performed.

Deloitte's Comments

Item 12(b)(ii) of the Goods & Services Tax (Zero-Rated) Order 2014 provides for zero rating of services supplied under a contract with a person who belongs in a country other than Malaysia and which directly benefit a person who belongs in a country other than Malaysia who is outside Malaysia at the time the services are performed, **but shall not include services which are supplied directly in connection with goods which are in Malaysia at the time the services are performed**.

This Minister's Relief is the result of many applications made before the MoF and continual discussions between various industrial bodies and the RMCD. You will notice that the reliefs are primarily focused on not charging GST. This is in line with the general expectation of the industry which is seeking relief from charging GST on services performed under a contract with a person who belongs in a country other than Malaysia and which directly benefit a person who belongs in a country other than Malaysia who is outside Malaysia at the time services are performed, **whether or not** services are supplied directly in connection with goods which are in Malaysia at the time services are performed.

Some points to note:

- **Pre-approval condition**
  Under Group 2 and Group 3 it is not clear whether the pre-approval condition prescribed is going to be a blanket approval or whether it is required to be obtained at each and every instance which could be administratively burdensome or even impractical for businesses to do.

- **Drop shipments**
  Under Group 2, some businesses may have drop shipments into Free Zones and Bonded Warehouses but it is unclear whether the relief could be extended to such a scenario to qualify as exports.

- **60 day rule for export**
  - In the supply chain arrangements, it can often be the case that goods are stored in bonded warehouses & free commercial zones for more than 60 days. Therefore, the 60 day rule under Group 1 and Group 2 and approval at every instance for a period beyond 60 days specifically under Group 1 may be impractical for the businesses.

  - Under Group 2, there is no provision for the service provider to apply to the RMCD for grant of additional days beyond 60 days for exporting the goods which leaves the service provider with no choice even in cases of business exigencies.

  - The goods involved in the R&D will have no commercial value and are scrapped at scrap value. In most cases, the goods are not exported. Therefore, the 60 day rule or any other period approved by the RMCD and the approval to be obtained if the goods involved in R&D activities given relief are intended to be disposed of within Malaysia may not be practical for the businesses.

- **Maintenance of documents**
  Under Group 1, it is prescribed that the service provider has to maintain a copy of the export documents such as Customs Prescribed Form K2/K8 or Free Zone Prescribed Form ZB 1. However, in cases where the goods are sent to a third party, the service provider will no longer have control over the goods. In such cases, it would not be possible for the service provider to maintain the said document. Furthermore, placing the onus on the first service provider to track and ensure the third party exports the goods within 60 days is unduly burdensome.

- **Location of the tools or machines**
  Due to the supply chain specialisation, tools, equipment and machineries are often placed at the subcontractors' premises. Therefore, under Group 4, the condition that the tools or machines used specifically to manufacture the overseas customer's goods in the manufacturer's premises and for them to be not available for use in Malaysia by other than the manufacturer, may be impractical for the businesses.

- **Steps moving forward**
  In light of the above, businesses should consider revising their current business practices and consider the applicability of the relief provided to their business. Businesses should be wary of the conditions set out above and consider restructuring their services where possible to take advantage of the relief.

  Having said that, companies are still advised to practice prudence by obtaining confirmation from RMCD on whether the services provided meet the criteria set out above. This is in lieu of there being many areas which may still require further clarification and guidance on the applicability of the relief provided.

  Where business arrangements cannot be restructured, we would encourage businesses and the industry to continue to engage with the authorities to seek further refinement of the rules.

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3. GST Technical Updates

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Revised Guides

General Guide as at 12 July 2017

The revised general guide included an amended paragraph 92 and the addition of four examples that provide further clarification on the term "consumed in Malaysia" for the purpose of applying reverse charge for imported services.

It was clarified that the location of consumption refers to the location where the services are received (where benefit of the services are enjoyed) and not necessarily where the recipient of services is located.

The new examples provide practical scenarios for determining if services acquired from foreign suppliers would qualify as imported services. For instance, training fees and accommodation expenses incurred by employees whilst overseas would not be considered as imported services; while a foreign stock broker engaged to trade in foreign stocks, is considered to be imported services and reverse charge is required.

Deloitte Comments

The GST Act defines imported services to be "services by a supplier who belongs in a country other than Malaysia to a recipient who belongs in Malaysia and the services are consumed in Malaysia". The interpretation of "consumed in Malaysia" has given rise to much argument thus far.

