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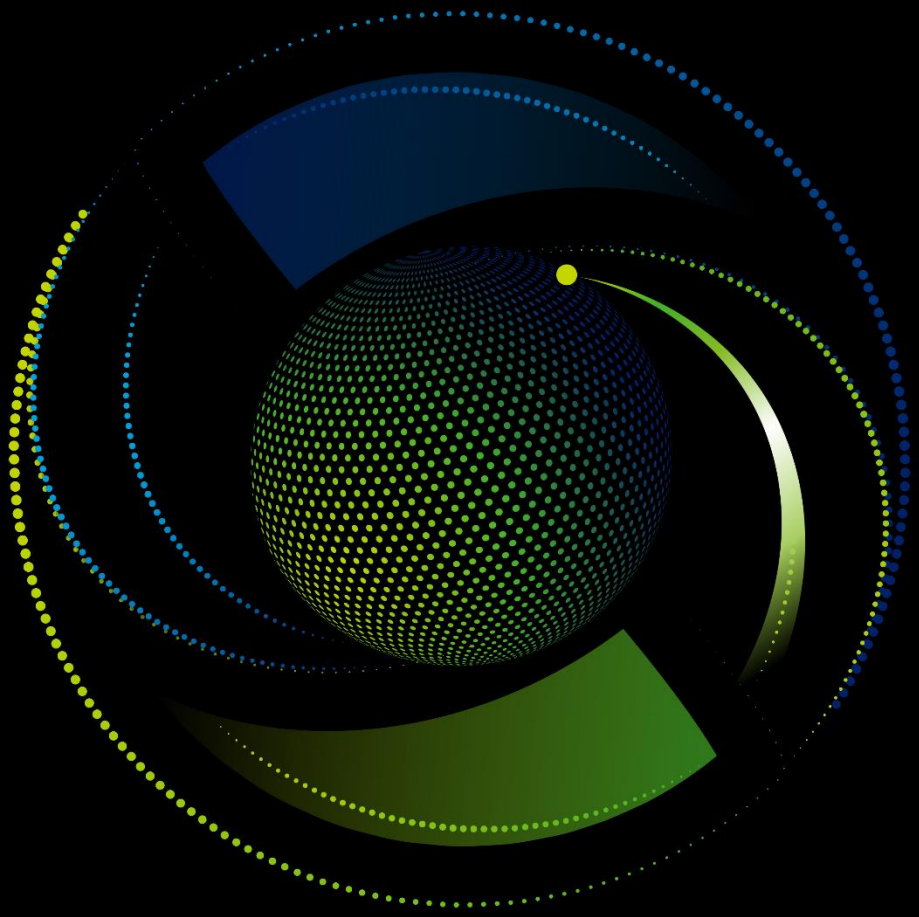

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Indirect Tax Chat

Keeping you updated on the latest news in the Indirect Tax world

MAKING AN IMPACT THAT MATTERS since 1845

December 2022

Issue 12.2022

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Key takeaways:

1. *Proposed Service Tax on Goods Delivery Services*
2. *Legislative Amendments to Windfall Profit Levy and Goods Vehicle Levy*
3. *High Court case on zero-rating exported goods under GST*

Greetings from Deloitte Malaysia's Indirect Tax team

Greeting's readers, and welcome to the December 2022 edition of our Indirect Tax Chat. We hope that you are keeping safe and well.

The Prime Minister, Dato' Seri Anwar Ibrahim, announced earlier this month that he would also be taking on the role of the Finance Minister. In discussing the 2023 Budget that was announced (but not tabled) prior to election, he mentioned that this would be reviewed. We anticipate that the Budget, with perhaps some revisions, would be tabled early in 2023. We will be covering the indirect tax developments arising from the Federal Budget, as part of a wider tax alert.

Moving on to what we will cover this month, we look at the proposed mechanism for service tax on goods delivery services which is slated to be effective on 1 January 2023. We also explore legislative changes to the Windfall Profit Levy Act 1998 and the Goods Vehicle Levy Act 1983, as well as a recent court case on zero-rating for goods and services tax ("GST").

Businesses should also take note that there will be two notable expansions to the indirect tax laws taking effect on 1 January 2023. The first being the imposition of service tax on delivery services, and the second, the requirement for online digital platforms to collect tourism tax on accommodation bookings in Malaysia. As both of these involve a wider range of stakeholders including consumers, business partners and suppliers, it is important that impacted businesses take note and ensure that they are compliant with the requirements.

