



Malaysia | Tax, Indirect Tax | March 2016



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GST Chat
All you need to know

Issue 3.2016

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Greetings from the Deloitte Malaysia Indirect Tax team

Hello Everyone! Welcome to our March edition of GST Chat.

As the Malaysian GST closes in on its first birthday, the public received welcome news that the GST rate would not be increased from its current level of 6%. There has been some debate and speculation over recent months that the GST rate may rise given the current economic climate. Fortunately, the Government released a strong statement that the rate would continue to remain at 6%.



Whilst the rate remaining at 6% is welcome news, the current economic conditions continue to put pressure on Government revenues. Over the past month we have seen the Inland Revenue Board of Malaysia (IRB) publicly state its intentions to increase collections, and we are seeing the Royal Malaysian Customs Department (RMCD) following suit and we are seeing a greater emphasis on taking actions to increase GST receipts while reducing refunds. These actions include a shift in focus to the conduct of audits. As there is no amnesty on penalties will mean taxpayers need to take greater focus towards achieving compliance.

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

- GST collection exceeded the RM 27 billion mark set by the Government for 2015 and a target of RM 39 billion has been set for 2016.

- A total of RM10bil was paid back to businesses under GST last year. However, a total of RM800mil worth of input tax claims made by businesses were rejected by Customs for being dubious or for lack of proper documentation
- Datuk Subromaniam Tholasy, Deputy Director General at RMCD has indicated that 70% of GST Refunds are now paid within the 14 day time-frame set in the Law, an increase from 17% in the first month of GST
- 'Ops Kesan', a four-day operation initiated by Sabah Customs, had seen 44 premises and companies inspected by RMCD personnel.

We hope you find our March edition useful. We would welcome your thoughts and feedback. Look out next month for our special edition of GST Chat, where we give our assessment on the first 12 months of GST and what things to look for in the 2nd year. Till then, best regards from us, the Deloitte Indirect Tax Team.

Kind regards,

Tan Eng Yew
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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. As a result, while useful for obtaining an understanding of RMCD's thinking on the topic, it is essential that you undertake a proper analysis of the situation in question taking into account your particular facts.

As a general comment, the changes in the guides were relatively minor, such as rearranging the order of the paragraphs, some edits to the examples and the insertion of new examples for further clarity.

New Guide

Guide on Gaming

Previously part of the entertainment industry guide, RMCD had introduced a new guide specifically for the gaming industry as at 16 February 2016. Below are the main highlights of the guide:

- Supply of services made by persons licensed or approved under any written law in Malaysia involving betting, sweepstakes, lotteries, gaming machines or games of chance is subject to GST at a standard rate.
- Time of supply rules for gaming activity are based on the following special provisions as stated under Regulation 13, GST Regulations 2014:
 - (a) For number forecasting, lottery and a game of chance, the time of supply shall be at the time when the numbers are drawn;
 - (b) For sweepstakes, the time of supply shall be at the time when the race takes place;
 - (c) For gaming machine, the time of supply shall be at the time when collection is removed from the machine, or at the time when transaction is recorded by the machine; or
 - (d) For casino betting, the time of supply shall be on the last day of the taxable period in which the supply takes place.

Deloitte Comment

This guide focuses on the time of supply, and therefore the time to account for output tax for gaming operators. Operators that are involved in more than one of the mentioned games should ensure that their systems/staff are able to account for output tax accurately in the correct tax period to avoid computing and filing incorrect returns. The provision for general penalties can apply to **each** incorrect transaction. The operators need to be aware of this and ensure that they do not fall afoul of the time of supply rules.

Revised Guides

[Guide on Approved Toll Manufacturer Scheme \(ATMS\)](#)

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

- New comments have been made in relation to damaged, waste and scrap raw materials, as well as finished or semi-finished goods:
 - Any person in Malaysia who acquires any damaged goods, waste or scrap from an overseas principal is allowed to do 'recipient self-accounting' for such purchases. The toll manufacturer will need to include the local buyer as the customer of the overseas principal in the ATMS net.
 - However, these sales would not form part of the 20% maximum quota allowed for local sales by the overseas principal. Sales classified as "other" local sales by the overseas principal are not considered as the allowable "local sales under ATMS".
 - These sales contribute towards the calculating the taxable supply threshold for GST Registration purposes.
 - If the damaged goods or scrap are to be disposed of by scrapping the goods; pre-approval must be obtained in writing from GST Division/Branch/Unit which controls the toll manufacturer.
 - For toll manufacturers with LMW status or operating in FIZ, a copy of the application and approval letters from the controlling Customs Division needs to be forwarded to the controlling GST Division/Branch/Unit.

