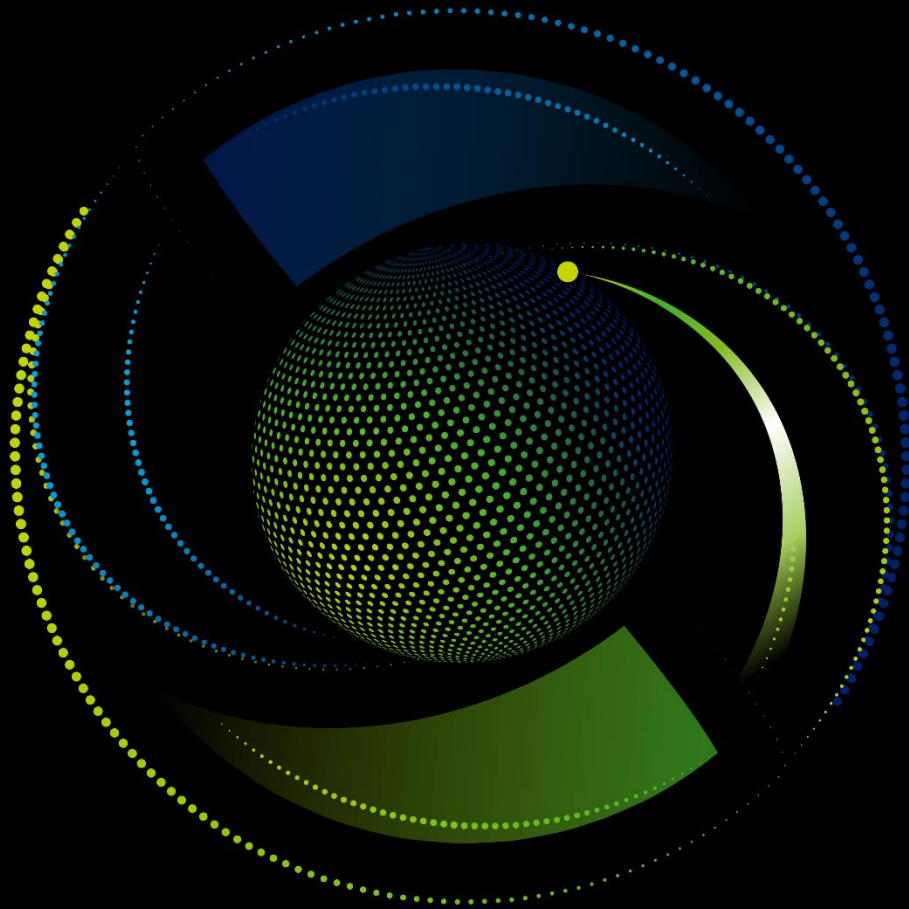


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Indirect Tax Chat

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

November 2021



Issue 11.2021

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Greetings from Deloitte Malaysia’s Indirect Tax team

Greetings readers, and welcome to the November 2021 edition of our Indirect Tax Chat.

The [Budget 2022 speech](#) announced by the Minister of Finance (“MoF”) on 29 October 2021 unveiled the [largest federal budget to-date](#) of RM332.1 billion. Deloitte is pleased to share our [Tax Espresso \(Special Edition\) – Highlights of Budget 2022: Part I](#), which covers the tax implications of the Budget 2022 including the eleven indirect tax proposals. Part II covers the Finance Bill 2021 which can be read [here](#). Please note that the Finance Bill did not include any indirect tax developments.



On a related note, the Ministry of Finance have also published the Fiscal Outlook and Federal Government Revenue Estimates 2022 report, available [here](#). [Section 2](#) of the report outlines that the indirect tax collection for 2021 is estimated to decline marginally to RM41.8 billion (2020: RM41.9 billion), mainly due to lower collection from Sales Tax and Service Tax (“SST”) and excise duties. SST is expected to record RM26.5 billion in 2021 (2020: RM26.8 billion). The indirect tax collection for 2022 is forecasted to improve by 5.4% to RM44 billion. This is mainly contributed by SST collection of RM27.6 billion, comprising RM14.6 billion from sales tax and RM13 billion from service tax.