RMCD's examples address some common scenarios, but fail to establish clearer principles that could be applied more broadly. Taxpayers should still proceed with caution when applying these rules and ensure that there are appropriate grounds to support the non-application of reverse charge.

Guide on Insurance and Takaful as at 6 June 2017

The previous guide had treated supply of Syariah advisory services for Takaful products as not subject to GST. The revised paragraph 9 in the new guide now treats such supplies as subject to GST at a standard rate.

Paragraph 21 of the revised guide was amended to specifically mention that input tax claims on any cash settlement for insurance and takaful relating to payment for medical expenses and the repair and maintenance of cars is disallowed under Regulation 36 of the GST Regulations 2014.

Paragraph 58 (a) was amended to add that any production bonus/persistency bonus received by insurance agents are subject to GST at a standard rate if the agents are registered for GST.

Paragraph 70 of the previous guide has been removed. This paragraph mentioned that if a repairer provides car repair service to an insurer for the claimant's car and issues a tax invoice to the insurer, the insurer can claim it as his input tax. This is no longer applicable.

Question 23 under the Frequently Asked Questions ("FAQ") was amended to clarify that GST on premium payments received by an insurer from an agent is to be accounted for when the cheque is received from the agent and not when the amount is credited into the insurer's bank account.

Question 46 under the FAQ was amended to clarify that soft commission is treated as a supply by the insurer/takaful operator to the agents by funding their expenses in recognition of the volume of business generated by the agent.

Question 47 was also amended to explain that profit sharing is treated as a supply by the insurance company to the insurance agents when they share their profits with the agents.

Deloitte Comments

A number of the changes in the Guide appear to be a reversal of previous concessions that have been granted to the industry, in particular the treatment of incentive payments. As there are no clear principles set out in the Guide, it is unclear whether the treatment simply applies to the incentives identified or broadly all incentives are impacted. We note, however, although there is uncertainty in the Insurance Guide, there is other guidance, in particular that provided to Direct Sellers that suggest that RMCD is taking a broader view that incentives paid to distributors and agents is taxable. However, until such time there is certainty in the RMCD position, participants are encouraged to connect with the respective industry associations and follow the approach recommended by the association.

Another important change is the RMCD view on the time of supply for payment of insurance premium, which ought to be accounted for on the day the premium (cheque) is received, in contrast to the date it is cleared by the bank. Insurance operators should ensure a robust reporting system to capture the date of receipt and account for the GST in timely manner.

Guide on Transfer of Business as a Going Concern as at 21 March 2017

Example 3 was added into the guide to describe the GST treatment on the input tax credits (ITC) relating to the incidental expenses incurred by the transferee on the transfer of a going concern.

The example on transfer of commercial properties outlines that:

a) ITC on expenses are fully claimable if the all the properties are taxable supplies;
b) ITC is not claimable if the properties are not taxable supplies; and
c) ITC is only partially claimable if only a portion of the property is attributable to taxable supplies

The example goes on to describe that where a property with units put up for rent is transferred:

a) GST is fully claimable in respect of taxable rental
b) GST is not claimable in respect of exempt rental
c) GST is partially claimable in relation to vacant units depending on factors such as intended usage of history of usage of the unit

Deloitte Comments

The view expressed in the Guide appears to conflict with section 68(4) of the GST Act which provides that both the transferor and the transferee are entitled to claim any ITC which is incidental to the transfer.

Whilst the RMCD position is understandable as an ITC would not normally be available for any costs related to the making of exempt supplies. A transferee benefits by getting an ITC, simply because the supply qualifies a going concern. However, ultimately this is a deficiency in the Act and the most appropriate action would be to amend the section. By issuing guidance that conflicts with the Law, the RMCD are perhaps confusing the issue further.

Guide on Tourist Refund Scheme as at 6 June 2017

In paragraph 10(d) in the latest guide, the conditions to qualify as an approved outlet (for the scheme) were updated to include retail outlets that do not wholly sell liquor, tobacco and tobacco products. The supply of sin products such as wine, spirits, beer and malt liquor, tobacco and tobacco products was always excluded from the scheme as clarified in FAQ15.

Deloitte Comments

This may impact some businesses that are dealing with these sin products, as you may not be able to participate in the scheme or certain products would need to be excluded from the scheme. Impacted businesses should ensure that the system is properly configured to cater to the new requirements.

Guide on Duty Free Shop as at 15 June 2017

The latest Guide on Duty Free Shop ('DFS') had been issued on 15 June 2017 to supersede the version on 14 January 2016.