Deloitte Comment

Toll manufacturers must consider the additional administrative tasks required to comply with the requirements to declare goods that are to be destroyed. Overseas principals are now potentially liable to be registered for GST on the sales of damaged goods to local customer, even if they are designated as the customer under ATMS.

[Guide on Telecommunication services](#)

- A statement has been included to the effect that the supply of a SIM card in Malaysia, including the Designated Area ("DA"), is subject to GST. If the SIM card is given free of charge to any person, it is not a supply and not subject to GST.
- This contradicts the existing law for supplies made in the DA. Sim card distributors and retailers operating in the DA's must now be aware that RMCD views the sales of sim cards within the DA as being subject to GST. To adhere with this view, their systems should be upgraded to ensure that they do not have to account for deemed output tax when the sim cards are given away.

Other Guides

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

- [Guide on Moneylenders](#)
- [Guide on Petroleum Downstream](#)
- [Guide on Tertiary Education](#)

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2. GST Impact on Manufacturing Sector



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GST was supposed to be a boon for the export-oriented manufacturing industry in Malaysia, increasing its competitiveness in a global market by removing the tax cost from exports. However, there is a concern that the results have fallen short of expectations with increasing complexity in the rules, and administrative hurdles and challenges imposed on those attempting to comply.

Malaysia is heavily dependent on foreign direct investment and is a manufacturing base for many large MNCs. Many support industries to these large MNCs sprang up in Malaysia, setting up base close to their major customers. Many of these manufacturing plants of MNCs and the supporting industries provide key services to these foreign companies like research and development, re-manufacturing, repairs and re-work, handling services, etc. The current GST legislation in Malaysia provides that the services performed on goods which are in Malaysia at the time of performance of service shall be subject to GST even if the goods are eventually exported out of Malaysia.

For the export oriented MNC's not registered for GST purposes in Malaysia, this not only imposes additional cost, but also hampers the competitiveness of Malaysia in comparison to other neighboring countries who are also vying for foreign direct investment from MNC's and currently zero rate such services.

Overseas companies with no presence in Malaysia are required to appoint a GST agent in order to register for GST in Malaysia if it is making taxable supplies in Malaysia. Many overseas companies perceive there are permanent establishment (PE) risks in registering their overseas entity. Moreover, registering for GST in Malaysia will require costly IT System configuration and compliance costs. Many companies simply choose not to register for the Malaysian GST. Non-registration not only reduces the presence of overseas entities in Malaysia but also results in Malaysian exports being more expensive as the GST charged is not recoverable by the overseas entities.

Ministry Relief's 1/2015 and 2/2015 were introduced to provide relief from GST in respect of activities undertaken by FIZ companies / LMW companies / FCZ companies. However, the coverage of the relief is very narrow and is also applied strictly by RMCD.

There are several issues (both technical and non-technical) that needs to be resolved for medium and long term. There has been ongoing dialogue with the authorities, and several proposals have been raised that would make things easier for manufacturers, but it remains to be seen whether these will be implemented. Perhaps a strong united front by manufacturers should lobby to the Ministry of Finance which may result in a favorable outcome.

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3. Input Tax Credit on Passenger Motor Cars – Driving through the GST law



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The RMCD has always adopted a restrictive approach towards businesses claiming the input tax credits ('ITC') on the purchase of passenger motor cars ('motor cars'). This is consistent with the difference of opinion, and therefore treatment of 'company cars' by the IRB for income tax purposes.

The GST law permits businesses to claim an ITC on the purchase of motor cars which are used '*exclusively for business purpose*' and approved by the Director General ('DG'). The law itself does not provide any clarification or explanation on how the term '*exclusively for business purpose*' is to be interpreted and applied by businesses.

