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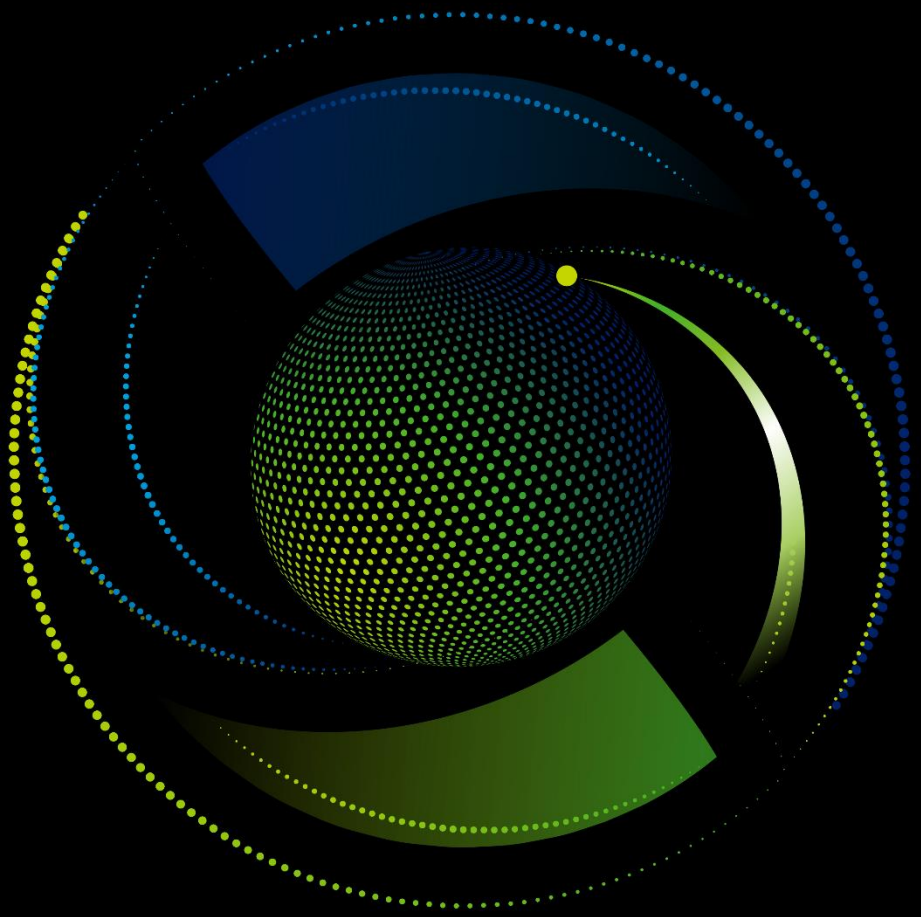

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Indirect Tax Chat

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

MAKING AN IMPACT THAT MATTERS since 1845

March 2022

Issue 3.2022

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Key takeaways:

1. *VA Program clarifications*
2. *Update to service tax exemption on brokerage services*
3. *Update to the RMCD's Public Ruling on review applications*
4. *High Court decision allowing pre-GST registration input tax credit claim*

Greetings from Deloitte Malaysia's Indirect Tax team

Greetings readers, and welcome to the March 2022 edition of our Indirect Tax Chat.

We are now three months into the Special Voluntary Disclosure and Amnesty Program ("VA"), and we have received several questions from our clients on the process, especially in light of inconsistent messages received from some of the Royal Malaysian Customs Department ("RMCD") officers. We have consolidated the questions and shared some answers. We will also cover a number of amendments to the RMCD's service tax policies and public rulings, as well as a recent GST court case.

Another critical development is the ratification of the Regional Comprehensive Economic Partnership ("RCEP") free trade agreement which came into force in Malaysia on 18 March 2022. The Ministry of International Trade and Industry ("MITI") said that the RCEP market size comprises over 2.2 billion people, almost a third of the entire global population, with about 30% of the world's trading volume. Malaysia is expected to be the largest Southeast Asian beneficiary of the China-backed RCEP in terms of export gains, with a projected US$200 million increase. Anchored on the rules-based multilateral trading system, this will enable Malaysia to enjoy the global trade and investment ecosystem, benefiting from the eventual elimination of approximately 90% tariff among members.

