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# Indirect Tax Chat

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

*June 2021*

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1. *SST Technical Updates*
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# Greetings from Deloitte Malaysia's Indirect Tax team

Greetings readers, and welcome to the June 2021 edition of our Indirect Tax Chat. We hope you and your families have been keeping safe.

In this month's edition, we will cover the first service tax policy of 2021 and an updated Guide for Refunds, Drawbacks and Appeals, both issued by the Royal Malaysian Customs Department (RMCD). We also cover a recent case from the Court of Appeal on customs duty and sales tax for victims of fraud for Customs clearance of imported goods.

In view of the current pandemic, we are running more webinars to keep you updated on indirect tax matters. Our next webinar on 15 July 2021 will be our 'Year in Review' session on sales tax and service tax ("SST"), which will cover all technical, legislative, and administrative developments in relation to the SST regime that have occurred in 2020 and 2021.

This would be an interactive session and there would be opportunities to submit questions throughout the session as well as during the Q&A session. If you are interested, please reach out to your usual Deloitte contact or email us at myidtseminar@deloitte.com.

Separately, here are some other recent news that may interest you:

- As part of the PEMERKASA+ aid package announced by the Prime Minister Tan Sri Muhyiddin Yassin on 31 May 2021, the current 100% sales tax exemption for locally assembled passenger vehicles and 50% sales tax exemption for imported passenger vehicles will be extended to 31 December 2021. The sales tax exemptions on passenger vehicles were initially introduced as part of the *PENJANA* initiative back in June 2020 which was slated to end on 31 December 2020. It was first extended to 30 June 2021 through a press release by the Ministry of Finance at the end of December 2020. For more information, please click here and here.

- According to the Minister of International Trade and Industry, Datuk Seri Mohamed Azmin Ali, Malaysia and New Zealand have agreed on upgrading the regional ASEAN-Australia-New Zealand free trade agreement ("AANZFTA") which is undergoing a comprehensive review. AANZFTA, which involves the 10 ASEAN member countries, Australia, and New Zealand, currently eliminates 90% of goods traded between the bloc and the two countries. According to aseanbriefing.com, the agreement will be fully implemented in 2025, by which time, almost all trade between ASEAN states, Australia, and New Zealand will be tariff-free. For more information, please click here and here.

We hope you find this month's tax chat informative, and we look forward to chatting with you again next month.

Best regards,
**Tan Eng Yew**
Indirect Tax Leader

# 1. SST Technical Updates

## Service Tax Policy No. 1/2021

The RMCD published a service tax policy 1/2021 on 27 May 2021 outlining certain service tax exemption scenarios for companies operating in the Joint Development Area ("JDA") under the Malaysia-Thailand Joint Authority ("MTJA"). This exemption is provided by the Minister of Finance based on subsection 34(3)(a) of the Service Tax Act 2018.

Subject to the conditions stated below, service tax exemption is provided to the MJTA and companies operating in the JDA on taxable services provided within the JDA by any company in the Principal Customs Area ("PCA").

a) Exemption of service tax is effective from 1 May 2021;
b) Any service tax collected from customers from 1 September 2018 until 30 April 2021 must be remitted to the RMCD in accordance with section 26 of the Service Tax Act 2018;
c) Application from any person for refund of service tax paid before 1 May 2021 shall not be approved;
d) Service tax for services which have been provided by service providers but yet to be issued with an invoice or service tax which has been charged but yet to be paid by the customer shall be given remission under subsection 40(1) of the Service Tax Act 2018; and
e) No service tax exemption shall be given on the importation of taxable services and digital services into JDA.

*Deloitte's comments*

The Service Tax Policy provides exemption for taxable services provided by companies in the PCA to companies operating in the JDA from 1 May 2021 onwards. This is a concession provided by the Minister in view that currently, under section 55 of the Service Tax Act 2018, service tax is chargeable by any registered person whose principal place of business is located in Malaysia who provides any taxable service to a special area. JDA is included in the meaning of a special area. However, the concession appears to be applicable only for services rendered within the JDA.