Separately, here is a recent news that may interest you:

- The Malaysian Consortium of Mid-Tier Companies ("MCMTC") said that Malaysia cannot afford to withdraw from the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP") as the agreement is crucial for the country's trade moving forward. MCMTC President, Callum Chen said that unlike other trade agreements, the CPTPP does not only open up trade but also brings with it technical assistance and technology/know-how transfer, which are critical for capacity building for local businesses. For more information, please click here and here.

I also wanted to give a brief word of thanks to my dear friend and colleague, Wong Poh Geng who will be retiring at the end of the month. Poh Geng has had a wonderful career stretching nearly 40 years of experience which included stints at the Royal Malaysian Customs Department ("RMCD") and three of the Big 4 consulting firms. We have thoroughly enjoyed the eight years that she has spent with us and we wish her all the best in her retirement, which will no doubt be spent travelling to various places around the world.

As a final note, we at Deloitte Indirect Tax would like to wish all who are celebrating, a Merry Christmas, and to the rest of you, happy holidays and a happy new year. We hope you continue to stay safe, and we look forward to chatting again in 2023!

Best regards,
Tan Eng Yew
Indirect Tax Leader

1. Proposed Service Tax on Goods Delivery Services

Service tax on goods delivery services was proposed in the Budget 2022 (tabled in October 2021) and was slated to go live on 1 July 2022. However, the RMCD announced at the eleventh hour that this would be postponed to a future date to-be-announced.

Recently, the RMCD held a sharing session online with delivery service industry players to provide more information on the proposed mechanism of service tax on the goods delivery services. The salient points from the session are as below.

Taxable person

Goods delivery services will become a taxable service by amending item 6 in Group I ("Item 6") of the First Schedule to the Service Tax Regulations 2018 ("STR"). The taxable person in column 1 (*see page 109 in the embedded STR*) will be amended to:

a) any person who provides goods delivery services for documents, packages, or goods; or
b) any E-Commerce platform that provides goods delivery services, including on behalf of any other person.

Taxable service

The taxable service in column 2 of Item 6 (*see page 109 in the embedded STR*) is proposed to be amended to be the provision of:

a) delivery services including express courier for documents, packages or goods; or
b) delivery services including the courier of documents, packages or goods using E-commerce platforms, including on behalf of other persons.

This would include deliveries:

a) from a place in Malaysia to another place in Malaysia
b) from a place in Malaysia to a Designated Area (Labuan, Langkawi, Tioman, Pangkor)
c) from a place in Malaysia to a Special Area (free zone, licensed warehouse and licensed manufacturing warehouse, the Joint Development Area, and a petroleum supply base licensed under section 77B of the Customs Act 1967)
d) from a Designated Area to a Special Area, or vice versa, if the primary business premise of the deliverer is in Malaysia

In its webinar, the RMCD shared how the service tax would be administered, using three categories.

Category 1: Conventional Purchase without use of Delivery Company

Where a seller sells goods to a buyer and charges a delivery fee to deliver the goods, the delivery fee would be subject to service tax.

Category 2: Conventional Purchase with use of Delivery Company

Category 2 is where a seller sells goods to a buyer and arranges for a delivery company to deliver the goods to the buyer. The delivery company would charge service tax on their delivery service to the seller. Where the seller also charges a delivery fee (regardless of markup) to the buyer, such delivery fee would be subject to service tax. If the seller does not charge a separate delivery fee and only for the sale of the goods, no service tax would be charged by the seller.

Category 3: Purchases on an Electronic Market Place ("EMP") platform

Category 3 is where the seller sells goods to a customer on an E-commerce platform, and the delivery could be done by third party delivery companies or by themselves. Where a third-party delivery company is engaged by the EMP operator to deliver goods to buyers, the third-party delivery company shall charge service tax on their delivery fee. Where the EMP operator charges a delivery fee to either the seller or the buyer, such delivery fee would likewise be subject to service tax.

Where the EMP operator's in-house riders conduct the delivery of goods, the in-house riders would not need to charge service tax to the EMP operator.

