The introduction of a tourism tax (TTx) in Malaysia has been a hotly debated topic ever since the tourism tax bill was introduced into Parliament a few months ago. In the ensuing months we saw not only a postponement of the start date to 1 September 2017 but also key changes to the rate and exemptions. Now that the tax is in place, in this article, we will explore in detail how the tax will operate and some of the key challenges that participants will face.
WHAT EXACTLY IS A TOURISM TAX?

A TTx, like other forms of indirect tax, is aimed at taxing consumption as opposed to income. The Goods and Services Tax (GST), or Value Added Tax (VAT) as it is also known, is perhaps the most common form of indirect tax, and for the purposes of this article, I will highlight some of the key differences between our existing GST and the now implemented TTx.

The most obvious difference between the two is that whilst the GST looks to tax all forms of consumption, the TTx is more focused in that it seeks to tax tourism, or more accurately, occupancy. The tax is intended to tax consumers who rent accommodation within Malaysia, and it is for this reason these taxes have also been called ‘occupancy taxes.’

The concept of a TTx is not a new one, and similar taxes are collected by various cities across the United States, Europe and Asia, including Malaysia. At present, Penang, Langkawi, Melaka and Kota Bahru have city-based tourism or heritage taxes. The TTx implemented at the federal level will co-exist with the existing state based tourism taxes, meaning that both would apply to tourists from 1 September 2017. As is the case with the GST, the TTx would be administered by the Royal Malaysian Customs Department (RMCD).

THE SCOPE AND RATE

Subsection 6(1) of the Tourism Tax Act 2017 (TTx Act) provides that the tax shall be charged and levied on a ‘tourist’ staying at any ‘accommodation premises’ made available by any operator. The obligation to pay the tax is on the tourist but there is equally a responsibility imposed on every operator to collect the tax (read Sections 6(2) and 7(1) together).

Unlike the GST, there is no requirement for a payment or some form of consideration to be payable for the tax to apply, which means that the tax can be collected on complimentary rooms if the room guest is classified as a tourist.

Importantly, where there is more than one tourist staying in the same accommodation at the same time and one of the tourists has paid the tax, then the other tourists are not required to pay the tax. However, the Law is a little unclear when you share housing, such as dormitories, where you have multiple guests’ bookings but essentially only one room that is being rented.

Section 8 requires that the Minister of Finance set the rate of tax, and this has been addressed through the gazetted of the Tourism Tax (Rate of Tax) Order 2017 which has set a fixed rate of RM10 per night.

In order to understand the scope more clearly, we need to examine some of the key terms more closely.

In conjunction with the release of the Law and Regulations, the RMCD have also released its ‘General Guide on Tourism Tax’ (General Guide), and where appropriate, we would also seek to reference RMCD’s views on the matter.

The General Guide has proven useful in addressing some of the unclear points about the scope of taxation. For one, complementary early check-ins and check-outs would not attract additional tax. This was proposed in an earlier draft of the Guide but was later clarified as not being subject to tax, refer to FAQ Q6, 34,35 and 44.

Tourist

The definition of tourist is taken from subsection 2(1) of the Tourism Industry Act 1992 (TIA), which provides a very broad definition of tourist:

“Tourist” means any person, whether he is a Malaysian national or otherwise, visiting any place in Malaysia for any of the following purposes, namely:

a) pleasure, recreation or holiday;
b) culture;
c) religion;
d) visiting friends or relatives;
e) sports;
f) business;
g) meetings, conferences, seminars or conventions;
h) studies or research;
i) any other purpose which is not related to an occupation that is remunerated from the place visited.
As a consequence, any person with the exception of persons who are “remunerated from the place visited” are in scope. At first reading, it was thought the exclusion would apply to those employed by the place they are staying in i.e. the employees of the hotel, however, this has since been interpreted more broadly by the RMCD. In particular in FAQ 89 of the General Guide, it provides that a foreigner on a work permit who travels to a place that is in the vicinity of the location covered by the work permit would also be exempted. Based on our discussions with the RMCD we understand that ‘vicinity’ is in reference to the district and that the postcode is a useful reference point for determining whether a location is in within vicinity.

‘Accommodation premises’

The definition of accommodation premises is also taken from subsection 2(1) of the TIA and is equally broad. It is taken to mean any building, including hostels, hotels, inns, boarding houses, rest houses and lodging houses, held out by the proprietor, owner or manager, either wholly or partly, as offering lodging or sleeping accommodation to tourists for hire or any other form of reward, whether or not food or drink is also offered.

In keeping the definitions quite wide, the legislators have given considerable scope for the TTx to apply. Unlike the GST, there is no exclusion for accommodation providers operating in Labuan, Langkawi and Tioman and these providers are within the scope of the tax.

In balancing the impact of the tax and to ensure it is not overly burdensome, the inclusion of exemptions becomes quite critical.

