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GST Chat

News and Views

Issue 5.2016

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Greetings from the Deloitte Malaysia Indirect Tax team

Hello Everyone! Welcome to the May edition of GST Chat.

The price control measures that were introduced prior to the GST and applied for 18 months are due to end next month. There are concerns on how businesses will set their prices after that. Would there be a surge in prices or it will be stable? One hopes that the prices would more or less remain stable, but only time will tell. Recently we were asked give our views on the impact and you can read the article here.

Another area of focus for the country is the impact of the Trans-Pacific Partnership Agreement or TPPA. The TPPA is a free trade agreement with 12 Pacific Rim countries of which USA, Canada and Malaysia are parties, which once implemented, is likely to achieve major economic benefits for the country. For those interested, look out for our series of workshops (in association with the Malaysian Institute of Accountants) where we delve deeper into the practical implications from the TPPA.

In this month's edition we focus on issues impacting the plantation industry and explore the origin and meaning of the 'direct beneficiary' test in our zero-rating exported services provisions.

Here are some other interesting recent developments:

- Prime Minister Datuk Seri Najib Tun Razak has said that the introduction of the GST and subsidy rationalization are viewed by the new Bank Negara Malaysia Governor, Datuk Muhammad Ibrahim, as a bold move taken by the government to face the global economic uncertainty
- The GST has made a positive impact after a year of implementation, according to the Customs Director-General Datuk Seri Khazali Ahmad. Apart from the collection parameters, GST has stabilized the flow of economy and there have been no negative signs, he added.
- Deputy Finance Minister Datuk Chua Tee Yong has refuted allegations that are plans, discussions or suggestions within the government to increase the Goods and Services Tax (GST) rate.

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

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The guides issued by the Royal Malaysian Customs Department (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.

Revised Guide

Guide on Import

The frequently asked question ("FAQ") no. 7 relates to short payment of GST on importation of goods. As per the amendment made under revised guide a company would require Director General's approval in order to claim input tax credit for the GST on short payment notice. (i.e. short paid earlier at the time of importation)

Deloitte Comments
The amendment is consistent with the Regulation 38(4) of GST Regulations. However, it is still not clear on the timing to claim the input tax credit – i.e. whether to claim in the taxable period in which payment is made; or to claim in the return corresponding to the original importation is made.

GST (Zero-rated Supply)(Amendment) Order 2016

There were minor amendments made to the Order, the amendments include some rewording and the addition of a number of items to be zero-rated. The rewording appears to be to correct grammatical and wording errors in the previous draft of the Order than to say narrow or broaden the scope of the provisions. The changes are as follows:

1) Item 2 of the First Schedule – where the word "Medicaments and medical gasses and medical devices" is substituted for the word "Medicaments, medical gasses and medical devices".

2) Item 24 of the Second Schedule – where the word "the lease or air container" is substituted for the word "the lease of air container".

3) The Appendix:

   i) Under tariff heading 07.13 – Peas *(Pisum sativum)(exclude whole and not skinned)* is added; and

   ii) A new tariff heading has been added into the Appendix

11.08	**Starches; inulin.**
	- Starches:
1108.14 000	- - Manioc (cassava) starch
1108.19	- - Other starches:
100	- - - Sago

National Essential Medicines List (Suffix X & Suffix N) and the Control Drug List (Suffix A)

There has been a revision on the National Essential Medicines List and the Control Drug List.

Please find the links to the list below:

- The National Essential Medicines List
- The Control Drug List

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2. Plantation Industry – Provision of Employee Accommodation

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The provision of employee accommodation is a vital benefit provided to workers in the plantation industry, the introduction of GST and its implication on the provision of such a benefit remains an issue. These concerns generally relate to:

- Claiming input tax for building residential accommodation

In addressing these concerns, it is crucial to keep in mind the following points:

- Input tax is generally claimable if incurred for business purposes and are used to make taxable supplies (provided it is not specifically restricted by law e.g. claiming input tax credit on golf club memberships)

Claiming input tax with respect to residential accommodation provided to employees

RMCD have recently formed the view that providing residential accommodation to workers even where it is necessary for the fulfilment of their duties would be considered an exempt activity and any costs relating to the residential accommodation including construction costs would be blocked from recovering input tax.

