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GST Chat
All You Need to Know

Issue 6.2016

In this issue

1. [GST Technical updates](#)
2. [Issues around GST treatment for samples – Evolving RMCD view](#)
3. [GST In India – A new Dawn](#)
4. [National GST Conference 2016 – updates!](#)
5. [Legal corner – Legitimate Expectation under GST Law](#)

Related links:

[Other tax information](#)

Contact us:

[Deloitte Contacts](#)

Greetings from the Deloitte Malaysia Indirect Tax team

Hello Everyone! Welcome to the June edition of GST Chat. We wish our Muslim readers a happy fasting month – Ramadhan Kareem!

The National GST Conference 2016 was held earlier this month, with participation from Royal Malaysian Customs Department (RMCD) as well as GST practitioners from both corporate and consulting. You can read about some of the key issues discussed in our update further below. However, some interesting points include the indication from RMCD that they intend to close off all outstanding special sales tax refund claims by the end of September, and the availability to now submit online the notifications for extending the time to claim bad debt relief.



In this month's edition we will also cover recent updates that have been made to Customs guides and Director General's decisions.

On the Global front, the Trans-Pacific Partnership Agreement (TPPA) is a reality that Malaysian businesses have to face, Malaysian businesses should prepare themselves and educate themselves on the TPPA and how it will affect their businesses. The TPPA opens-up new markets across the Pacific, covering nearly 40% of global GDP and a population of 800 million. With these large opportunities also come some obligations as Malaysia has agreed to undertake a number of commitments that impact a broad range of industries and will have significant implications for Malaysian business. Look out for our series of national seminars that we are hosting in conjunction

with the Malaysian Institute of Accountants (MIA) over the next month in which we discuss the implications in greater detail.

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

- Some 30,000 online businesses have come under scrutiny of the RMCD for not registering under the GST.
- The 'Jom Minta Resit GST' (Ask for Goods and Services Tax receipt) contest scheduled to end in the next month, has been extended till November, said the RMCD.
- The International Monetary Fund cited Malaysia as a great model to implement GST for other countries, in particular within the Middle East.

We hope you find this month's edition informative. We would welcome your thoughts and feedback.

Before we go, we would like to wish our Muslims readers a Selamat Hari Raya Aidilfitri! Till 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



Susie Tan
**(Indirect Tax Senior
Manager)**
Johor Bahru Office



Wendy Grace
(Indirect Tax Senior)
Kuala Lumpur Office

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.

New Guide

Guide on Investment Precious Metals (IPM's)

- New guideline issued by RMCD on IPMs. The IPMs comprise of bullion gold, silver and platinum. This guide is merely for investors of IPMs, not for manufacturers of IPMs.
- IPMs which meet the prescribed criteria as specified under the GST (Exempt Supply) Order 2014 are exempted from GST. One main criteria is that IPMs must have an “investment characteristics” which is only applicable to IPMs that are certified by the London Bullion Market Association (LBMA) or London Platinum and Palladium Market (LPPM). Currently, there is no refinery in Malaysia that is listed in LBMA or LPPM. Hence, locally fabricated IPMs are not entitled for GST exemption.
- Importation of IPMs are given relief under GST (Relief) (Amendment) (No.2) Order 2015. Importers who meets the criteria set for the relief are required to get approval in form of certificate from the Director General (DG). Other administration requirements are stated in the guide.

Deloitte's comments

GST exemption and relief given to IPMs is clearly for the supply of non-local fabricated precious metals (PM) which does not benefit the local fabricated PM market. RMCD has come up with the Approved Jeweler Scheme (AJS) to ease the cash flow burden, where approved jewelers are not required to pay upfront GST on acquisition of prescribed PM. Jewelers are required to meet certain condition imposed by RMCD in order qualify for AJS. In a nutshell, GST exemption and relief given for IPMs is for investment purpose and not for manufacturing purpose.

