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Indirect Tax Chat

Keeping you up to date on the latest news in the Indirect Tax world

August 2019

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Quick links: *Contact us - Our Indirect Tax team*

Key takeaways:

1. *SST technical updates*
2. *Right of review and appeal after the repeal of GST*
3. *Levy on departing Malaysia*

Greetings from Deloitte Malaysia's Indirect Tax team

Greetings readers, and welcome to the August 2019 edition of our Indirect Tax Chat.

This month the Royal Malaysian Customs Department (RMCD) issued their Guide on Digital Services which we will cover further in this month's chat below. With just over a month to go before registration for foreign service providers opens in October 2019, foreign service providers should start to push forward on their implementations.

Back in our June 2019 edition, we briefly mentioned the coming into operation of ASEAN - Hong Kong Free Trade Agreement (AHKFTA) for some countries, but not Malaysia. However, Malaysia has now implemented the AHKFTA and also the ASEAN - China Free Trade Agreement (ACFTA) with the gazetting of two Orders. Importers will be happy to know that many items now have import rates of 0%. You may access the AHKFTA Order here, and the ACFTA Order here; and both Orders came into operation on 1 August 2019.

Here are some other recent news that may interest you:

- An economist, Professor Dr. Hoo Ke Ping has urged the Government to broaden the country's tax base and boost indirect tax revenue, in line with recommendations by the Organisation for Economic Co-operation and Development (OECD) to reduce reliance on oil-related revenue. He was responding to a recent report by OECD highlighting the positive impact of increased coordination in environmental policy at the sub-national level and the opportunity for greater use of environmental taxation, notably a carbon tax.

- For every RM1 earned from excise duty on cigarettes, the Government has to spend RM4 to treat patients who are habitual smokers. Deputy Health Minister Dr Lee Boon Chye said the amount spent annually to treat patients with diseases due to smoking habits was around RM16 billion, four times the excise duty on cigarettes collected by the government, estimated at RM4 billion per year. The expenditure was based on the estimated treatment cost figures obtained from the government and private hospitals and clinics, involving patients with various health issues due to their smoking habits. For more information, please click here.

We hope you find this month's Indirect Tax Chat informative. Please do not hesitate to contact us if you have any queries, comments or require our assistance on any indirect tax matters.

Best regards,

Tan Eng Yew
Indirect Tax Leader

1. SST technical updates

Revised Guide on Employment Services (as at 5 August 2019)

The Guide on Employment Services was revised and reissued this month (as version dated 5 August 2019) with a number of amendments impacting the treatment of employment services. The key changes and implications of the changes have been summarised below.

Terminology

The definition of "employment" has been introduced to provide clarity on what may fall within the purview of an employment service. The terminology provides, in specific terms that "employment" for the purposes of service tax is a relationship between two parties where one party is remunerated for work done and the relationship is usually one that is based on a contract although this may not necessarily be the case always.

The previous definition of secondment of employees within a group of company has been removed. The Guide introduces a set of conditions that are required to be fulfilled in order for an employment arrangement to be considered as secondment. In this respect, it appears that ALL five conditions laid in the Guide must be satisfied. The conditions have been summarised as follows:

i. An employee is transferred temporarily by the employer to perform duties elsewhere for a certain period of time and after the completion of his duties the employee returns to the same employer to continue his employment;
ii. the employee will remain employed by the original employer and the continuity of the employment remains continuous and unbroken;
iii. during the secondment period, the employee solely works for the seconded company;
iv. seconded company has the total control over the employee; and
v. the remuneration and any other allowances will be paid by the seconded company either directly or indirectly and no other extra charges being imposed.

Deloitte's view

While the redefinition of secondment of employees beyond the narrow ambit of "within a group of companies" is a move in the right direction, we are of the view that the conditions provided in the Guide, still leave room for much interpretation. For instance, the first condition requires that the transfer of the employee is for a temporary period. However, the Guide is silent on what constitutes as a "temporary" transfer - this then raises the question as to whether transfers of employee for a longer duration such as 2 years would fail to fall within the ambit of secondment on the account of "temporary" requirement even in a scenario where all the other conditions laid therein are fulfilled.

Further, condition four requires that the seconded company has "total control" over the employee and once again it is unclear as to what "total control" entails. Is it enough that the seconded employee reports to the seconded company directly on matters of work with no interference externally or does it require something more to fulfil the condition - i.e. a scenario where the seconded company also has the power and right to terminate a

respective employee and request for a replacement staff from the employment service provider.