The RMCD has updated the tax changes made in item 3, Second Schedule of the Goods and Services Tax [Relief] [Amendment][No.2]Order 2016 to specify the locations for a DFS in order to be eligible for relief from charging GST. The location is amended from "situated at the airport, port or border" to "after the immigration checkpoint situated at the airport or port."

In addition to the above, Paragraph 17 and FAQ 5 of the GST Guide on Duty Free Shops have also been amended to reflect the amendment to the relief order above.

FAQ 8 has been added to provide an example that goods sold in a duty free shop located at border would be standard rated.

Deloitte Comments

In view of the amendment to the relief order and the guide, it is clear that the location where the duty free shop is set up plays an important part in determining its GST treatment. Thus it is recommended that businesses take note of the amendments made to the locations in determining where their business premise can be eligible to be treated as DFS and have their goods sold qualify to not be subject to GST.

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4. GST Technical Committee Meeting Update

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The GST Technical Committee ('the Committee') was formed to resolve and bring clarity to various technical issues faced by businesses. The Committee comprising various industry associations, professional bodies and senior officers of the RMCD convened its meeting on 22 December 2016 to deal with several technical issues where clarification was needed. The meeting minutes were recently circulated on 14 June 2017. Based on the review of the minutes, several issues still remain unclear and need to be addressed by the RMCD.

As a continuation from our previous edition, we have summarised below some of the important issues raised along with RMCD's responses. Our analysis on RMCD's responses is included below.

Item 1 – Licensed Manufacturing Warehouse ("LMW")

Under Section 70 of the GST Act 2014, for goods approved by the RMCD to be deposited in a warehouse, supplies of such goods made within or between the warehouses are disregarded under the 'Warehousing Scheme'. Such 'warehouses' should include licensed warehouse as defined in Section 2 of the Customs Act 1967 – a warehouse licensed under Section 65 of the Customs Act 1967

1. In such a case, the RMCD is of the view that LMWs do not fall within the ambit the Warehousing Scheme being a warehouse licensed under Section 65 and 65A of the Customs Act 1967 ('LMW') – as opposed to being licensed under Section 65 only, where the scheme would have applied.

   Deloitte Comments

   The RMCD's view of excluding the LMW from the ambit of the Warehousing Scheme seems to be consistent with their practice (dating back to prior 1 April 2015) of treating warehouses licensed under Section 65 and 65A of the Customs Act 1967 differently from those under Section 65 only.

2. The RMCD viewed that the supply of local goods / LMW manufactured goods to a company in the Principal Customs Area ("PCA") which were stored in the bonded warehouse (a warehouse licensed under Section 65 of the Customs Act 1967) should be subject to GST at 6%. The RMCD also added that in such circumstances where a Customs Form No. 9 ("K9") is declared for the removal of goods from the bonded warehouse, GST should apply only once – which is on the supply when a tax invoice is issued; not when the K9 is declared.

   Deloitte Comments

   Though we agree that the event where GST applies should occur once based on such arrangement, we view that more clarity should be sought from the RMCD on the ambit of the Warehousing Scheme for supplies made under such circumstances.

Item 2 – Approved Trader Scheme ("ATS")

1. The RMCD has clarified that the suspension of GST under the ATS applies on supplier owned inventory only if the importer is a toll manufacturer approved under the Approved Toll Manufacturer Scheme ("ATMS") or a person approved by the Minister of Finance ("MoF").

   Deloitte Comments

   Given such a view, companies may need to consider relooking into their import terms especially where ownership is concerned.

2. The RMCD generally undertakes a verification process prior to approving the addition of goods to be imported under the ATS. The RMCD raised that issues in relation to the delay in approving additional goods for ATS in the case of a LMW should not occur. This is because such goods would have been declared by the LMW when these are added for LMW purposes. The RMCD also added that all relevant documents should be provided when applying for additional goods to be added to the ATS for a smooth verification process.

   In addition, for ATS purposes, self-declaration of the goods under the scheme (without RMCD's verification) is not permitted; this is to ensure that RMCD could verify that such goods are eligible for the ATS.

   Deloitte comments

   It would seem that the RMCD has acknowledged the current administrative restrictions/issues involving the ATS approvals. However, as existing processes continue to improve over time, ATS holders should manage their imports/ATS-related applications whilst taking into consideration such restrictions at this stage.

3. The RMCD seems to require the location where the goods (imported under ATS) are stored to be consistent with the address as indicated in the ATS holder's GST registration (the business address). Amendments to the business address can be made via an application to the GST Processing Centre.

