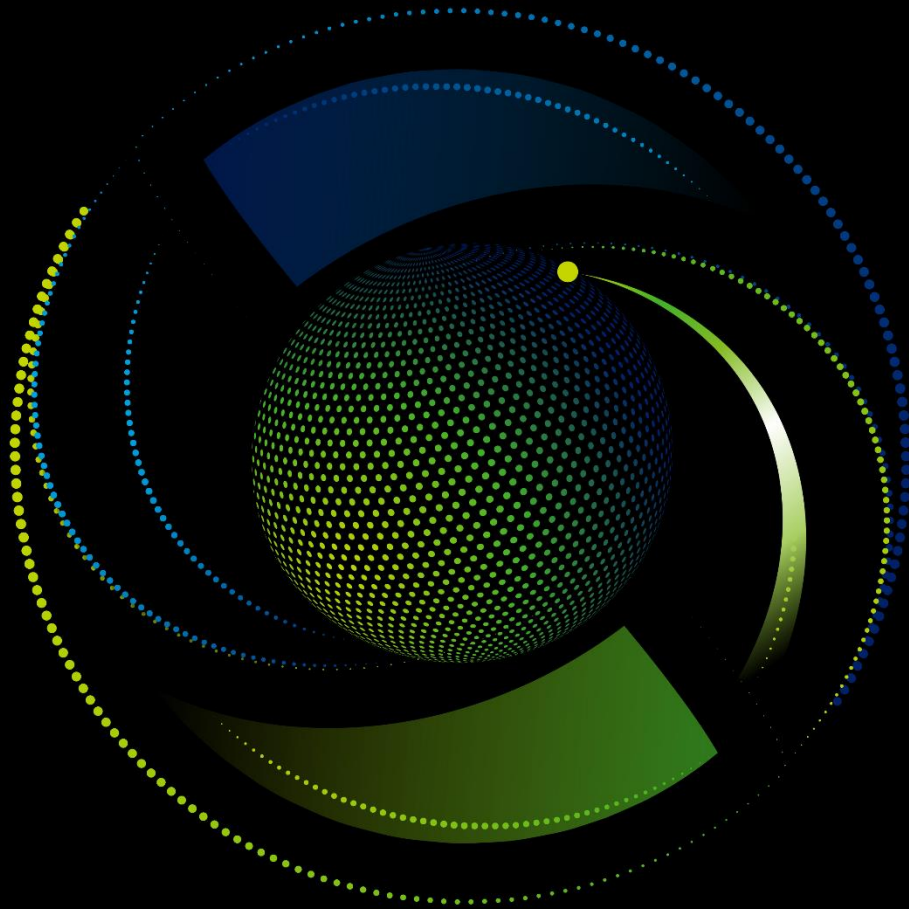


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## Indirect Tax Chat

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

July 2023



# Issue 07.2023

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## Greetings from Deloitte Malaysia’s Indirect Tax team

Greetings readers, we are delighted to welcome you to the July 2023 edition of our Indirect Tax Chat.

The Inland Revenue Board Malaysia (“IRBM”) has launched its electronic invoicing website and its draft guidelines that can be found [here](#). While the IRBM is driving this initiative, the guidelines require transmission of various pieces of indirect tax related data that relates to service tax, sales tax, tourism tax, customs, and excise duties. The e-invoicing obligations will commence from 1 June 2024 and will be a significant exercise.



As for the ongoing programs by the Royal Malaysian Customs Department (“RMCD”), the Voluntary Disclosure (“VD”) Program will be available until 31 May 2024, while the Penalty and Surcharge Remission Program is ending on 30 September 2023. Businesses that are interested in participating in these programs should take note of these deadlines to avoid missing the opportunity.

This month, we look at the Customs (Amendment) Regulations 2023 that came into effect on 1 January 2023. We will also cover the updated guide on Accommodation Services, as well as the decision in the Court of Appeal case decision on the constitutional validity of the departure levy’s imposition.