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

- The government is expected to collect more than RM1 billion in windfall profit tax levy in 2022 based on the projected average crude palm oil price of RM4,250 per tonne and production of 19 million tonnes. Minister of Plantation Industries and Commodities Datuk Zuraida Kamaruddin said the palm oil industry is also estimated to generate another RM2 billion worth of tax revenue from export tax this year. For more information, please click here, here, and here.

- Coming out of a fourth quarter that yielded sequential improvements to bottom lines, the auto sector is planning ahead for the scheduled end of the government's exemption on the sales tax in June 2022. According to RHB Research, there is an increase in bookings as the expiration date of the sales tax exemption looms. However, it is expected to slow down in subsequent quarters. For more information, please click here and here.

We hope that you continue to stay safe and well.

Best regards,
Tan Eng Yew
Indirect Tax Leader

1. VA Program clarifications

As we are halfway through phase 1 of the RMCD's VA Program, we understand there have been confusion among taxpayers on aspects of the VA Program, due to the receipt of inconsistent messages from different RMCD officers / controlling stations. We address some of the issues below.

- Q: A business receives a letter from the RMCD inviting them to participate in the VA Program and to respond within 21 days. However at this stage, the business does not wish to make any voluntary declaration. By refusing the invitation, does this mean the business effectively waives their right to join the VA Program in the future?

  A: As the VA Program consists of two phases and ends on 30 September 2022, if a business does not intend to take up the RMCD's invitation to submit a voluntary declaration at the time of receiving the offer letter, they still have until September 2022 to submit and make payment, should they change their mind. This is on the basis that the VA Program is offered until 30 September 2022 as per paragraph 4 of the VA Program Guide.

- Q: Will the RMCD provide approval to join the VA Program within 3 working days after submission of the VA-01 application form as mentioned in the VA Program Guide?

  A: We understand that the Participation Eligibility Letter (VA-02) may take more time (over 7 working days) to be generated. From our experience, this can be due to a backlog of cases at the RMCD or simply an internal system issue which may have caused the delay.

- Q: Can a business participate in the VA Program more than once?

  A: We understand that after one voluntary declaration submission has been completed and fully paid, the business may subsequently discover other errors in which they wish to voluntarily declare, and they may do so before the VA Program ends in September 2022.

- Q: For sales tax and service tax ("SST") voluntary declarations, does the business need to submit any tax returns?

  A: It depends on whether the business is effectively registered for SST in the relevant taxable periods which the voluntary declarations relate to. Based on our experience and our discussions with the RMCD, businesses registered for SST would have to file supplementary SST-02 returns via MySST as part of the voluntary declarations. If the business is not registered for SST, no SST-02 returns would need to be lodged.

- Q: Some businesses have been told to walk-in and pay the taxes at the RMCD counter, whereas some have been told to post bank drafts to the Customs Processing Centre ("CPC"). How does a business make payment in this VA Program?

  A: We have clarified with the RMCD that businesses may walk into the controlling station which they have registered for the VA Program under, and to make payment by **bank drafts** or by **debit cards** (depending on the controlling station, and if that particular RMCD station accepts card payments). However, specifically for businesses who are already registered for SST, after submitting supplementary SST-02 returns via the MySST

portal, automatic penalties would be imposed by the system. Based on our experience and discussions with the RMCD, in order for the business to only pay the tax amount (less remission incentive which is provided in the VA-02 letter) and exclude the penalty amount, it would need to post a bank draft to the CPC. Please note that separate bank drafts would be needed for each individual taxable period (for SST payments).

We would advise that businesses liaise with the RMCD officers at the controlling station they are registered with, and be guided by the One Stop Centre available or the RMCD officer in charge of the case. The list of RMCD controlling stations which have dedicated VA Program teams can be found here. Other resources you may refer to are RMCD's VA Program Guide, FAQ, and User Manual.