In considering that we have an expansionary budget coupled with dwindling tax revenues, in particular, indirect tax revenues, there continues to be suggestions to widen the tax net in Malaysia. One of the more prominent ones being the reintroduction of the Goods and Services Tax (“GST”). The MoF was posed a question recently by [the Edge](#) on how quickly GST could be reintroduced when the timing was right. He responded that this could be done in “six months” because GST was not scrapped but reduced to “zero” in June 2018 before being replaced with Sales Tax and Service Tax in September 2018. Although it would be incorrect to say the GST was not scrapped as the Law was repealed, the more concerning news is that 6 months would give businesses a very short lead time to re-implement the tax.

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

- Panellists at the Malaysian Economic Association 2022 Post-Budget Dialogue were mooting for the reinstatement of the GST to widen the government’s tax revenue base to prepare for turbulent times ahead. Malaysian Institute of Economic Research Chairman, Tan Sri Sulaiman Mahbob posed the question to National Budget Office Director, Datuk Johan Mahmood Merican, who was among the panellists, on whether the government is looking at implementing GST. Datuk Johan said “there are no immediate plans at this stage of the economic recovery to introduce something that is so broad-based, but certainly, rest assured that my colleagues in the tax department are always ready to introduce it when the right time comes”. For more information, please click [here](#).

We hope you find this month’s issue informative, and that you continue to stay safe and well.

Best regards,
Tan Eng Yew
 Indirect Tax Leader

1. SST Technical Updates

Sales Tax (Imposition Of Sales Tax In Respect Of Special Areas) (Amendment) Order 2021 (“Amendment Order”)

The Sales Tax (Imposition Of Sales Tax In Respect Of Special Areas) Order 2018 (“[Principal Order](#)”) was recently amended through the gazettal of the [Amendment Order](#).

Effective 3 September 2021, paragraph 2 of the Principal Order was amended as follows:

- (2) Sales tax shall be charged and levied at the rate fixed under subsection 10(2) of the Sales Tax Act 2018:
- (a) on the goods specified in Schedule A which is imported or transported into a free zone, licensed warehouse, or licensed manufacturing warehouse to be used or consumed in a free zone, licensed warehouse, or licensed manufacturing warehouse;
 - (b) on wine, spirit, beer, malt liquor, tobacco, and tobacco products imported or transported into Tasik Kenyir Duty Free Area;
 - (c) the following goods which are imported or transported into a free zone other than free zone authorised by the Minister of Finance under section 6A of the Free Zone Act 1990 [Act 438] for the purposes of re-export:
 - (i) cigarettes;
 - (ii) tobacco products;
 - (iii) smoking pipes (including pipe bowls);
 - (iv) electronic cigarettes and similar personal electric vaporising devices;
 - (v) preparation of a kind used for smoking through electronic cigarettes and electric vaporising device, in form of liquid or gel, not containing nicotine; or
 - (d) the following goods which are imported or transported into a free zone authorised by the Minister under section 6A of the Free Zone Act 1990:
 - (i) cigarettes;
 - (ii) tobacco products;
 - (iii) smoking pipes (including pipe bowls);
 - (iv) electronic cigarettes and similar personal electric vaporising devices;
 - (v) preparation of a kind used for smoking through electronic cigarettes and electric vaporising device, in form of liquid or gel, not containing nicotine.

Deloitte’s comments

With the Principal Order amended as above, businesses should take note of the scope of sales tax on goods imported into or transported to Special Areas such as free zones, licensed warehouses, or licensed manufacturing warehouses. The Amendment Order to include smoking and tobacco products reflects the Government’s stance to reduce smuggling of such products as well as to discourage consumption of the same, by way of taxing them. Compliance with sales tax legislation should be at the forefront of businesses to avoid future disputes with the Royal Malaysian Customs Department (“RMCD”) in the future.