## Updated guide on sales tax refund, drawback, and appeal

The RMCD has published an updated guide on sales tax refund, drawback, and appeal dated 21 April 2021 which replaces the previous guide dated 13 February 2020. The guide serves to provide guidance on the conditions and administrative requirements in relation to these sales tax facilities. The guide is currently only available in Bahasa Malaysia and can be accessed here.

We summarise the updates of the guide below.

Conditions for sales tax drawback under subsection 40(1) of the Sales Tax Act 2018

An additional drawback condition has been inserted under subparagraph 13(viii) of the revised guide.

Where the taxable goods, which are imported into a free zone for the purpose of re-export and the re-exportation was made at the same free zone of importation, are the following goods:

a) Cigarettes;
b) Tobacco products;
c) Cigarette pipes (including faucets);
d) Electronic cigarettes and similar personal electric vaporisers; or
e) Preparations used for smoking through electronic cigarettes and electric vaporisers, in liquid or gel form, which does not contain nicotine

Appeal for review of application for sales tax refund or drawback rejected by RMCD

Previously, the appeal for review of refund application is to be submitted to *Cawangan Kawalan Kemudahan Fasilitasi dan Konsultasi*, RMCD Headquarters. It is stated in the revised guide that the appeal under paragraph 17(ii)(b) and 17(ii)(c) of the guide are to be submitted to the *Unit Semakan Semula, Cawangan Pendakwaan, Penguatkuasaan ABT dan Rayuan, Bahagian Penguatkuasaan*, RMCD headquarters pursuant to section 96 of the Sales Tax Act 2018.

*Deloitte's comments*

It is crucial for businesses to be familiar with the relevant authorities and department to ensure that the submission is attended to promptly by the relevant division of RMCD.

Further to the above, the checklist of required information/documents, the sample of JKDM No. 2 form together with the instructions to complete the form have been removed in the revised Guide since these documents have been uploaded and can be accessed in the MySST portal, available in Bahasa Malaysia version only.

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# 2. 'Final' justice for victims of fraud in customs clearance - A tale of 2 cases through the appeal process

## Background

The dust of appeals to the Customs Appeal Tribunal ("Tribunal"), High Court ("HC") and Court of Appeal ("CA"), has finally settled in 2 'fraud' cases in customs clearance. We had initially won these cases, in 2018, at the Tribunal for the victims of the fraud who were the taxpayer-importers of goods: CL Systems Sdn Bhd ("CLS) and Starken AAC Sdn Bhd ("Starken"). See our earlier March 2018 Indirect Tax Chat pursuant to the Tribunal stage.

The journey through the appeal process is summarised below.

## Tribunal stage - joint hearing and common outcomes in favour of taxpayer

*The* separate "*appeals to the Tribunal* [lodged in 2017] *were against the decisions of the Director General of Customs ("DG")* [in 2017] *that affirmed bills of demand (BODs) issued* [in 2015 for Starken, and 2016 for CLS] *by a State Customs Director to the appellants* [CLS and Starken, respectively] *for short-paid customs duties/sales tax. The short-paid duties/tax arose due to fraud suspected to have been committed by persons other than the appellants, i.e., inter alia the customs/forwarding agents of the appellants, during the customs clearance process of the goods imported by the appellants."* (as per our Indirect Tax Chat in March 2018)

After a joint hearing of the merits of both appeals, the Tribunal's decisions in 2018 were in favour of CLS and Starken respectively, i.e. to set aside the DG's decisions in 2017, cancel the BODs, and order the refund of the duties/taxes paid in respect of the BODs.