Brought to you by:

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2. Update to service tax exemption on brokerage services

The RMCD has issued the Service Tax Policy (STP) 3/2021 (Amendment No. 1) dated 1 March 2022 (only available in the national language) to amend the STP 3/2021 dated 31 December 2021 in relation to service tax exemption on brokerage services related to trading of listed shares.

The following are the two amendments according to the STP No. 3 (Amendment No. 1):

- Paragraph 2.2 of the STP 3/2021 has been amended to state that the exemption under Subsection 34(4) of the Service Tax Act 2018 provides the exemption to brokerage services from being charged with service tax.
- Amendment made to FAQ 7 in the Appendix which states that:
    - The brokerage service providers on stock trading are still required to remain registered under Section 12 of the Service Tax Act 2018 ('STA") even though they no longer provide any services that are subjected to service tax due to the exemption granted after 1 January 2022.
    - They should in any case file their SST-02 return even if there is no tax payable for the brokerage services related to trading of shares.
    - The exempted amount must be declared in the SST-02 return form under item 18(c) in Part D.

Deloitte's comments

The original STP 3/2021 stated that brokers who provide only brokerage services for stock trading may apply for deregistration. However, the RMCD has changed their stance to strictly require service providers to remain registered and file their SST-02 returns even when brokerage services are exempted.

The exemption provided in STP 3/2021 is based on subsection 34(3)(a) of the STA which exempts any person or class of persons from payment of service tax. Therefore, the brokerage service provided is still a taxable service although exempted, and therefore the conditions of subsection 18(1) for the cessation of liability to be registered are not fulfilled.

Although the brokerage service providers no longer have a service tax liability, they should ensure that the value of exempted taxable services reported is correct, as there is an offense for submitting incorrect returns under subsection 26(6)(b) of the STA. Furthermore, it remains unclear where there are changes to the value of the exempted taxable service after the SST-02 has been filed, will require amendment to the SST-02.

A further consideration is that as the broker remains registered, it would still need to account for any service tax on any remaining taxable services. As the exemption is only limited to 'shares', the requirement to impose service tax on brokerage commissions on other forms of securities will remain. This will be the case even if the taxable commissions are minimal and below RM500,000 (the threshold for becoming registered).

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3. Update to the RMCD's Public Ruling on review applications

Further to our October 2020 Chat, there has been further guidance introduced by the RMCD on the application for review via Public Ruling No 1/2020 (amended version as at 19 August 2021).

The main update the guidance introduces is that the review application is now extended to cover the following legislation:

- Goods and Services Tax Act 2014 (pursuant to Section 124)
- Tourism Tax Act 2017 (pursuant to Section 67)
- Free Zones Act 1990 (pursuant to Section 46)

The formal written decision of the Director General ("DG") which are capable of review includes decision of any senior officer of the RMCD with the title of Deputy DG, Assistant DG, Director, Deputy Director, Senior Assistant Director, and Assistant Director made on behalf of the DG pursuant to the legislation above.

The application for review must now be made online via http://ereview.customs.gov.my/. Some key points that should be noted include the following:

- The application form must be filled completely and signed by the applicant or person authorised by the applicant only. If the applicant is a company, the authorised person must be an officer of the company. Tax agents or lawyers are not allowed to sign the application form on behalf of the applicant.

- Ground(s) of the review must be stated clearly.

- The supporting document that must be attached together with the application form are:

  a) the Director General of RMCD's decisions;
  b) a printed copy of the review form signed by the applicant / authorised person; and
  c) any other document to support the grounds of review (if any).

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4. High Court decision allowing pre-GST registration input tax credit claim

A recent judicial review decision by the High Court (HC) in JEPSB v Ketua Pengarah Kastam (15 April 2021, unreported as yet) has allowed a taxpayer (JEPSB) a refund of input tax credit ("ITC") that was claimed as exceptional ITC claim, under regulation 46(1), Goods and Services Tax (GST) Regulations 2014 ("GSTR").