Additionally, here are some recent news that may interest you:

- Ten retail and tourism associations in Malaysia have expressed their disapproval of the proposed luxury goods tax, arguing that it would lead to an increase in the prices of brand-name products in the country. One of their main concerns is the difficulty in defining what constitutes a luxury good, which could result in established brands being inadvertently affected. As these established brands typically have globally standardised prices, this would ultimately raise the local prices. For more information, click [here](#).
- GST was introduced in 2015 and subsequently abolished after the 14<sup>th</sup> general election in 2018. While the proposed federal government budget for 2023 does not contain any mention of the reimplementing of GST, some suggested that the implementation of GST 2.0 should be taken into account as part of a comprehensive review of Malaysia’s tax system. For more information, click [here](#).
- Tebrau MP Jimmy Pua referred to a 2020 report by the United Nations’ Food and Agricultural Organisation, stating that the average sugar consumption per Malaysian stands at 41.6kg annually. Due to this high intake, the government should consider increasing the sugar tax, particularly for pre-packaged beverages, as a measure to discourage excessive consumption of these sugary drinks by the public. For more information, click [here](#).

To our readers who are celebrating, we wish you a wonderful *Awal Muharram*!

Best regards,

**Tan Eng Yew**

Indirect Tax Leader

# 1. Amendments to the Customs Regulations 2019

On 24 April 2023, the Customs (Amendment) Regulations 2023 was gazetted and came into effect on 1 January 2023. Notable amendments were made to the abovementioned Regulations as below: -

## Revision of wordings in the Regulations

- For Regulation 20 in respect of transit of goods from inland clearance depot or inland customs station for export, the scope of persons required to submit customs declaration forms now includes licensed carriers or any person approved under Section 35G of the Customs Act 1967.
- Certain Regulations with expressions of Customs declaration forms (e.g., Form Customs No.2, Form Customs No.9, etc.) are now replaced with “*a declaration in the form and manner as determined by the Director General*”.

## Deletion of Regulations

- The following Regulations are now deleted:
  - Regulation 11;
  - Regulation 13;
  - Regulation 14;
  - Regulation 15;
  - Regulation 55 (1)(c);
  - Regulation 57; and
  - Third Schedule.

## Amendments to Regulation 19 – Transit of goods through principal customs area

- This paragraph is substituted with the following:

*“The owner, agent, licensed carrier or any person approved by the Director General under section 35G of the Act to move goods in transit and transshipment through the principal customs area—*

*(a) to another place outside the principal customs area by land from a free zone or a place outside Malaysia;*

*(b) to another place outside the principal customs area by sea from a place outside Malaysia or a place outside the principal customs area; or*

*(c) from another country to another country;*

*shall submit to the proper officer of customs a declaration in the form and manner as determined by the Director General.”*

Amendments to Regulation 51 – Presumption as to goods contained in cases, etc.

- This paragraph is substituted with the following:

*“For the purpose of paying customs duties, every case, cask, receptacle or package containing dutiable goods shall, unless proven otherwise, be deemed—*

- (a) to contain no less a quantity of goods than is contained in similar cases, casks, receptacles or packages in the ordinary course of business, unless the owner of the cases, casks, receptacles or packages or his agent, within twenty-four hours or such further period as the proper officer of customs may allow after the arrival of the dutiable goods in the customs warehouse or licensed warehouse wherein they are deposited in accordance with section 66 of the Act, makes a written application for survey;*
- (b) to contain material or ingredient as stated in the label of the cases, casks, receptacles or packages;  
or*
- (c) to be used for the purposes as stated in the label or mark on the cases, casks, receptacles or packages.”*

Amendments to Regulation 56 – Drawback in relation to exportation and re-exportation

- The abovementioned paragraph is substituted with the following:

*“Where the drawback under section 93 of the Act is in relation to exportation and re-exportation of cigarettes, that cigarettes shall be exported or re-exported by sea or air from free zones.”*

Deloitte’s comments

Businesses should take note of the changes and determine if there are implications to the current business practices.