The Tribunal decisions are based on the following common key factors in both cases: (a) CLS and Starken had paid the correct duties/taxes to the customs/forwarding agents for the customs clearance of the goods, (b) it was the customs agents/forwarding agents who had fraudulently underdeclared the customs import declarations and underpaid the duties/taxes, whereas CLS and Starken were victims of this scam, (c) RMCD had the duty to control these customs agents, (d) RMCD had released the imported goods from customs control without the payment of the correct duties/taxes, (e) the fraudulent customs/forwarding agents were "importers" as defined in customs law i.e. persons in possession of imported goods until customs clearance, and (f) RMCD's action of issuing BODs to the fraud victims (CLS and Starken) for payment (again) of the duties/taxes and not the fraudulent importers (i.e. customs agents/forwarding agents) would tantamount to giving a 'greenlight' for such fraud to perpetuate.

The Tribunal grounded its decisions on the principle of **reasonableness** required of administrative actions (such as the decisions of the DG to affirm the BODs issued to the appellants). This principle has been long established by case law, including a CA case relied on by the Tribunal due to similar facts and factors as in CLS and Starken (though involving an administrative action by the Minister of Finance and not the DG): ***Minister of Finance & Anor v Wincor Nixdorf (M) Sdn Bhd [2016] 4 MLJ 621 ("Wincor")***.

## Subsequent appeals by RMCD to HC – separate hearings with different outcomes!

RMCD lodged separate appeals against the Tribunal decisions. CLS and Starken had each engaged different legal counsel, which naturally led to separate HC hearings in 2018 before different HC judges. (Deloitte was engaged by Starken to provide litigation support in connection with the HC appeal conducted by Starken's external legal counsel.)

However, the RMCD legal counsels in both cases were the same and the single, common ground argued by RMCD before the different HC judges was that the DG's decision in 2017 to affirm the BODs issued in 2015/2016, was not a 'decision of DG' appealable to the Tribunal and thus the Tribunal allegedly lacked jurisdiction to hear taxpayer's appeals against that DG's 'decision'.

(Note: This issue of jurisdiction was not raised by RMCD at the Tribunal, but it is the sole question of law that RMCD decided to raise at the HC stage for both cases. The issue of merits of the Tribunal decision was dropped by the RMCD at the HC hearing in each case.)

The HC judges gave conflicting decisions – the RMCD lost in CLS in October 2018 (Tribunal decision upheld – HC decision in CLS is reported at *[2018] 1 LNS 1817*) but won in Starken in December 2018 (Tribunal decision set aside – HC decision in Starken in 2018 is reported at *[2020] 1 LNS 567*, due to a delay in the writing of the HC grounds of judgment, which delayed the hearing of the subsequent CA appeal proceeding till 2021 – see later in this article).

(Although the HC decision in CLS was decided earlier than Starken, the RMCD counsel did not draw the attention of the HC in Starken to the HC decision in CLS on the same issue of jurisdiction, hence the HC in Starken had decided without the benefit of seeing the HC decision in CLS. Further, the HC decision in Starken had gone on to decide for the RMCD that the Tribunal was also in error on the issue of merits, despite the issue of merits being dropped by the RMCD at the HC hearing.)

In relation to the issue of jurisdiction, the approaches of the HC in CLS and Starken are briefly compared in the table below:

| HC in CLS | HC in Starken |
|---|---|
| The HC in CLS decided that the DG's decision in 2017, in response to taxpayer's appeal to the DG against the BODs, was the "final" decision of the DG to affirm the BODs issued in 2016.<br><br>Taxpayer was aggrieved by that "final" DG's decision in 2017 and hence could appeal to the Tribunal against it. Thus, the Tribunal had jurisdiction to hear the appeal. | The HC in Starken decided that Starken was aggrieved by the BODs issued in 2015 (purportedly by the DG) and ought to have appealed to the Tribunal within 30 days thereafter.<br><br>Thus, Starken had already exceeded the above 30-day deadline, when Starken appealed to the Tribunal against the DG's decision in 2017, in response to taxpayer's appeal to the DG against the BODs. Thus, the Tribunal did not have jurisdiction to hear the appeal. |

It can be seen that the approaches of the HC share a similarity, in that they consider the DG as issuing the BODs as an (initial) decision. The difference is that the HC in CLS considered the latter DG's decision in 2017, affirming the earlier BODs as a "final" decision of the DG, that was still appealable to the Tribunal. On the other hand, the

HC in Starken insisted on strict compliance with the 30-day deadline to appeal against the initial decision to issue the BODs, purportedly by the DG.