An exceptional ITC claim under regulation 46, GSTR is made on GST paid by a taxable person on the supply of goods or import of goods essentially before the effective date of that taxable person's GST registration, for the purpose of a business carried on or to be carried on at the time of the supply or payment.

Key background facts

- The Applicant's (JEPSB) principal activities are to design, construct, commission, operate, and maintain a power plant. It entered into a power purchase agreement on 22 July 2014 to sell electricity to Tenaga Nasional Berhad for 25 years (apparently from the commencement of the power plant's operations in 2019, after the plant's construction was completed in that same year).

- The Applicant made an application to the Respondent to be a GST registrant and the application was first approved with the effective date of 1 March 2018. However, this approval was subsequently cancelled, and the Applicant applied again (it is unclear when, from the judgment), and the second application was approved on *29 June 2016* with a first taxable period of *1 August 2016 to 31 January 2016* (which seems unusual, as the taxable period seems to be stated in reverse chronology to a point before the apparent GST registration effective date of 1 August 2016).

- Pursuant to this, the Applicant made the exceptional ITC claim to the Respondent under Regulation 46(1), GSTR for a sum of RM45,873,669.66 but the Respondent informed the Applicant that the Respondent would not make a final decision on allowing the exceptional ITC claim until the Applicant had started making taxable supplies from its business activities (expected at that time to be in 2019).

- Subsequently, the Applicant applied to vary the duration of its taxable period, and it was allowed by the Respondent (new taxable period commenced from *1 August 2016 to 31 August 2018*, which is the last day before GST repeal effective 1 September 2018). The GST return was required to be filed *by 29 December 2018* (final GST return following the repeal of GST).

- The Applicant *filed its first (and apparently last) GST return on 28 December 2018* with an ITC claim of RM360,247,062.65 (exceptional ITC claim of RM45,873,669.66 for tax paid pre-GST registration effective date of 1 August 2016, and RM314,373,392.98 for transactions that took place during the first taxable period).

- The Applicant submitted all the relevant supporting documents to the Respondent via its letter dated 8 January 2019.

- The Respondent arrived at its final decision on 25 March 2019 and informed the Applicant that only RM2,232.21 (out of RM45,873,669.66) of the exceptional ITC Claim would be allowed and the Applicant challenged this same decision via judicial review to the HC.

Key reasons of HC in allowing the exceptional ITC claim in full

The HC decided that the Applicant's exceptional ITC claim was to be allowed in full, due to the following reasons:

- HC disagreed with Respondent's position that regulation 46, GSTR is subject to the requirements under sections 38 and 39 of the GST Act. Regulation 46, GSTR was held to be a separate and independent provision for pre-GST registration input tax, whereas sections 38 and 39, GST Act are applicable for general ITC claims during a taxable period (post-GST registration).

- The Respondent's decision to impose an additional requirement for pre-GST registration input tax (i.e. to fulfil sections 38 and 39, GST Act) is without any legal basis and thus the Respondent had wrongly exercised its discretion to disallow the substantial portion of the exceptional ITC claim.

- The Applicant had complied with all relevant requirements of the exceptional ITC claim, in regulations 46(2) to (5), GSTR – paraphrased below:

(2) The goods were not:

(a) supplied or consumed;
(b) used partially or incorporated into some other goods; or
(c) held for other than business use by the taxpayer before, essentially, the effective date of GST registration.

(3) The claim was made on the first GST return (unless otherwise allowed by DG) and the officer of GST may require it to be supported by tax invoices and other evidence (which the Applicant had provided via its letter on 8 January 2019).

(4) Taxpayer had been keeping relevant records for the prescribed 7 years.

(5) Any person who has been, but is no longer a taxable person, may make a claim to the DG for the payment of any amount of any tax on supplies of services made to the taxable person essentially after he ceased to be GST registered, which was attributable to any taxable supply made by him in the course or furtherance of any business carried on by him when he was essentially GST registered (note: this seems to be irrelevant to the Applicant's case, which deals with goods, and not services).