Additionally, condition five appears to mean that the definition of secondment is limited to employment arrangements where it is purely for a recovery of salary cost. Where there is an additional charge or mark-up, the Guide seems to suggest that the employment arrangement would no longer be regarded as secondment and therefore would not be excluded for service tax. However, we note that a concession has been given at Example 8 and FAQ 3 of the Guide which states that where there is a mark-up charged for the transfer of an employee to a recipient company, only the portion of the mark-up will be subjected to service tax. We are of the view that the secondment of employees should be excluded as a whole for service tax whether or not there is an imposition of mark-up fee. The Guide should have reflected the above instead of adopting a restrictive definition of secondment and subsequently resorting to provide a concession in the very same Guide. In this respect, since the law does not expressly state that the secondment of employment must be without a mark-up to be excluded from the scope of prescribed taxable services, it is arguable that the Guide does not appear to be in line with the law at present.

Scope of employment services

The Guide includes few new additions of taxable employment services and an example of a scenario is provided for each taxable employment service. The additions to the list of taxable employment services are as follows:

(i) Temporary conferment of employment activities to clients and in consideration a fee was charged to the clients.
(ii) Individual job seekers looking for a job through an employment agency.
(iii) Where an employer requires an employment agency to recruit and conduct an interview on the potential employee for his company.
(iv) The provision of employment services from Malaysia to Special Area or Designated Area or vice versa.

The Guide also includes provision of employment services between or within Special Area or Designated Area and between Special Area and Designated Area as non-taxable employment service, a provision that was not present in the earlier Guide.

Deloitte's view

The new addition to the list provides more clarity than before as to what may constitute as a taxable employment service and further the examples provided gives an insight on how these new provisions would be applied by Royal Malaysian Customs Department (RMCD).

Other changes

More examples have been included in the Guide for various sections. (e.g. disbursement fees and FAQ section).

The Guide also reaffirms the RMCD's earlier position that cost of recovery under disbursements are excluded from service tax. This is only so where the charges are itemised in the invoice and can be segregated from the whole amount. If there is a margin imposed on the disbursement cost, such margin will be regarded as taxable and be subjected to service tax. Where the disbursement charges are not shown separately in the invoice issued to customers/clients, service tax is chargeable on the whole amount.

It also appears that where employment services are provided based on hourly rate with no mark-up, such fees will not be treated as emolument and may be subjected to service tax.

The example provided under FAQ 10 and 12 suggest that where a service provider provides employment services in an arrangement that can equally be considered as providing management services (i.e. provide accommodation, transport), the service provider will be regarded as providing both management and employment services.

Deloitte's view

Where the service provided by a service provider can be classified as both employment and management service, there is no guidance as to which category one should account for them. It appears that service providers may exercise their own discretion in classifying which category it ought to be accounted for.

In this relation, this may have potential implications on the application of B2B exemption and intra-group relief/exemption as employment services are excluded for the benefit of such exemptions.

Guide on Digital Services (as at 20 August 2019)

The much awaited Guide on Digital Services has finally been released by the Royal Malaysian Customs Department (RMCD) on 21 August 2019!

The contents of the Guide are more or less the same as the draft guide that we analysed and provided our comments on previously via an Alert dated 21 August 2019 (click here).

The Guide is generally consistent with the details covered in our previous Alerts except for the following:

- Scope of Digital Services

  As mentioned in our previous Alert, only internet-based telecommunication services are intended to be captured as a digital service. The Guide amends the draft version that was presented in the meeting by clearly stating that "Internet-Based Telecommunication" falls under the scope of digital services with examples quoting Cloud-PABX and VOIP phone.

- Invoicing

  Foreign service providers who are registered for service tax are required to observe invoice requirements for any taxable digital service provided to Malaysian consumers. In this respect, the Guide states that a request can be made to the Director General of Customs (DG) to exclude any particulars specified in an invoice by the foreign registered party.

- Payment of Service Tax

  Where the foreign registered party has overpaid the service tax amount, application can be made using the prescribed online form (JKDM 2) to obtain a service tax refund.

Deloitte's view

The Guide is fairly consistent with the draft version that was presented to us previously and in this respect, our comments on the new Guide released by RMCD to a large extent, is reflective of our comments provided on the draft Guide in the abovementioned Alert dated 21 August 2019.