   Deloitte comments

   The need to match the location where goods imported under the ATS are stored and the ATS holder's GST registered address may prove challenging to ATS holders especially those with several locations of operation. Though the RMCD has absolute discretion over the application of the ATS, it is important that the administrative arrangements applied be consistent with common business practices.

Item 3 and 4 – Contract manufacturer's claim on material purchase price variance and inventory revaluation related to manufactured goods to export

RMCD has opined that the price variance of material purchases (due to price fluctuations of raw materials) and inventory between the budgeted and the actual value of goods, which is charged to customers, will not be treated as a zero-rated supply.

In practice, the variance will be charged to customers upon making import of the raw materials or inventory i.e. before commencement of the manufacturing process.

Manufactured goods will only be treated as a zero-rated supply once goods are exported. Therefore, the purchase price variance and inventory value variance shall be treated as a standard rated supply.

Deloitte Comments

Though application of the zero-rating treatment may be arguable, businesses may consider managing their pricing of goods whilst taking into consideration potential price fluctuation for raw material and inventory.

Item 5 – Section 65(6) GSTA 2014

In the event of a non-resident making supply of services involving a fixed establishment in Malaysia, he may be considered as a person belonging in Malaysia where the liability of GST registration may exist. In such case, a locally appointed agent for GST purposes may not be required.

The RMCD is in support with the above and will be releasing a guideline for GST registration under such circumstances.

Deloitte Comments

We agree with the RMCD on the need to apply for GST registration by the non-resident making taxable supply of services in Malaysia. The release of a guideline should facilitate the GST registration procedure for non-residents.

Item 6 – Issuance of tax invoice by a registered person for non-taxable supply

Section 33(10) of the GST Act provides that no invoice showing an amount which purports to be GST shall be issued by any GST registrant on non-taxable supplies or zero-rated supplies.

The RMCD clarified that this provision serves to disallow GST registrants from issuing tax invoices with GST 6% for non-taxable supplies or zero-rated supplies made.

Deloitte Comments

We agree with RMCD's view that GST 6% should not be indicated on invoices issued for non-taxable or zero-rated supplies. This view is consistent with the provision of the GST law.

Item 8 – Removal of goods from a free zone to another free zone through Malaysia

The RMCD clarified that under Section 162A(1) of the GST Act, the removal of goods into a PCA or to another free zone through the PCA is treated as an importation of goods into Malaysia. However, GST is suspended if the goods are removed from the free zone to another free zone, designated area or a warehouse under Section 70 of the GST Act.

Deloitte Comments

We agree with RMCD's view that GST suspension should apply on the removal of goods from a free zone to another free zone, designated area or a warehouse under Section 70 of the GST Act. This view is consistent with the provisions of the GST law.

Item 9 – New requirement for claiming ITC for goods exported

The RMCD requires the statement "A claim for input tax under the GST Act 2014 will be made" on the export declaration form in order for the GST registrant (the exporter) to be eligible for input tax claims.

This statement serves to expedite the RMCD's GST refund processing and to facilitate their checks to ensure compliance and whether the zero-rating treatment applied on export supply of goods is genuine.

Deloitte Comments

Though the requirement to indicate the statement above on export declaration forms is not provided in the GST law, failure to comply may affect or cause delay to the process of certain businesses in obtaining their GST refunds.

Item 10 – Post-importation adjustment

In the event of a post-importation valuation adjustment is made which results in the short payment of import GST, the RMCD allows claims of input tax credit on the payment of short paid import GST. However, this is provided a voluntary disclosure is made by the importer and subject to the Director General's approval. The process of seeking such approval will be explained further in the GST Import Guide (which at the point of release of this article, remains unavailable on the RMCD's GST portal.

The RMCD added that in the event a bill of demand ("BoD") is issued to a delinquent importer (having failed to voluntarily disclose the GST short paid as a result of post-importation valuation adjustment), it is the Department's policy to disallow input tax claims associated GST payment as per the BoD issued. A statement indicating so will be included in the BoD issued by the RMCD

Deloitte Comments

As the current GST law does not provide that input tax claims can be made based on the GST paid (which was short paid due to post-importation valuation), the concession above is a welcome to businesses. However, it may prove challenging for businesses to make input tax claims in the event a BoD is issued. Given so, it is important that businesses are vigilant in identifying and reporting any possible underpayment of GST to the RMCD in the event of a post-importation valuation.

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

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