- GST revenue for the Government is by way of output tax and ITC is to be refunded to GST-registered businesses when the requirements of GST law have been fulfilled. In this case, the above requirements in regulations 46(2) to (5), GSTR have been fulfilled and the tax should be refunded.

- Section 30(1), Interpretation Acts 1948 and 1967 provided that the repeal of written law will not affect the previous operation of the repealed law or any right that had accrued before the repeal. In this case, the tax was paid before the effective date of GST registration (on 1 August 2016), which was the relevant date prior to the repeal of GST law on 1 September 2018, and hence the right to the exceptional ITC claim had accrued before the repeal of GST law. There is no significant provision in the GST Repeal Act 2018 to disallow the exceptional ITC claim.

- There is no concern that the exceptional ITC claim would result in loss of revenue to the Government on the basis, as alleged by the Respondent, that output tax would not be recoverable from the Applicant due to the repeal of GST. The entire claim was made in the Applicant's first (and last) GST return on 28 December 2018, by which time, had GST not been repealed, the Applicant would have commenced making taxable supplies of electricity, and hence still be entitled to a refund of the exceptional ITC.

- The Respondent's relevant GST Guide (in paragraphs 56 to 59) allowed exceptional ITC claim on pre-GST registration assets that had capitalised in the taxable person's accounts, which the Applicant had fulfilled. The Applicant had submitted all the relevant supporting documents via its letter on 8 January 2019. Thus, the Applicant had a legitimate expectation that the exceptional ITC claim would be allowed in full, and that the Respondent had acted contrary to this legitimate expectation.

- The Respondent applied a formula in considering the exceptional ITC claim, when there is no such formula prescribed in regulation 46(1), GSTR.

- The Respondent's decision to disallow pre-GST registration input tax on the construction of the power plant is inconsistent with the Respondent's decision to allow nominal pre-GST registration input tax for some furniture and equipment.

Deloitte's comments

Based on the rather unusual facts, the HC found as a fact that the exceptional ITC claim was made in the Applicant's "first" (and last) GST return on 28 December 2018. Nevertheless, the Applicant seems to have made an earlier claim (not clear exactly when) resulting in the Respondent giving an initial decision that was not final. It was pursuant to the "first" claim on 28 December 2018, that the Respondent had made the final decision to allow only a nominal amount of exceptional ITC claim while denying the substantial portion.

Despite the lack of clarity in facts, in substance the HC's reasoning and decision are ultimately just and promote the purpose of GST law, which is not to burden businesses with GST input tax cost.

It is interesting that the HC held the right to claim the exceptional ITC had accrued at the time the tax involved in the exceptional ITC claim was paid by the Applicant before the effective date of GST registration, and not when the time the "first" claim was made on 28 December 2018. In our view, this is a correct interpretation of section 30 (1), Interpretation Acts 1948 and 1967. (Note: We had also commented before that, based on section 28, Interpretation Acts 1948 and 1967, the repeal of written law (GST Act) would allow the continuance of provisions of subsidiary legislation (GSTR) that were made under the repealed law (GST Act), provided those provisions of the subsidiary legislation (GSTR) were not inconsistent with the repealing legislation (GST Repeal Act 2018). In this case, the Applicant's exceptional ITC claim on 28 December 2018 would seem to be consistent with section 8(1), GST Repeal Act 2018, on the basis that the HC found that the exceptional ITC claim was made in the first – and last – GST return on 28 December 2018).

It also appears the Respondent did not provide any written reasons for his decision to allow only a nominal amount of exceptional ITC claim. In this regard, the HC does not seem to have considered the binding precedent of the Court of Appeal in *Uniqlo Malaysia Sdn Bhd v Ketua Pengarah Kastam* [2020] 9 CLJ 521, that a public decision-making body has a duty to give written reasons for its decision, where failure to do so may result in its decision being quashed via judicial review for breach of natural justice.

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