Revised Guides

Guide on Supply – revised as at 24 May 2016

- New para 40 (f) has been added along with example 54 to explain GST treatment for staff secondment
 - Staff seconded between companies which are within the same group of companies is treated as a supply of services subject to GST at a standard rate.
 - In the example it is explained that salary paid by subsidiary A (receiving company) to the staff seconded from other subsidiary B (sending company) is treated as consideration for supply of services.

Deloitte's comments

The above amendment to the guide clarifies that intercompany transactions involving secondment of staff is subject to GST at a standard rate. Hence companies engaged in such practices must account for GST on such supplies.

- New examples for reimbursement and disbursement

Example 67 talks about disbursement which states that a private clinic charges an individual for medical expenses and the individual subsequently recovers the expenses from his employer ("the company"). In such case recovery of expenses would be treated as disbursement.

Example 68 - A private clinic charges the company for medical services provided to an individual and the company subsequently recovers the expenses from his employee.

The recovery of the expenses from the employee is treated as a reimbursement and subject to GST. The example further elaborates that the company would be entitled to claim input tax credit if the supply is made by the clinic to the employee and the tax invoice is issued under the company's name and does not indicated the employee's name.

If the tax invoice is under the employees name or identifies the employee as the beneficiary of the services, then the recovery of the expenses by the company from the employee would be treated as a disbursement.

Deloitte's comments

The above two examples shows that the RMCD places emphasis on the benefitting party and the tax invoice documentation details as key points on deciding if a supply qualifies as a disbursement.

Example 69 - The company incurs utility bills on behalf of their employees and recovers the expenses from the employees through payroll deductions. The tax invoice is issued to the company by the supplier. This cost recovery is treated as a reimbursement and subject to GST following the original GST treatment of the supply (i.e. zero rated if the supply is zero rated and standard rated if the supply is standard rated)

Deloitte's comments

From the above example it seems RMCD could also adopt the approach of looking into original supply to determine GST treatment for reimbursements. This approach is also being adopted by the Inland Revenue Authority of Singapore (IRAS) to determine GST treatment for reimbursements in Singapore.

Guide on advertising services – revised as at 20 May 2016

- Further guidance were provided on place of circulation to determine zero-rating as follows:

Advertisement considered to be circulated in Malaysia if:

- If an advertisement is placed on a hardcopy print (e.g. newspapers, magazines) made available in Malaysia; or
- If the advertisement is placed on local television and radio channels aired mainly in Malaysia

Media sales through mobile phone (e.g. advertising via SMS)

Considered to be circulated in Malaysia if the place of subscription of the telephone line is in Malaysia.

- With regards to media planning and creative and production sales, for GST purposes, those services does not have a direct nexus with the place of circulation of the underlying

advertisement. Hence, for the purpose of zero-rating, the concept of place of circulation cannot be relied on.

- Guidance is provided for the term “directly benefit”. Where a contract specifies the recipient of the service and/or requires the supplier to deal directly with the service recipient, the service recipient is seen to benefit directly from the supplier’s services.
- Certain changes were made to the 51% rule
 - 51% rule applies only to publication of the same version/edition for distribution to multiple areas or countries.
 - Magazines or newspaper with the same content printed in different languages or slight modifications for distribution in different countries cannot be regarded as the same version/edition
 - For media sales of airtime (i.e. through television and radio), the 51% rule applies to the same advertisement aired simultaneously in designated area, Malaysia and overseas countries (if any).

Deloitte’s comments

The revisions made by RMCD further narrow the scope of zero-rating on advertising and in particular the scope of the 51% rule. Taxpayers who are currently zero-rating advertising services would need to re-examine these services to assess whether they comply with RMCD’s revised guidelines. The Law requires the DG to be satisfied that the advertisement is intended to be “substantially promulgated” outside of Malaysia and so the requirements set by RMCD become critical.