In our view, the wording of the appeal provisions in indirect tax law allow an appeal generally against *"any"* decision of the DG, within the 30-day time-limit from the notification of that decision. Therefore, the law does not appear to require the strictness of the HC approach in Starken of complying with the 30-day time-limit from the *initial* decision of the DG; 30 days from the notification of "*any",* including *"final",* decision of the DG ought to suffice, as per the approach of the HC in CLS.

It can also be seen that the HC in both Starken and CLS did not consider if the taxpayer was right to have appealed to the DG against the *BODs issued by the State Customs Director*. This argument was canvassed in detail by the taxpayer in Starken at the CA.

## Appeal by Starken to CA – argument canvassed on correct appeal process & Tribunal decision reinstated

Starken appealed to the CA against the HC decision in Starken. (Deloitte continued its litigation support for Starken in connection with the CA litigation conducted by Starken's external legal counsel. The RMCD appealed to the CA against the HC decision in CLS but withdrew the appeal before the CA hearing.)

Besides arguing before the CA that the HC approach in CLS is correct, the taxpayer in Starken had argued a more important additional (alternative) argument in relation to the issue of jurisdiction, namely that the taxpayer had followed the correct appeal process under the indirect tax law i.e. (a) *taxpayer first appealed to the DG against the BODs issued in 2015 by the State Customs Director (not the DG)*, a finding of fact at the Tribunal stage (see earlier in this article), and (b) *after the DG had decided in 2017 to affirm the BODs issued by the State Customs Director*, *only then did taxpayer rightly appeal to the Tribunal against the DG's decision in 2017*. This argument was canvassed in detail based on a close reading of another CA precedent that was first cited by RMCD before the CA in Starken i.e. ***Pengarah Kastam Negeri Johor & Anor v Kedai Makan Kebun Teh Sutera Utama Sdn Bhd & Ors And Another Appeal [2014] 3 CLJ 733 ("Kebun").***

In ***Kebun,*** there was a *notice (a.k.a. BOD) to impose sales tax and penalty issued by a State Director of Customs* to the taxpayer. The taxpayer in ***Kebun*** had filed an application for judicial review to the HC to quash the said notice. Leave was granted by the HC and the RMCD appealed to the CA that leave to file judicial review ought not to have been granted by the HC, on the basis inter alia that, taxpayer ought to have exhausted the 'internal remedy' under the sales tax law. The taxpayer had argued that section 141N, Customs Act 1967 gave allowance to challenge the said notice at the HC, bypassing the 'internal remedy' of appealing to the Tribunal under the sales tax law. However, the CA in ***Kebun*** held that:

> *"taxpayer must have exhausted its* ***appeal remedy with the Director-General of Customs in respect of the impugned notice*** [by the State Director of Customs]*….While s. 141N [,Customs Act 1967] seems to suggest that* ***the aggrieved party may go to the High Court*** [bypassing the Tribunal]***, it does not expressly say that the aggrieved taxpayer may do so without first exhausting its remedy by appealing to the Director-General.****"*
> [Emphasis in bold and underlined.]

The remedy of appealing to the DG as referred to in ***Kebun*** was expressed in the relevant sales tax law provision at that time, as follows:

> *"Where any person* ***disputes the decision of a proper officer*** *acting in the course of duty … he may* ***appeal therefrom to the Director General****."*

The term "proper officer" is widely defined to include any officer or senior officer such as the State Customs Director in ***Kebun,*** Starken and CLS.