The RMCD interpretation is open to debate in a number of areas, firstly, is there any consideration paid for the provision of the accommodation and if so what is it? In order for there to be an exempt supply there must be consideration. Secondly, and more importantly, it does not take into consideration that the provision of worker's housing is essential for the conduct of the plantation business. Plantations operate in remote and not well serviced areas, in the absence of housing, the business activity could not be conducted, or at least not conducted to the level that is currently performed. The latter point is important, as one can understand and appreciate RMCD's concerns in the context of executive housing or housing for senior management, these are essentially 'perks' and benefits provided as part of employment and arguably have some private nature. For a plantation, however, workers need to be on-site or be within reasonable proximity in order to perform their duties and the housing is a necessity for the business to operate.

The hope is that there is greater discussion and debate on this issue so that an outcome is reached that is more balanced and takes into consideration that in some cases there can be a nexus between the provision of housing and making taxable supplies

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3. Legal corner – Origins of ‘directly benefit’

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A key criterion to qualify for zero rating of services under the ‘general’ zero rating provision in Malaysian GST law is that the services must “directly benefit” a foreign entity. Our direct benefit test appears to have its genesis in the 2007 amendment to the former Singapore GST zero rating provision. In turn, the 2007 Singapore amendment is tacitly a result of a 1995 judicial decision in New Zealand (NZ) on a former NZ GST zero rating provision i.e. the case of Wilson & Horton Ltd v CIR [1996] 1NZLR 26 (“Wilson & Horton”). It may be useful to look to the Singapore and NZ developments in this regard to see if there is a possible solution to the difficulties presented by the direct benefit test.

To summarize the Singapore and NZ developments, the former NZ and Singapore zero rating provisions had a common criterion i.e. the services must be supplied “for and to” a foreign entity (this was incidentally the same phrase used in our former service tax law provision on the non-taxability of “exported taxable service”). Wilson & Horton decided that the word “for” does not mean “beneficially for” but is similar in meaning to the word “to” i.e. “contractually for” or “contractually to”. The court took it that the words “for and to” were repeated for emphasis and rejected a lower court decision that “for” imported a “benefit test” of ascertaining whether the supply was “beneficially for” a foreign entity.

In 1999, the NZ Government announced that it proposed to amend the NZ zero rating provision due to Wilson & Horton, but did not wish to enact a benefit test, in deference to the court’s criticisms of the practical difficulties inherent in such a test. The NZ Government stated: “As noted by the Court of Appeal in Wilson & Horton, any requirement to consider where the actual benefit of a service is enjoyed would raise major complications from a practical perspective. It would require a supplier to look beyond the purchaser of the supply (the person who has contracted and paid for it) to determine who is actually benefiting from the supply.” Instead, the NZ Government proposed and introduced (in 2003) a “recipient in NZ” test, which excluded a service from zero rating if the performance of the services was received in NZ by a non-contracting entity, or, reasonably foreseeable to be received in NZ by such other non-contracting entity at the time the contract is entered into with the foreign entity.

On the other hand, Singapore went ahead in 2007 to amend its zero rating provision to expressly enact a direct benefit test, to avoid any ambiguity as to the meaning of “for and to” in the former provision. Singapore subsequently came out with guidelines to clarify the direct benefit test but nevertheless adverted to the difficulty of the test: “The difficulty in the application of the expression "directly benefit" is one of scope – businesses are not sure to what extent they are required to trace the benefits conferred by the supply, when it seems that everyone, even the person most remote from the transaction, benefits from the supply of services in one way or another.”

Whilst there is some similarity between the “resident in NZ” test and the “direct benefit” test of Singapore, it is suggested that the former approach has the benefit (pardon the pun) of greater clarity than the latter. The former approach, when adopted to Malaysian GST would mean zero rating would apply to the services supplied under a contract with the foreign entity, so long as there is no non-contracting service-recipient belonging in Malaysia, or, it is reasonably foreseeable at the time of entry into the contract with the foreign entity that there is no non-contracting entity service-recipient belonging in Malaysia.

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