Guide on Credit Card and Charge Card

The provision of credit cards and charge cards by any person who is regulated by Bank Negara Malaysia are taxable services as prescribed under Group H in the First Schedule to the Service Tax Regulations 2018 (“STR”). The RMCD recently released an updated [Guide on Credit Card and Charge Card](#) (“Card Guide”) dated 26 October 2021.

The salient points of the Card Guide are:

- Amendment made to the service tax point where service tax is to be charged at the date of activation (previously mentioned in the guide as date of issuance) or renewal of the credit card or charge card or on every twelve months after the date the card is activated or renewed.
- Several new scenarios and examples are updated to reflect the above change of tax point from date of issuance to activation.
- Further elaboration that service tax is not applicable for electronic money (e-money) which is a payment instrument that contains monetary value that is paid in advance by the user to the e-money issuer. The user of e-money can make payments for purchases of goods and services to merchants who accept e-money as payment. E-money can be issued in different forms, such as card-based (e.g. Touch ‘n Go card) and network-based which can be accessible via the Internet, mobile phones or any other devices (e.g. QRPAY, Boost, Touch 'n Go eWallet, etc.).
- New section mentioning issuance of invoice for credit card.
- New section explaining that credit card providers can apply to the Director General for the service tax deduction facility for cancellation of cards after activation or renewal. The deduction facility is only applicable where there was no usage of the card by the customer within 1 year from when service tax was paid.

Deloitte’s comments

The updated guide reflects the wording of the Service Tax Regulations 2018 where service tax for credit cards should be charged at the point of activation instead of issuance. Also, it is now clear that e-money in the form of any physical card should not be subject to service tax. It is important that credit card providers issue valid invoices for charging service tax instead of just reflecting the service tax amount in the credit card statement. The deduction facility should also be considered where credit notes are not able to be issued by the credit card provider.

Guide on Freight Services

The RMCD has updated the first page of their [Guide on Freight Services](#) (only available in the national language) to state that effective 1 September 2019, logistic managements services are not taxable services under the First Schedule to the STR.

Other Service Tax Guides

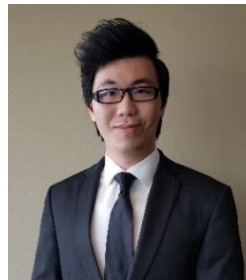
The RMCD has also recently released the English version of guides that were previously only available in the national language. These include:-

- [General Service Tax Guide](#)
- [Management Services Guide](#)
- [Consultancy, Training, or Coaching Guide](#)
- [Electricity Services Guide](#)

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2. Documentation requirement on Customs Duty Drawback Facility

Under section 93 of the Customs Act 1967 (“CA”), companies can claim for a customs duty drawback on the re-exportation of goods subject to the satisfaction of specific conditions. However, the application process had often been plagued with tedious administrative requirements involving physical submission documents and long drawn processing times.

In its effort to facilitate trade and improve the drawback application process, the RMCD has announced that effective 1 November 2021, drawback applications under section 93 will no longer require physical submission of Customs Forms No.1/ No. 2/ No.9.

However, the RMCD has clarified that if further inspection is required, the documents above may be requested. To apply for the drawback under section 93, the following documents will still need to be submitted:

- Application cover letter
- Form JKDM No.2 (Claim for refund/drawback of duty/tax/others)
- Letter of authorisation
- Company’s bank statement
- Statement indicating the calculation of customs duty drawback being claimed
- Payment receipt
- Invoice declared during importation
- Prescribed form to confirm delivery and receipt of goods (Lampiran J PTK Bil.14)
- Invoice declared during exportation
- Packing list/Delivery order
- Other supporting documents (if any)

Deloitte’s comments

Though the above change would not significantly address most of the underlying issues of the drawback application process, this is a right direction the RMCD is taking in improving the application process.

As the RMCD continues making incremental improvements to the application process, businesses should still familiarise itself with the application requirements to avoid rejections due to administrative or technical non-compliances.