Exclusion (non-taxable service)

Goods delivery services that would not be subject to service tax are:

a) delivery of food and drinks ("F&B") that are prepared by F&B establishments
b) logistics services*
c) delivery of goods from a place outside Malaysia to another place outside Malaysia
d) delivery of goods from a place in Malaysia to a place outside Malaysia
e) delivery of goods from a place outside Malaysia to a place in Malaysia

*The RMCD mentioned during the webinar that there is still debate as to the extent to which delivery services would apply to logistics services given the exemption afforded to logistics management services. They indicated the prevailing view was that logistics services encompass the end-to-end movement process including storage, preparation, delivery, movement, and other related logistical services. Where a company does only one or part of the process mentioned above (but not all), their services would not fall under the exclusion for logistics management services.

Registration threshold

The value of taxable services under Item 6 would remain unchanged at RM500,000. Therefore, where a company derives over RM500,000 from delivery of goods over a rolling 12-month period, the company would need to register for service tax.

Effective date

The proposed effective date is 1 January 2023. However, the registration and charging date would differ for different businesses as below:

a) For non-service tax registrants who provide goods delivery services, the business should monitor the value of its delivery services, and register for service tax once it breaches RM500,000, and start charging service tax once registered.
b) For service tax registrants who are registered under Item 6 before 1 January 2023, such businesses would need to charge service tax from 1 January 2023.
c) For service tax registrants who are registered under other taxable services apart from Item 6, such as professional services in Group G, the effective date for charging service tax on goods delivery services shall be 1 March 2023.

Deloitte's comments

The above information that was shared during the RMCD's webinar is the **proposed** mechanism of how service tax would be administered on goods delivery services. We would have to wait for the amendments to the STR to be gazetted, and for the release of the official guidelines by the RMCD to understand the final position adopted.

There was no indication as to whether the B2B exemption and intragroup relief would be extended to Item 6, and whether disbursements under a cost recovery would be applicable to goods delivery services. Such exemptions and relief are vital to reduce the occurrence of cascading tax effects, as the spirit of service tax was to be different from GST, and to be a single-stage tax.

We will cover the goods delivery services in a future edition of our Chat once the finalised regulations are gazetted and the guide (if any) is published by the RMCD.

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2. Legislative Amendments to Windfall Profit Levy and Goods Vehicle Levy

The Windfall Profit Levy (Amendment) Act 2022 and the Goods Vehicle Levy (Amendment) Act 2022 were gazetted on 18 October 2022 but are not in force, yet. These Acts make amendments to the Windfall Profit Levy Act 1998 ("WPL") and Goods Vehicle Levy Act 1983 ("GVL"), respectively.

The key provisions of each Act are summarised below.

Windfall Profit Levy (Amendment) Act 2022

- New section 3A empowers the Minister (of Finance) to extend the period to perform an act that is required to be completed within a certain period under the WPL, if he is satisfied that the act or thing could not be completed within the period due to the occurrence of any public emergency or public health crisis. (For example, where the WPL return is to be submitted by a registered person at the end of a particular month, the Minister may extend the deadline to a date as he deems fit, due to public emergency or public health crisis.)

- New section 3B states that, where terms and conditions are imposed for any matter under the WPL, the Minister may, on the advice of the Director General of the RMCD, modify (i.e. add to, delete, or vary) the terms and conditions for the purpose of carrying out the objectives of the WPL. Reasonable notice must be given to the person bound by the terms and conditions to notify them of such modifications and the effective date of such modifications.

- New section 6A enables the Director General of the RMCD to issue a public ruling on generally any matter under the purview of the WPL.

- Amendments to section 11, 14, and 28 of the WPL empowers the Director General of the RMCD to determine the "form" to be used for the submission of a return under section 11 of the WPL or the making of a claim for refund under section 14 of the WPL of the overpaid levy or the erroneously paid penalty.

- Amendments to section19(1)(c) of WPL make it an offence for any person who causes any document which is or may be required under the WPL or used in the transaction of any business or matter relating to windfall profit levy, to be counterfeited or falsified, or who causes to be used or assists in the use of any counterfeited or falsified document.

Goods Vehicle Levy (Amendment) Act 2022

- New section 7A empowers the Minister to extend the period to perform an act that is required to be completed within a certain period under the GVL, if he is satisfied that the act or thing could not be completed within the period due to the occurrence of any public emergency or public health crisis. (For example, where the return is to be submitted by a registered person at the end of a particular month, the Minister may extend the deadline to a date as he deems fit, due to public emergency or public health crisis.)