RMCD appears to provide some concessions in the Guide on invoice requirements and allowance for service tax refund upon DG's approval although the amended provisions of the Service Tax Act 2018 is silent on these aspects.

The Guide, whilst provides some insight as to what would fall under the scope of digital services, it does not prove to be a comprehensive Guide to help prepare businesses in the changes that are yet to materialise 2020 onwards.

Administrative Aspects of SST-02A Return

The requirement to account for reverse charge on imported taxable services by local Malaysian businesses applies to both service tax registrants and non-registrants. For businesses who are not registered for service tax, the Law only requires the filing of an SST-02A Return for the month in which a reportable transaction happens. As a consequence, if in a particular month there are no imported taxable services, there should be no requirement to file a return.

However, in practice, the MySST does not allow businesses to file the SST-02A return for a particular month, unless all preceding months have been filed. Furthermore, in the event that a declaration with payable service tax is made for a back-dated taxable period, the payment for that particular declaration would need to be made and captured in the MySST system, before declaration can be submitted for the subsequent taxable period(s) (i.e. the recipient is unable to furnish declaration for multiple taxable periods at once, is required to wait for payment for each taxable period to clear, before proceeding for the next declaration).

Deloitte's view

Although the service tax legislation does not require declaration to be furnished where no imported taxable services are acquired, businesses should take note of the practical limitations in the systems and ensure that NIL returns are filed in the months where there is no reportable activity.

It is also imperative that businesses ensure that there are no back-dated periods where tax has yet to be paid prior to the submission of the current SST-02A, so as to allow time for payment (for the past periods) to be processed and to avert any potential imposition of penalties.

Brought to you by:

Larry James Sta Maria
Director
KL Office

Lekhashinii Nadarajan
Tax Assistant
KL Office

Back to top

2. Right of review and appeal after the repeal of GST

Limited scope of review and appeal after the repeal of the Goods and Services Tax (GST) Act 2014

The repeal of the GST Act 2014 (GST Act) effective 1 September 2018 has given rise to the question whether taxpayers would have any right of review and appeal as previously existed under the GST Act.

The short answer is taxpayers would mainly be without any right of review and appeal under the repealed GST Act, for any GST dispute arising after the repeal of GST effective 1 September 2018.

This is due to section 5 of the GST (Repeal) Act 2018 ("GST (Repeal) Act"), read with section 141M of the Customs Act 1967 ("Customs Act", as amended by the Customs (Amendment) Act 2018), which provides for a very limited continuance of the right of review and appeal after 1 September 2018, as follows:

(1) Review applications pending with the Director General of Customs (DG) as at 1 September 2018 may be dealt with on or after 1 September 2018 (i.e. this would mean decisions on such pending review applications shall ultimately be made by the DG on or after 1 September 2018);
(2) review applications decided by the DG before or after 1 September 2018 and appealable to the GST Appeal Tribunal, may be appealed to the Customs Appeal Tribunal within 30 days after the aggrieved persons are notified of the decisions of the DG in respect of such review applications; and
(3) appeals pending with the GST Appeal Tribunal as at 1 September 2018, shall continue to be heard and decided by the Customs Appeal Tribunal.

Disputes arising after repeal of the GST Act are not granted right of review and appeal

The GST (Repeal) Act on or after 1 September 2018, does not give any right of applying for review to the DG against any decision of a proper officer of GST on GST matters, or, right of appeal to the Customs Appeal Tribunal against any decision of the DG on GST matters *(other than in review of applications that were pending decisions by the DG as at 1 September 2018)*.

There would certainly be GST matters *other than the review of applications* that are pending with Customs (i.e. proper officer of GST including the DG), as at 1 September 2018.

Examples are:

(1) Outstanding cases involving refund of GST input tax credit; and
(2) applications to the DG for written confirmation on GST treatment.

Further, section 4(1), GST (Repeal) Act allows inter alia any GST liability incurred to be enforced, and any tax due to be collected or refunded, as if the GST Act had not been repealed. For this purpose, GST closure audits are being conducted or initiated by Customs on or after 1 September 2018, and subsequent audit findings/assessments may be made by the RMCD.

However, there is *no express right of review and appeal in the event of any dispute with the RMCD on these GST matters arising on or after 1 September 2018*.

Post-GST repeal: No remedy to taxpayers?