RMCD has however, issued a panel decision which provides conditions to be met for a motor car to be treated as used '*exclusively for business purpose*'. Amongst all the conditions, one requirement is creating the most significant difficulty for businesses. This is the requirement that the motor car must be parked at the business premises at night and cannot be taken home by the employee using the motor car. In practice this requirement may be very difficult for many businesses to meet.

There are many instances where the employees of the business are spread all over the country and it is not possible for them to return the car to the business premises every night, particularly where the vehicles are used outstation, either regularly, or at regular intervals.

Businesses that have a large fleet of motor cars or are heavily reliant on motor cars for their operations appears to be unfairly discriminated against by such conditions as there are many reasons why it may not be physically possible for the business to comply in a situation where any impartial observer would conclude that the car is used '*exclusively for business purposes*'.

While persuasive, the panel decisions are not legally binding as they merely represent that DG's view of the application of the law, and reflect the discretion granted to the DG under the law.

In exercising the discretion, the DG should give due regard to the specific risks and circumstances of each applicable taxpayer. Despite this, in recent times it has been observed that the RMCD is strictly applying their panel decision to deny businesses from claiming ITC on the purchase of motor cars regardless of the circumstances applicable to the use of the motor car. Businesses may wish to consider challenging the application of the DG decision by the RMCD to the Ministry of Finance or before the GST Tribunal to seek an appropriate application of the DG's discretion under the law.

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4. Denial of Special Sales Tax Refund – A dare to challenge



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Under the transitional rules included in the GST Act, GST registered businesses were to allowed to claim a refund of sales tax paid on goods that were held in stock at 1 April 2015 (the commencement date of GST in Malaysia). Many businesses sought to take advantage of this concession and had submitted applications by the closing date of 30 September 2015. However, in the 3 to 4 months since, it became clear to the applicants that obtaining RMCD approval on these applications is proving to be a difficult exercise.

RMCD are undertaking detailed reviews of each application and have requested significant amounts of information and documentation to substantiate claims. Although we have seen many grounds on which applications are being rejected, the most common, is that the businesses have not complied with the rules governing anti-profiteering as set out in the Anti-Profiteering Regulations 2014 (the Regulations).

The Regulations are administered by the Ministry of Domestic Trade, Co-Operatives and Consumerism (MDTCC), and were introduced to prevent profiteering as a consequence of the change from the sales and services tax regime to GST. Under the rules, taxpayers were required to exclude sales tax from their pricing (as it is no longer being charged to them), and also factor in any refunds of sales tax under the Special Sales Tax Refund (SSTR) provisions. In practice, MDTCC have taken the stance that a business only need to factor the SSTR into the pricing of their goods once they have become aware of the amount to be claimed, or once the claim has been granted.

RMCD appear, however to be taking a different view, even though they are not responsible for administering the Regulations. They appear to be denying claims on the basis that the business did not immediately on the introduction of GST make adjustments to its prices to factor in the refund (even though the amount in question may not have been established).

Further RMCD appears not to be prepared to take account of other factors such as the exchange rate drop which would have resulted in an increase in costs etc., before concluding that the particular refund applicant is in contravention of the Regulations. In essence, therefore, RMCD appear to be using the Regulations for purposes for which they were not designed and in situations where there it should not be applicable.

In our view the use of the Regulations in order to justify the denial of refund is legally incorrect. The GST Act, does not require businesses to adjust their price as per part of the formula set out in the Regulations in order to be eligible to claim SSTR. In addition, the business would only be in breach of the Regulations if its Net Profit Margin, in Ringgit terms has been increased by doing so.

The RMCD decision to reject an application for the SSTR cannot be appealed against before the GST Appeal Tribunal. In practice this has appeared to have the effect that RMCD are not willing to provide

clear reasons for their decision, possibly as they are of the view that applicants have no further legal recourse and therefore that there is no necessity for them to do so. This leaves the impression that the decisions being taken may be arbitrary and without due regard for the facts in the situation, merely because there is not prospect of an appeal.

In such a situation, there are, however, some steps that businesses can take. Unfortunately, due to the strict timelines that may be applicable for action to be taken from when a decision is given by RMCD many businesses have been left with no viable outcome. One possible option is that businesses may apply to the RMCD for the decision to be reviewed, even though it is unlikely that this will be successful. There are other potential alternatives, but again these need to be commenced within a short period of time after RMCD rejects the refund claim.

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