An important area to observe is when making declarations on customs forms for the movement of goods. This is because, formats and information required for such forms can change as and when determined by the Director General of RMCD without amending the Regulations (as opposed to the previous practice). As such, it is important that businesses stay on top of any changes to forms of notification or update issued by the RMCD especially on RMCD’s webpage. In the case of uncertainty, businesses and individuals should seek clarification from the RMCD accordingly.

Brought to you by:



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## 2. Updated Guide on Accommodation Services

The RMCD released an [updated Guide on Accommodation Services](#) (“Accommodation Guide”) dated 27 June 2023. This supersedes the previous Accommodation Guide dated 13 October 2020. The salient updates are as below.

- The updated Accommodation Guide states that the provision of accommodation services in Special Areas is subject to service tax effective 6 September 2018. “Special Areas” are defined as any 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. Meanwhile, accommodation services provided within the Designated Areas (Labuan, Langkawi, Tioman, and Pangkor) are not subject to service tax.
- Accommodation premises excluded from service tax was expanded to include accommodation premises provided by private educational institutions registered under the Education Act 1996, effective 15 May 2023, in addition to the existing private higher educational institutions registered under the Private Higher Educational Institutions Act 1996.
- The scope of taxable services in relation to provision or sale of tobacco products and alcoholic and non-alcoholic beverages was expanded to include the provision or sale of the following items:
  - Cigarettes;
  - Tobacco pipes (including pipe heads);
  - Electronic cigarettes and similar personal electric vaporising devices; and
  - Preparations used for smoking through electronic cigarettes and electric vaporisation devices in liquid or gel form whether or not containing nicotine.
- FAQ 23 addresses the service tax treatment on the vending machines owned as well as not owned by hotel operators in hotel premises. The answer was updated to state that the sale of beverages, cigarettes, tobacco products, tobacco pipes (including pipe heads), electronic cigarettes, and similar personal electric vaporisation devices, preparations used for smoking through electronic cigarettes and electric vaporisation devices in the form of liquids or gels only machines via vending machines owned by a hotel operator are subject to service tax. Where the vending machine is not owned by the hotel operator, the service tax treatment remains unchanged (i.e., not subject to service tax).
- FAQ 28 relates to the service tax treatment for student accommodation in hostels by Private Colleges or Private Schools/International Schools. The answer states that the student accommodation in hostels provided by Private Colleges or Private Schools/International Schools registered under the Private Higher Education Institutions Act 1996 or the Education Act 1996 is not subject to service tax. Both the question and answer were updated to incorporate accommodation premises provided by private educational institutions registered under the Education Act 1996.

Deloitte's comments

The Accommodation Guide was mainly updated to align with the relevant amendments made to the Service Tax Regulations 2018.

Businesses such as hotel operators that sell products such as cigarettes, electronic cigarettes, etc. are required to charge service tax on the provision or sale of such items.

Meanwhile, private educational institutions providing student accommodation are recommended to review their requirement to be registered for service tax under Group A (Accommodation).

**Brought to you by:**



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### 3. Court of Appeal Upholds Imposition of Departure Levy

#### Introduction

On 14 March 2023, the Court of Appeal (“COA”) in *Kengadharan Ramasamy v Menteri Kewangan Malaysia & Anor [2023] 4 CLJ* dismissed the appeal challenging the constitutional validity of the imposition of departure levy and held that departure levy is indeed constitutional and valid.

For the uninitiated, with effect from 1 September 2019, departure levy is imposed under the Departure Levy Act 2019 (“Departure Levy Act”) on any person leaving Malaysia, through a registered operator - this levy is generally shown on the registered (airline) operator’s invoice. Departure levy is administered by RMCD.

To challenge the imposition of departure levy, a judicial review application was initiated by Kengadharan Ramasamy (Appellant) to the High Court (“HC”) of Malaya. The HC subsequently dismissed the application and held that departure levy is not unconstitutional. Pursuant to the decision of the HC, the Appellant made an appeal to the COA, which essentially upheld the decision of the HC. Key background facts and arguments are provided in the ensuing paragraphs.