Taxpayers would be in a considerable disadvantage not to have any right of review and appeal under the repealed GST Act, on GST matters pending as at 1 September 2018 or arising on or after 1 September 2018, beyond the limited scope of review/appeal under section 5, GST (Repeal) Act read together with the amended section 141M, Customs Act.

Taxpayers without such right of review/appeal under section 5, GST (Repeal) Act would have to apply for judicial review to the High Court, which would be relatively expensive and complicated, compared to the simpler Tribunal process.

Recommendations have been made, through professional bodies, for Customs to propose legislative changes to expand the limited review and appeal scope under section 5, GST (Repeal) Act read together with the amended section 141M, Customs Act, to expressly allow:

1. Any decision of a proper officer of GST on GST matters, made before or after 1 September 2018, to be reviewable by the DG on or after 1 September 2018, provided the review application is made to the DG within 30 days after the decision of the DG is notified to the taxpayer, as per section 124 of the repealed GST Act.

2. Any decision of the DG on GST matters, made before or after 1 September 2018, to be appealable to the Customs Appeal Tribunal on or after 1 September 2018, subject to the limits of the GST Appeal Tribunal's jurisdiction and the filing deadline of 30 days after the notification of the decision of the DG to the aggrieved person or such extended filing period as may be allowed by the Customs Appeal Tribunal.

Unfortunately, RMCD has decided to retain the existing limited scope of review and appeal under section 5, GST (Repeal) Act read together with the amended section 141M, Customs Act.

Therefore, applications for judicial review to the High Court would seem to be the primary method for taxpayers to seek remedy against adverse decisions of the DG on GST matters, arising post 1 September 2018. In this regard, Deloitte has the experience and is able to assist in providing litigation support to taxpayers on GST/indirect tax technical matters in respect of judicial review cases in High Court and beyond, that are conducted by lawyers appointed by the taxpayers.

Brought to you by:

Chandran TS Ramasamy
Director
KL Office

Back to top

3. Levy on departing Malaysia

Regulations and Orders

In our July 2019 tax chat, we brought to you what the Departure Levy Act 2019 was about. Since then, multiple Regulations and Orders have been gazetted to operationalise this Act. They are:

Regulations

1. Departure Levy Regulations 2019 [*P.U. (A) 215/2019*]
2. Departure Levy (Compounding of Offences) Regulations 2019 [*P.U. (A) 216/2019*]

Orders

1. Departure Levy (Rate of Departure Levy) Order 2019 [*P.U. (A) 213/2019*]
2. Departure Levy (Exemption) Order 2019 [*P.U. (A) 214/2019*]

From these legislation, we have noted some important information for you:

- The effective date for charging and levying of the departure levy is 1 September 2019.
- Operators and agents appointed by foreign operators who are liable to be registered shall apply for registration in Form DL-01 by way of electronic service. Once approved for registration, the registrant will be notified in writing, assigned an identification number and issued a certificate of registration.
- The taxable period for the departure levy is one calendar month and every registered person shall furnish the return in Form DL-02, through an electronic service or by post, regardless whether there is any departure levy to be paid. Payment of departure levy or penalty shall be made through electronic banking.
- Where a decision made by an officer of RMCD is to be disputed, the registered person may apply to the Director General within thirty (30) days from the date the person has been notified of such decision, in Form DL-03.
- The rates for levy are as below:

Country/Class	ASEAN countries		Other than ASEAN countries	
	Economy class	Other than economy class	Economy class	Other than economy class
Rate of departure levy	RM 8	RM 50	RM 20	RM 150

- The persons exempted from paying the levy are as below:

  (a) Infant and toddlers below age of 24 months old;
  (b) aircraft passenger transiting through Malaysia who arrives and leaves within 12 hours;
  (c) pedestrians;

(d) people driving themselves in any vehicle for personal use and any passenger in such vehicle;
(e) any crew on duty on board of any vehicle including aircraft or vessel.

- The operators exempted from registering and charging the levy are as below:

  – Operator of any water or land vehicle;
  – commercial vehicle operators who provide chartered air transport services for carrying workers to an oil rig, platform or the like;
  – any Government operating any type of vehicles carrying out passengers from Malaysia.

Guides on Departure Levy

Apart from the Regulations and Orders released by the government, RMCD has released multiple guides on the departure levy. They are:

- General Guide on Departure Levy
- Guide on Departure Levy Registration (in Malay)
- Guide on Departure Levy Returns and Payments
- Guide on Departure Levy Refund

Some important information we note from the guides are as below:

- The registered flight operators are to charge the departure levy in their ticket sales or invoices on people flying out of Malaysia.