- New section 7B states that, where terms and conditions are imposed for any matter under the GVL, the Minister may, on the advice of the Director General of the RMCD, modify (i.e. add to, delete, or vary) the terms and conditions for the purpose of carrying out the objectives of the GVL. Reasonable notice must be given to the person bound by the terms and conditions to notify them of such modifications and the effective date of such modifications.

Deloitte's comments

The amendments in the Acts provide additional powers to the Minister/the Director General of the RMCD relating to the extension of statutory deadlines due to public emergencies or health crisis, the modification of terms and conditions under the WPL and GVL, and, for the WPL, the determination of forms to be used under the WPL.

The extension of statutory deadlines in WPL and GVL by the Minister would allow more time for taxpayers to perform their statutory obligations under the WPL and GVL without risk of incurring 'late penalties', if any, during public health crises or emergencies (such as the movement control orders imposed during the COVID-19 pandemic).

For WPL, there is also greater flexibility for the Director General of the RMCD to determine the forms to be used for the purposes of the return and refund process under the WPL, instead of the usual prescribed forms.

Both Acts also give the Minister the power to modify terms and conditions issued pursuant to the WPL and GVL, respectively. This could potentially include the modification of terms and conditions of licenses or exemptions, if any, granted pursuant to the WPL and GVL.

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3. High Court case on zero-rating exported goods under GST

Introduction

In a recent decision (25 August 2022), the High Court of Malaya quashed a Bill of Demand ("BOD") issued by the RMCD to Petronas Nasional Berhad ("Petronas") for GST of around RM 14.8 million. The BOD had been issued by the RMCD for Petronas' alleged incorrect zero-rating of its supply of goods that were exported, under **section 17(1)(b) Goods and Services Tax Act 2014 ("GST Act")**. The earlier decision of the High Court of Sabah and Sarawak in ***Jakinta Trading Sdn Bhd v. Director General of Customs & State Director of Customs, Sabah*** **[2021] 1 LNS 678 ("Jakinta")**, had also made a decision in favour of taxpayer for zero rating of exported goods, under the same section 17(1)(b) of the GST Act, though apparently contrary to prior decisions of the High Court of Sabah and Sarawak in ***Seratim Sdn Bhd v Customs Appeal Tribunal & Anor*** *[2020] 1 LNS 223 ("**Seratim**")* and ***Acedeck Sdn Bhd v Customs Appeal Tribunal & Anor*** *[2020] 1 LNS 209 ("**Acedeck**")* . See previous write up on the cases of ***Jakinta*** *(abbreviated as "**JSB**"* in the article, as ***Jakinta*** was unreported at that time*)*, ***Seratim*** and ***Acedeck*** in the May 2021 Indirect Tax Chat issue.

This article examines the ***Petronas case*** in light of the development of the case law on the repealed GST Act provision of section 17(1)(b), which could have potential ramifications for the GST treatment of exported goods, if GST were reintroduced. Note the High Court judgment in ***Petronas case*** has yet to be reported and our comments are based on materials that has been published so far (i.e. newsletter from the legal firm that represented Petronas, and other news reports).

*Summary of key background and outcome of **Petronas case***

In summary, the relevant key background of ***Petronas case***, is as follows:

- Petronas supplied goods (ethylene) to a third-party company in Malaysia i.e. Idemitsu SM (Malaysia) Sdn Bhd ("ISM") but the goods were exported directly by Petronas to "overseas buyers" (presumably buyers of ISM), as evidenced amongst others by the export declaration form ('K2') stating Petronas as the exporter.
- The RMCD took the view that the transfer of ownership of the goods by Petronas to ISM had concluded in Malaysia and therefore, the supply was to be treated as a standard rated supply, not zero-rated supply under section 17(1)(b), GST Act. (Section 17(1)(b), GST Act zero-rates *"any supply of goods if the goods are exported"*.)

As indicated earlier, the High Court's judgment in favour of Petronas has not been reported, and hence the reasoning of the High Court is not fully known. However, from the published material in news reports etc., it appears the High Court decision is based on the clear words of section 17(1)(b) of the GST Act that, any supply of goods would be zero rated if the goods are exported, as in this case where the supply of goods by Petronas to ISM would be zero rated since the K2 proves that the goods were exported. The High Court seems to have rejected the RMCD's position that section 17(1)(b), GST Act requires transfer of ownership to be made by the supplier (Petronas) to a person outside Malaysia, for the obvious reason that it is not required by the clear words of section 17(1)(b), GST Act.