Guide on Transfer of Business as a Going Concern (TOGC) – revised as at 24 May 2016

- Definition of “agreement” and “date of transfer/transfer date”. The date of transfer is the effective date of transfer of the going concern that is provided in the agreement of sale. There are several exclusions such as the date of the agreement, the date when the agreement is effective, etc.
- A new paragraph has been included to state that for a transfer capable of being treated as a TOGC, it must include the transfer of business assets.
- Three additional conditions are added for a transfer of business assets to be considered as a TOGC. These include:-
 - Business or part of the business transferred as a going concern shall be an income earning activity on the transfer date. This income earning activity includes income earned from leasing activity. Examples of non-income earnings include interests and dividends earned;
 - If a transferor has not really taken much risks in putting a ‘business’ together and cannot enjoy much, or any, reward from the operation of that business, then there may not be a going concern in his hands to have a transfer of; and
 - If a registered person has not yet made any taxable supplies, the transfer of the business might not be a transfer of a ‘going concern’. However, where sufficient preparatory work has been undertaken prior to making taxable supplies, there may be a business capable of being transferred as a going concern.
- A new paragraph for TOGC involving GST group registration has been added to state that the transfer of business asset to an entity who is a member of a GST group who will only make supplies to other members of the GST group cannot be considered to be a TOGC for GST purposes.
- A new FAQ has also been added to the revised guide to clarify that the business transfer can only be considered as a TOGC if the transferee continues with the ‘same’ kind of business as the

transferor. In the example, the transferor is in the business of distributorship where products were being supplied to businesses while the transferee was in the business of retailing where products are being supplied to end customers. In this case, the business transfer is not considered as a TOGC.

Deloitte's comments

RMCD have clarified what they consider to be a going concern. Interestingly they are willing to accept businesses that have not yet commenced income producing activities but enough 'preparatory work' has been undertaken. It remains to be seen how broad this would be applied, but it is a welcome clarification.

Importantly RMCD have confirmed that TOGC is not an option and it is mandatory where the conditions are fulfilled i.e. GST must not be charged. Furthermore, it is a requirement to notify RMCD when a TOGC supply is made. It is unclear whether this can be done through the TAP Portal so at this stage it would most likely need to be done in writing.

DG Decisions

There have also been amendments made to the DG's Decisions, below are our comments:

DG Decision 2/2014

With regards to accounting for GST on deemed supplies (the gift rule), the DG only takes in to account the "total costs" incurred on gifts for the same person in the same year. It is to be only on goods that are subject to GST only (not purchased from non-GST registrants, exempt goods or zero rated items). The Act however mentions "total cost of goods to the donor".

Deloitte's comments

We agree with RMCD interpretation as the intention seems to be that if GST was incurred and/or claimed back then the deemed supply of such goods should be subject to GST, however if GST was not incurred on the acquisition of such goods, then GST should not be accounted for on the subsequent supply of such goods.

DG Decision 5/2015

The criteria to qualify for "reimbursement" has been removed. From now onwards there is only a single test which is to determine whether an expense meets disbursement criteria. Any deviation from this test will result in the expense to be a reimbursement transaction.

Deloitte's comments:

RMCD have taken a very prescriptive test to distinguish between disbursement and reimbursement. Whilst this could simplify the process, it may not accurately reflect the transactions. Taxpayers should still assess the legal and contractual arrangements to determine whether it is a reimbursement or a disbursement scenario.

[Back to top](#)

2. Issues around GST treatment for samples – Evolving RMCD view



Diamond Khanted
(Indirect Tax Manager)
Kuala Lumpur Office



Nyana Pragasam
(Indirect Tax
Assistant Manager)
Kuala Lumpur Office

As a child, I remember opening up shampoo packets in the mail, back in the late 80's and early 90's distributing shampoo packets via post was one of the marketing and promotional techniques used by businesses to promote their products in Malaysia.

Back then there was not a widespread use of the internet and businesses could only advertise their goods via TV, billboards or radio advertisements. Distributing trade samples directly to potential customers homes was one method to win customer confidence as it allowed potential customers to test the products themselves and allowed them to judge whether it was suitable their personal usage. It also had a spillover effect where if the product met the expectations of the user the potential good feedback from word of mouth would be invaluable as well, because let's be honest, how many times have we bought products based on a friend's recommendation?

Before the advent of information age technology, this was an effective way to advertise and market products. Over time this practice evolved where samples packets were handed out in malls/ shopping complexes leading to samples being given out in malls to this day – I'm sure many of us would have tried out F&B samples such as cheese samples, coffee samples (repeatedly in some cases) to get a better feel of the product.