- In determining whether a flight operator has a local "establishment", the operator must have a place of business registered with the Companies Commission of Malaysia. Flight operators without a local establishment are deemed to be foreign operators who need to appoint a local agent.

- The responsibility of registered flight operators are as below:

  (i) Charge the departure levy on outgoing passengers by issuing tax invoice, receipts or any other documents including a statement of account that state the rate and amount levied on passengers;
  (ii) account for the departure levy collected;
  (iii) furnish the monthly DL-02 return and pay no later than the last day of the following month to which the return relates to;
  (iv) for cancellations, inform RMCD in writing the date of cessation at least 60 days before the cessation date;
  (v) for foreign operators, inform RMCD in writing should there be a change in appointed agent at least 30 days before such change happens;
  (vi) inform RMCD for any change in trading name, registered address, or trading status;
  (vii) keep sufficient record of all business transactions relating to the departure levy in the national Malay or English language for a term of 7 years.

- As the departure levy is collected during tickets sales but only due when a person leaves Malaysia, the person has the right to claim back the departure levy amount that has been

paid to the airline operator in cases where the person does not actually embark on the flight leaving Malaysia.

- Registered operators may apply for a refund on departure levy paid in cases where an overpayment has occurred. The registered person shall submit the refund application to the DG through the MyDLv system within 1 year from the date of payment of the departure levy. To apply for a refund, supporting documents to be submitted includes the Passenger Manifest, Load Message (LDM) and other documents deemed necessary by the DG. The decision on the refund application will be issued by the DG through a letter in the MyDLv system. If successful, the refund application will be sent to the Accountant General to initiate the payment of refund. The refund will be deposited into the registered person's bank account as registered in the MyDLv system within 90 working days of the refund approval.

Deloitte's view

The general public will welcome the change in rates which are now based on class of travel with reduced rates for economy travellers. The approach to apply the levy based on class of travel is also consistent with the current Passenger Service Charge collected by the airport operator. However, the change in methodology and the limited introduction period will pose challenges to airline operators. Furthermore, the Government has expressed an interest in revising the rates further with a potential split between low-cost and full service airlines which is likely to add further complexity.

A further compliance challenge will be the need for foreign airlines to use local agents for filing and reporting purposes. Similar provisions existed under the previous GST regime, but due to the imposition of 'joint and several' liability on the local party, identifying willing parties to take on this role can be challenging.

Brought to you by:

Senthuran Elalingam
Executive Director
KL Office

Patrick Ng
Tax Assistant
KL Office

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Back to top

Contact us – Our Indirect Tax Team

Tan Eng Yew
Indirect Tax Leader
etan@deloitte.com
+603 7610 8870

Senthuran Elalingam
Global Indirect Tax Clients & Industries Leader
selalingam@deloitte.com
+603 7610 8879

Wong Poh Geng
Director
powong@deloitte.com
+603 7610 8834

Chandran TS Ramasamy
Director
ctsramasamy@deloitte.com
+603 7610 8873

Larry James Sta Maria
Director
lstamaria@deloitte.com
+603 7610 8636

Irene Lee
Associate Director
irlee@deloitte.com
+603 7610 8825

Nicholas Lee
Associate Director
nichlee@deloitte.com
+603 7610 8361

Wendy Chin
Senior Manager
wechin@deloitte.com
+603 7610 8163

Name	Email address	Telephone
Leong Wan Chi Manager	wanleong@deloitte.com	+603 7610 8549
Eliza Azreen Kamaruddin Manager	eazreen@deloitte.com	+603 7610 7271
Atika Hartini Suharto Manager	asuharto@deloitte.com	+603 7610 7986
Naresh Srinivasan Assistant Manager	narsrinivasan@deloitte.com	+603 7650 6459

Other offices

Name	Email address	Telephone
Susie Tan Johor Bahru and Melaka	susietan@deloitte.com	+607 268 0851
Ng Lan Kheng Penang	lkng@deloitte.com	+604 218 9268
Lam Weng Keat Ipoh	welam@deloitte.com	+605 253 4828
Philip Lim Kuching and Kota Kinabalu	suslim@deloitte.com	+608 246 3311

Back to top

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