EXEMPTIONS

Under Section 9 of the TTx Act, the Minister of Finance has the power to exempt a tourist from paying the tax, an operator from collecting the tax or from needing to register for TTx.

The exemptions are contained in the Tourism Tax (Exemption) Order 2017, and the following parties have been exempted:

Tourists who are exempt from payment of the tax

a) Malaysian National; or
b) A Permanent Resident of Malaysia

This effectively exempts all locals from the tax and limits the tax to non-Malaysians. In order to qualify for the exemption, the presumption is that guests would need to provide their identity card or passport to verify their nationality or PR status. Interestingly, there is no exemption provided to those residing in Malaysia on working permits or long-term visas, and these ‘tourists’ would still need to pay the tax.

Another interesting outcome is where accommodation is shared between Malians and non-Malaysians. The exemption does not appear to apply to those scenarios and the tax would need to be paid. Aside from posing a rather interesting discussion amongst the guests on how the hotel bill should be split, it does pose a challenge for both an operator and an authority in ensuring compliance with the rules. It is not always the case that identity information is obtained for all the guests in an accommodation and even if a rule was set, it can be difficult to enforce.

The RMCD have sought to clarify this point in their General Guide FAQs, in particular FAQ 2, 3, 4 and 5 (Guide dated 31 August) In the RMCD’s view, if the accommodation is either booked by or paid by the foreigner, then the TTx would be applicable, however, if the reverse should apply i.e. booked or paid by the local, then there would be no TTx. This interpretation seems inconsistent with the Law, but may also prove to be problematic for operators to properly enforce and for the RMCD to enforce.

Another category of ‘tourist’ that may feel somewhat hard done by is the business traveller and the long-term resident, i.e., those tourists who may choose to stay in an accommodation for more than a week and perhaps months. In a number of foreign jurisdictions, these types of travellers have qualified for exemption but that won’t be the case in Malaysia.

Operators who are exempted from registration

a) An operator operating a homestay under the Pengalaman Homestay Malaysia Programme as determined by the Minister of Tourism and is registered with the Ministry of Tourism and Culture (MOTAC);

b) An operator who operates kampungstay determined by
the Ministry of Tourism and Culture Malaysia under the Visit My Kampung Kampungstay Programme and is registered with MOTAC;
c) The Federal Government, State Government, statutory body, local authority or private higher educational institutions registered under Private Higher Educational Institutions Act 1996 operating accommodation premises as a facility to any person for educational, training or welfare purposes;
d) An employer who operates accommodation premises for accommodation purpose as a facility to his employees;
e) Religious or welfare body who fully operates accommodation premises for the purpose of religious or welfare activities not for commercial purpose and registered with the Registrar of Societies Malaysia or under the written law and approved by the Minister responsible for religious or welfare matters; and
f) An operator of accommodation premises having four or less than four rooms

The exclusion of homestays ensures that low cost accommodation is kept out of the ambit of the tax, which is a welcome move as it removes the administrative burden of needing to comply with the tax for these small providers. This would also be the intention of excluding those premises with four rooms or less. However, in providing this exemption, it also excludes those providers who operate through digital platforms such as Airbnb. Whilst such providers neither own accommodation nor operate them, much like Uber and Grab have shaken up the taxi industry globally, Airbnb and its competitors represent a significant disruption to the hotel industry. In acknowledgment of this fact, it is now understood that the government intends to widen the scope of the tax to allow for Airbnb to collect the tax on behalf of its operators. This treatment has been followed in a number of the countries that operate a TTx and ensures greater parity between these providers and the more conventional providers.

The exclusion of employer-operated accommodation will also be welcomed by the many businesses in Malaysia that need to provide employee housing as a function of their business. However, one challenge that exists is to define how widely or narrowly this provision should be interpreted. If read narrowly, it would require the company who operates the accommodation and who employs the employee to be one and the same. This interpretation would pose significant challenges for employers as many of them operate in a group
structure with employees sitting across a number of entities. The writer hopes a more pragmatic approach consistent with the intention of the exemption to exclude employer-operated housing can be taken.

One exemption that has been announced publicly and included in the latest General Guide on Tourism Tax but that is not specifically reflected in the order is the exemption provided to contract group tours that had bookings prior to the announcement of the tax. In order to access this exemption, tour operators are required to first apply individually to MOTAC to obtain a supporting letter to seek the exemption. Once this letter is received, an application would need to be made to the Minister of Finance with the supporting letter to seek exemption under Section 9(2) of the TTx Act. If the exemption is granted, then certified copies of the documents issued need to be sent to the operators in order for them to not charge TTx.

A further exemption is contained in the Guide, which relates to the issue of dormitories. It is contained in FAQ Q67 and exempts “backpacker accommodation” that have accommodation that is designed to be occupied by 2, 4 or 6 people that is charged on a per room basis and that can be occupied at different times. It is unclear under what provision of the Law this exemption is provided, and appears to be more in the nature of an administrative concession provided by the RMCD. However, the exemption itself does not clearly mention dormitories, nor does it address how they should be taxed, which is still relevant for providers who have both dorms and individual rooms in the building as they would not qualify for exemption.