In the lead up to GST going live, one of the issues faced by most retailers, FMCG manufacturers and businesses dealing with consumer goods was the treatment of trade samples and how RMCD would view these supplies. Before the GST regime went live, you could hand away as many shampoo packets or Milo packets as you liked and you needn't worry about the tax implications as they would be viewed as costs incurred for advertising and promotional purposes. With the GST regime in place, giving goods away for free would be a deemed supply for GST purposes and the company would have to account for 6% GST on the value of those goods.

Having said that however, the Act does allow for businesses to provide commercial samples "in a form not ordinarily available for sale to the public". RMCD have recently changed their interpretation on what constitutes a commercial sample. Previously they had set out a number of conditions including the requirement to have the goods stamped with the words 'sample only.' In the recently revised retailing guide (released on 11 March 2016), the conditions have been removed and it merely goes back to the definition in the Act i.e. 'in a form not ordinarily available for sale to the public'.

The shift in view represents a challenge to all businesses as it is unclear now as to what RMCD considers to be a commercial sample. In the absence of clear guidelines, it may be relevant to consider accepted industry and business practices and what is usually followed in other GST / VAT jurisdictions. Generally speaking, most jurisdictions require the sample to be distinguishable from the

normal commercial product (e.g. size, quantity, marked as a sample etc.). This is likely to vary according to the facts and circumstances, and so it becomes important to evaluate each on a case by case basis. Any positions taken should be documented so that it can be supported during an audit, and if there is any uncertainty consideration should be given whether external advice or RMCD clarification is required.

[Back to top](#)

3. GST In India – A new Dawn



Robert Tsang
GST Implementation Leader – India
South East Asia Indirect Tax Leader

Late on 14 June in India a draft GST law was finally released – when GST comes to the country it will be arguably the most important and biggest indirect tax reform in India ever. Expectations are high that the GST will simplify doing business in India, allowing supply chains to be integrated and aligned plus allowing for greater transparency.

While the GST Constitution Amendment Bill awaits approval from Upper House of the Parliament, the Ministry of Finance is seeking input and comments from stakeholders on the draft law. The 190 pages of the draft legislation is not too dissimilar to Malaysia’s own GST law, and provides for the broad architecture under the new regime. This includes provisions related to definition of supply, levy and collection of Central GST, State GST, Integrated GST, input tax credit, exemptions, refunds, compliance requirements and transition provisions.

Indian businesses have been given a clear signal to prepare for this brave new world of GST – watch out for a Deloitte Special Edition Dbrief or webcast on what you should be doing if you are affected, plus analysis of the detail and direction of the draft law. You can register for Dbrief [here](#).

[Back to top](#)

4. National GST Conference 2016 – updates!



Vivek Mehta
(Indirect Tax Manager)
Kuala Lumpur Office

The National GST Conference 2016 was held in Kuala Lumpur on 31 May 2016 and 1 June 2016. During the various sessions, lots of interesting news and updates were shared by the senior RMCD officers including the Director General of Customs, Dato' Sri Khazali Hj Ahmad and the Deputy Director General of Customs, YBHG Dato' Subromaniam Tholasy.

Dato Subromaniam Tholasy, shared insights during the session titled 'Discussion on GST Hot Topics'. Our Indirect tax country leader, Tan Eng Yew was one of the panelists during this session.

Some of these insights are shared below:

- In relation to the Special Sales Tax Refund, 2384 applications were received by the RMCD. Out of this 1185 were approved, 499 were rejected and remaining 700 are under review.
 - One of the main reasons for rejection is that there has been no decline in the prices after GST. RMCD are of the view that prices should have reduced by 4% after 1 April 2015.
 - Whilst the authorities were targeting to close all the applications by September 2016, given the work involved it seems December 2016 is a more realistic target.
- Price Control and Anti Profiteering provisions were introduced with the noble intention to curtail prices. RMCD had taken the view that the traders took advantage and increased their margins before January 2015, when the provisions came into effect.
- In relation to the amendments made to the GST guide, authorities acknowledge the difficulty in identifying the amendments made and thus going forward the last page of the GST Guides would indicate the exact amendments made. However where a new guide is issued altogether to replace the earlier version of the guide, this would be indicated on the second page of the guide.
- In relation to the amendments to the GST Return, only one amendment would be allowed to be made after the due date and within the expiry of the last date of the subsequent taxable period. (For example, June 2016 return which falls due on 31 July can be amended once until 31 August 2016). Any subsequent amendments would require the business to apply for a pre-approval using the RMCD portal – unless the amendment involves payment of additional output tax or a reduction in input tax credit claimed.
- The Slab-based late payment penalty introduced from the 1 January 2016 would be imposed on the entire amount of GST due and payable and not the amount of late paid tax. Remission would be granted only for 'genuine' errors.
- In relation to imports, whilst the present GST law has no provisions for amending the declarations, the officers indicated that new provisions may be introduced later. Further, input

tax credit cannot be claimed on the under declarations where the RMCD have issued a letter of demand. However, the RMCD may allow business to claim input tax credit in 'exceptional' cases.

- GST expenses by the business will not be allowed for income tax deduction purposes in cases where the business is liable to register for GST but fails to do so or the business was entitled to claim input tax credit but the business decides to forego it.

[Back to top](#)

5. Legal corner – Legitimate Expectation under GST Law



Chandran TS Ramasamy
(Indirect Tax Director) –
Appeals & Dispute Resolution
Kuala Lumpur Office



Jeet Oza
(Indirect Tax Manager) –
Appeals & Dispute Resolution
Kuala Lumpur Office

The RMCD issues various guidance materials, referred to as “Guides”, for interpreting the provisions of the GST Act and provide clarification on various issues normally faced by businesses.

In recent times, it is observed that the RMCD has been increasingly amending its various Guides in an attempt to withdraw any beneficial clarifications or concessions given in the various guidance materials. Many businesses could have taken a position regarding a tax treatment of their transactions based on such clarifications/concessions given by the RMCD in their Guides. The question is, whether the action of the RMCD to amend such guides is unfair to businesses who have adopted a tax treatment based on the RMCD Guides.

The answer to the above question lies in understanding the principle of legitimate expectation; this principle primarily embodies the duty to act fairly. The principle of legitimate expectation is a common law principle and is therefore universally accepted and capable of being applied across various areas of law.

In the context of GST law, the principle of legitimate expectation could be applied by businesses to defend their tax positions which were adopted based on the RMCD Guides. In other words, if a tax payer has a legitimate expectation that a certain procedure or practice will be followed, the same ought to be followed due to the duty of fairness towards the tax payer.

The principle of legitimate expectation is constantly evolving as its scope of operation and application is very wide ranging from general statements of policy to formal guidance’s issued by public authorities. There is no thumb rule or straight-jacket formula for applying the principle of legitimate expectation and each case would have to be evaluated in light of its own merits and factual circumstances.

In Malaysia, the High Court in the case of *Zakiah Ishak vs Majlis Daerah Hulu*¹ held in the context of employee welfare & protection law, that for legitimate expectation to arise, there must be evidence of a promise or undertaking made by the concerned party.

In the GST context, the question whether a beneficial clarification given by the RMCD in its Guides, can be a basis for a tax payer forming a legitimate expectation, is still to be judicially tested by the appropriate Tribunals and Courts of this country.

¹ Selangor (2005) 4 CLJ 77 (CA)

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[Back to top](#)

Contact Us

Kuala Lumpur Office



Robert Tsang
**South East Asia Indirect Tax
Leader**

robsang@deloitte.com

(+65) 6530 5523



Tan Eng Yew
**Country GST & Customs
Leader**

etan@deloitte.com

(+60 3) 7610 8870



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



Chandran TS Ramasamy
Director

ctsramasamy@deloitte.com

(+60 3) 7610 8873



Bonny Teo Wei Teik
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 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 Offices

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

[Back to top](#)

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Deloitte

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

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