(Although the Customs Act 1967 did not and does not have an express appeal process from decision of proper officer to DG, taxpayer had submitted in Starken that the appeal process for BOD on customs duty should be the same with the above position in ***Kebun*** for the BOD on sales tax. This is because there is a provision in the Customs Act 1967 (section 3(3)), where the Directors such as the State Customs Director *"shall be subject to the general direction and supervision of the Director General…"*, thereby necessarily implying that appeals may be made to the DG from decisions of such other officers of customs, and that there was no discernible reason for a different appeal process under the Customs Act 1967, especially where the customs duty was payable together with sales tax in the same customs import declaration process.)

Therefore, a careful reading of the ratio in ***Kebun*** shows that the correct appeal process was followed by Starken (and CLS) in first appealing from the BODs issued in 2015/2016 by the proper officer i.e. the State Customs Director, to the DG (there is no time-limit for this appeal) and thereafter to the Tribunal (within 30 days after being notified of the DG's decision in 2017), which Starken (and CLS) had complied with.

In the end, the CA in Starken decided in favour of taxpayer, set aside the HC decision and reinstated the Tribunal decision via proceedings held in April/May 2021.

(In relation to the HC decision in Starken on the issue of merits, taxpayer's written submissions before the CA had addressed that it was incorrect in law for the HC to have decided on merits since merits was abandoned by the RMCD at the HC hearing, and furthermore that the HC decision on merits was anyway incorrect in law. However, it is learnt from counsel for taxpayer that the issue of merits was not orally argued before the CA, as the RMCD's written submission to the CA did not address the HC's decision on merits, thereby indicative of the RMCD conceding that the HC was incorrect by law to have decided on the merits.)

Therefore, the HC decision in Starken is strictly no longer precedent on jurisdiction (and merits), since it was set aside in entirety by the CA in Starken.

## Conclusion and potential implications for new review and appeal process

It is hoped that the CA in Starken would produce a written judgment to show the development of the law from the conflicting HC reported judgments in CLS and Starken, and to explain the CA reasoning to set aside the HC decision in Starken on the issue of jurisdiction (and merits), including whether jurisdiction would be based on a similar approach as the HC decision in CLS (which still stands) or, in addition or alternatively the approach on the correct appeal process, as per ***Kebun***.

Although the appeal provisions in Starken and CLS have since been superseded by new review and appeal provisions, the CA decision in Starken could yet be potentially relevant. This is because the new review and appeal provisions still deal with the dispute resolution process of "decision of DG", similar to the issue dealt with by the CA in ***Kebun*** and Starken, and by the HC in CLS.

There is no express dispute resolution process under the new review and appeal provisions on decisions of proper officers, other than the DG. In the RMCD's Public Ruling 1/2020 dated 30 July 2020 on the new review (and appeal) process, the DG has ruled that "decision of DG" means inter alia a "conclusive" ("final") decision of DG, which is indicative of the approach of the HC decision in CLS. In para 5.9 b. vii of the Customs-Private Consultative Panel Meeting 2/2019 dated 28 November 2019, the DG had decided that all decisions of "proper officers" (who may not be the DG) are to be reviewed by the DG, so that the decisions of the DG on such reviews, would then be appealable to the Tribunal. These practice statements could mitigate issues arising on the correct dispute resolution process under the new review and appeal provisions, but such issues remain to be tested in the Tribunal and courts.

There is a potential risk that the RMCD may attempt to dispute future cases similar to Starken and CLS on the issue of merits, based on the HC reasoning in Starken on the issue merits, as merits was not heard before the CA in Starken. Such disputes on the issue of merits may have to be litigated up to CA for certainty.

In the meantime, the Tribunal decisions in Starken (which was reinstated by the CA), and CLS (which were upheld by the HC decision in CLS) remain intact as good law on the sole issue of merits that was considered and decided by the Tribunal in favour of taxpayers who were the victims of fraud in the customs clearance process.

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