ADMINISTRATION AND PAYMENT OF THE TAX

From an administrative point of view, many of the requirements for TTx mirror that of the GST as providers need to register, issue invoices and file returns periodically. It is unclear given the similar requirements, why the authorities didn’t perhaps combine the registration and filing requirements for GST and TTx as that would reduce the amount of paperwork involved. It is possible that the authorities were perhaps keen to keep both taxes separate, but from an efficiency perspective, it is hoped that this could be explored in the future.

Registration

The responsibility for registration sits with the operator, who is defined in Section (2) of the TTx Act as simply being any person operating the accommodation premises. Operators who had been operating an accommodation premises prior to 1 September 2017 were required to apply within 30 days of 1 August 2017 (the date the particular provisions of the TTx Act came into operation) to be registered. For any operators who commence post-1 September 2017, the 30-day requirement applies on a prospective basis, i.e., operators need to submit an application within 30 days of commencing operation.

The Director General of the RMCD also has the power to register accommodation premises that are currently registered with MOTAC as “tourism accommodation premises.” Our understanding is that for pre-1 September 2017 registrations, this process was followed with operators being automatically registered by the RMCD. Operators who are not registered with MOTAC have an obligation to notify the Director General and become registered, and a failure to do so can give rise to a penalty – upon conviction - of up to RM30,000, two years imprisonment or both. The registration process is completed electronically through the MyTTx portal that has been set up by the RMCD.

Once registered, operators are assigned a ‘tourism tax identification number’ and a certificate of registration. The former needs to be included on all invoices issued and the latter displayed in a conspicuous place at the accommodation premises.

Invoicing

As is the case with the GST, a
GENERAL PRINTING, GAZETTE & TRADING
DIGITAL PRINTING
DIGITAL IMAGING & ARCHIVING
E-BUSINESS & LAWNET
CARD BUSINESS

Tel. : 03-9236 6888 (Talian Am)
      03-92366894 (Customer Service)
Faks : 03-9221 1008
www.printnasional.com.my
cservice@printnasional.com.my
compliant invoice is required to be issued to each tourist. The key new pieces of information that need to be included on an invoice are the TTx identification number and the rate and the amount of tax payable.

Although the obligation to pay the tax is on the tourist, in the scenario where an invoice has been issued and remains unpaid after a period of 12 months, the obligation shifts to the Operator who must then pay the tax. Also, if the tax was originally charged in advance, the guest does not show up and the TTx is not refunded to the tourist, the operator would be required to account for TTx.

Credit and Debit Notes can also be used when there is a change in the TTx rate or an adjustment needs to be made in the course of the business. The most common scenario would be where there is a cancellation and no accommodation is provided. In the case TTx is paid, then a credit note would be issued to enable a credit of the TTx. Similar to the GST, the TTx amount should then be adjusted in the corresponding return.

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Payment of the Tax

The TTx amounts collected are to be paid to the RMCD at the end of the month following the end of the taxable period, which coincides with the filing of the return, the TTx-03. A copy of the TTx-03 can be found in the Regulations. It requires, amongst other things, a total figure for the number of rooms per night rented in the period and the total tax paid.

Operators who are registered for GST are required to file TTx-03 returns based on the same taxable period which applies for GST purposes (monthly, quarterly or variable). All other operators are required to file quarterly.

Bad debt relief

As is the case with GST, there is bad debt relief available for the TTx. However, it is far more limited in scope. Firstly, the relief is only available to an operator “who ceases or has ceased to operate accommodation premises”, secondly where the operator has received any part payment, this part payment is to be first applied towards settling the TTx. As a consequence, it would prove quite difficult for an operator to recover any debtors that have gone bad. It is unclear why the bad debt provisions are quite limited in comparison to the GST, and perhaps this is an area that can be further expanded over time.

IN CONCLUSION

The introduction of the tourism tax highlights the trend that we see regionally and globally towards indirect taxes. As governments are under significant pressure to encourage capital inflows and increase the competitiveness of business, we are likely to see this trend only increase in the future. As indirect taxes focus on taxing consumption and not income, the steps taken to implement such taxes can be a positive step towards achieving growth.

However, as we accept the ‘new normal’, care must also be taken to ensure that such taxes are ‘tax neutral’ and do not discourage the consumption of one good or service over another (unless specifically intended like ‘sin taxes’), and importantly we should look to ensure that there is efficiency in the administration of those taxes so that it does not unfairly burden businesses who are already facing constraints on costs including resourcing. In cases where an indirect tax is neither neutral nor efficient, we risk encouraging businesses to operate outside the system in the ‘grey economy’.

This writer hopes once things are bedded down with the tourism tax, it can prove to be an equitable and efficient method of tax collection that furthers the interest of our tourism industry and economy.

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