#### Key background facts and arguments

- The Appellant’s contention was that the departure levy contravenes the right (personal liberty) guaranteed under article 5(1) of the Federal Constitution to travel abroad and therefore, is unconstitutional, null, and void.
  - a) Counsel for the Appellant also submitted that a wider interpretation should be given to the expression of “personal liberty” in article 5(1), Federal Constitution, and cited the following Federal Court precedents: *Alma Nudo Atenza v PP & Another Appeal [2019] 5 CLJ 780; [2019] MLJ 1 (“Alma Nudo”)*
  - b) *Lee Kwan Who v PP [2009] 5 CLJ 631; [2009] 5 MLJ 301*
- Menteri Kewangan Malaysia’s (i.e. MOF) primary submissions were that: a) the Departure Levy Act was validly enacted within the framework of the Federal Constitution and that departure levy is “*intra vires*” the Departure Levy Act; b) the Appellant’s reliance on article 5(1), Federal Constitution is misconceived.
- In dealing with the Appellant’s contention that the departure levy denies the right to travel abroad as per article 5(1), Federal Constitution, the counsel for MOF submitted that the Appellant’s contention is without merits and relied on the following judicial precedents in describing what constitutes personal liberty:
  - a) *Government of Malaysia & Ors v. Loh Wai Kong [1979] 1 LNS 22; [1979] 2 MLJ 33*
  - b) *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal [2002] 4 CLJ 105*

#### Summary of grounds of COA judgement

COA upheld the decision of the HC and ruled in favour of the MOF, citing the following reasons:

- The 1979 *Loh Wai Kong* Federal Court decision is more relevant to be applied in the current appeal, than the 2019 Federal Court decision in *Alma Nudo Atenza*. This is because *Loh Wai Kong* involves an almost similar issue of so-called ‘restriction to travel abroad’, whereas *Alma Nudo Atenza* is on ‘dangerous drugs’ law and facts.
- As decided by *Loh Wai Kong*, there is no constitutional right for a citizen to leave the country or travel overseas. Article 5(1) of the Federal Constitution embodies only the constitutional protection in relation to personal liberty, which does not cover the right to travel abroad. Article 9 of the Federal Constitution provides for freedom of movement within the country only, and not the right to travel abroad. *Loh Wai Kong* was followed by, inter alia, the majority decision of the 2021 Federal Court in *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 2 CLJ 579 (“*Maria Chin*”).
- As also decided by the Federal Court in *Maria Chin*, even the freedom under article 5(1), Federal Constitution would be subject to laws, as per the wording of article 5(1), Federal Constitution, as below:
 

“5. (1) No person shall be deprived of his life or personal liberty save in accordance with law.”
- Based on *Loh Wai Kong* and *Maria Chin*, the Departure Levy Act and Departure Levy (Rate of Departure Levy) Order 2019 (P.U (A) 213) are validly enacted laws to impose levy when a person leaves Malaysia.

#### Deloitte’s comments

This tax case has given rise to constitutional issues of whether the right to personal liberty in Article 5(1), Federal Constitution covers the constitutional right to travel abroad, and, if so, to what extent that right could be subject to law, such as the departure levy law.

It is noted that, *Maria Chin* was a 4-3 majority decision of the Federal Court in 2021. The minority opinions in *Maria Chin* had essentially decided that, the right to personal liberty under article 5(1), Federal Constitution covered the right to travel abroad, and that right can only be subjected to any law that is essentially “fair, just and reasonable”.

It is not known whether the Appellant in this case would appeal to the Federal Court to revisit the majority decision in *Maria Chin*.

An appeal to the Federal Court in this case, if decided in favour of the minority opinions in *Maria Chin*, i.e. article 5(1), Federal Constitution would cover the right to travel abroad, would have an impact on whether the departure levy law would satisfy the requirement of a “fair, just and reasonable law” that the right to personal liberty (travel abroad) can be subjected to.

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