Deloitte's comments

We would concur with the High Court's decision in the ***Petronas case***. The clear words of section 17(1)(b), GST Act would zero rate any supply of goods if the goods were proven to have been exported, as was the undisputed fact in Petronas's case.

The RMCD's view that the transfer of ownership of the goods is by Petronas to a person (ISM) in Malaysia should not affect the zero rating. This is because, though the definition of "supply" of goods encompasses a transfer of ownership in the goods, section 17(1)(b), GST Act entitles the zero-rating of *"any supply of goods"* (i.e. *any transfer of ownership in the goods*) including to a person in Malaysia, such as ISM, if the goods are exported (a fact undisputed by the RMCD).

In contrast to ***Petronas case***, in ***Jakinta***, the supplier (Jakinta) had sold goods (timber) to an overseas customer but the exporter of record on the K2 was not Jakinta, but a third party (who held the timber export licence for export of the timber). The RMCD's position was that the supplier had to be the exporter of the goods on the K2 in order for the supply of the goods to be entitled to zero-rating under section 17(1)(b), GST Act. In brief, the High Court rejected the RMCD's position and held that section 17(1)(b), GST Act merely required the goods supplied by ***Jakinta*** to have been exported (a fact undisputed by the RMCD), regardless of who the exporter was on the K2. This decision is apparently contrary to ***Seratim*** and ***Acedeck*** which essentially held the suppliers (Seratim and Acedeck) had to be the exporter on the K2 for the purpose of zero-rating under section 17(1)(b), GST Act.

We would reiterate our preference for ***Jakinta*** over ***Seratim*** and ***Acedeck***, since section 17(1)(b), GST Act zero-rates any supply of goods that is exported and does not stipulate that the supplier of the goods has to be the exporter of the goods on the K2. It is understood that ***Jakinta*** is currently pending appeal by the RMCD to the Court of Appeal, and it is hoped that the High Court decision in ***Jakinta*** is affirmed and that the Court of Appeal also disfavours the approach by the High Court in ***Seratim*** and ***Acedeck***.

In any event, it seems the key background fact and issue in ***Petronas case*** are distinguishable from ***Jakinta***, ***Seratim*** and ***Acedeck***. In ***Petronas case***, the supplier of the goods claiming the zero-rating treatment and the exporter on the K2 are the same party (i.e. Petronas), unlike in ***Jakinta, Seratim, and Acedeck***, where the suppliers of the goods claiming the zero-rating treatment were different from the exporter on the K2 (third-party timber export licence-holders). Therefore, even in the unlikely event of an unfavourable outcome for taxpayer in ***Jakinta*** at the Court of Appeal, the favourable High Court decision in ***Petronas case*** should not be affected. Nevertheless, there could still be potential adverse implications to taxpayers if GST is reintroduced in the future.

Implications for GST 2.0

It seems to be a matter of concern that the RMCD is taking a very narrow view of zero-rating under the previous GST regime envisaged by section 17(1)(b), GST Act. The RMCD seems to be interpreting section 17(1)(b), GST Act as requiring the supply of goods to be made by the supplier to a person outside Malaysia (implicit in the RMCD's position in ***Petronas case***) and that the supplier must also be the exporter on the K2 (The RMCD's position in ***Jakinta***, ***Seratim*** and ***Acedeck***). There is a risk that the RMCD may introduce such restrictive requirements in the GST 2.0 legislation, which would statutorily and prospectively reverse the High Court decisions in ***Petronas case*** and ***Jakinta***.

If such restrictions materialise in the GST 2.0 legislation, they would defeat the original intention of section 17(1)(b) of the repealed GST Act, which tended to facilitate export-oriented businesses to conduct exports freely according to their commercial trade practices and still enjoy zero-rating on the goods that are exported.

A restrictive zero-rating provision in GST 2.0 would detrimentally affect Malaysia's export-oriented industries, which continue to be strong contributors to the well-being of the Malaysian economy. Hence, it is hoped that the tax authorities, including the Minister of Finance, would seriously consider adopting a broader stance to promote exports, by not imposing any restrictive requirements in the GST 2.0 zero-rating provisions.

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