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3. High Court quashes Bill of Demand for sales tax on trader's sales tax exemption on purchase of taxable goods for export

A recent decision by the High Court (“HC”) in *WMSB v Ketua Pengarah Kastam & Anor (on 6 September 2021, unreported as yet)* has allowed an application for judicial review by a trader (WMSB) to quash a Bill of Demand (“BOD”) for sales tax issued by the Director General of RMCD (“DG”) to recover sales tax that was exempted in WMSB’s purchase of taxable goods that were subsequently exported from Malaysia. We set out our comments on the case based on the key background facts and decision of the HC (as published in a newsletter of the law firm which handled the case).

Key background facts

- WMSB is a company incorporated in Malaysia primarily engaged in the trading of edible oil products which are sold overseas.
- For this purpose, WMSB purchased packaging materials into which the edible oils would be filled (by a packer appointed by WMSB) and then exported.
- WMSB is the exporter of record of the ‘packaged’ edible oils on the customs export declaration forms (i.e. ‘K2’ forms).
- In 2018, WMSB obtained verbal confirmation from the RMCD that WMSB is eligible for sales tax exemption on the purchase of the packaging materials, under Item 57, Schedule A of the Sales Tax (Persons Exempted from Payment of Tax) Order 2018, that was gazetted as PU(A) 210/2018 (“item 57, Schedule A, Exemption Order”). Consequently, WMSB was granted 17 certificates of exemption by the DG through the RMCD.
- However, WMSB’s sales tax exemption on the packaging materials was subsequently disallowed by the DG and the BOD was issued, on the following grounds:
 - a) WMSB’s description of goods and tariff codes declared in the K2s do not match with the packaging materials purchased.
 - b) The sales tax exemption is not intended for value added or processing activity (on the taxable goods i.e. packaging materials that were purchased).
- Aggrieved by the above decision of the DG, WMSB filed an application to the HC for judicial review of the DG’s decision to issue the BOD.

Key reasons of the HC in quashing the BOD

The HC allowed the judicial review and quashed the BOD based on the following reasons (as apparently argued on behalf of WMSB):

- (a) The Exemption Order is effectively a subsidiary legislation made under the Sales Tax Act 2018 (“STA”) and as such, would be equally applicable as the STA. Therefore, the DG must give effect to the Exemption Order where applicable, as equally as the DG would apply any provision of the STA.

- (b) The DG and the RMCD must give effect to the Exemption Order if the conditions for such exemption are satisfied and should not exercise their own discretion as to the applicability of the exemption, as per the principle in *Syarikat Pendidikan Staffield Bhd v Ketua Pengarah Hasil Dalam Negeri* [2011] 5 CLJ 916.
- (c) The necessary conditions under Item 57, Schedule A of the Exemption Order have been satisfied by WMSB i.e. taxpayer purchased the packaging materials, certificates of exemption were issued by the DG via the RMCD for the purchase exempt from sales tax, and the packaging materials were exported (with the edible oils contained in them).
- (d) Based on the decision in *Ketua Pengarah Hasil Dalam Negeri v Servier Malaysia Sdn Bhd (2012) MSTC30-038*, WMSB's business operation must be seen in totality and not in isolation.
- (e) Pursuant to the decision in *Ketua Pengarah Hasil Dalam Negeri v Latex Manufacturing Sdn Bhd (2016) MSTC 30-125*, WMSB ought to be able to enjoy the sales tax exemption, since the exemption was not cancelled - the DG and the RMCD are not allowed to disregard the exemption that has been granted.
- (f) Relying on Indian precedents, the DG and the RMCD are bound by policy decisions implemented by the Legislature and the Executive (as represented by the DG and RMCD) cannot impose sales tax against such policy decisions, and are further estopped from denying WMSB the sales tax exemption which was granted pursuant to the Exemption Order.
- (g) The DG and the RMCD cannot impose their own conditions which are not stipulated in the Exemption Order – there is no room for intendment in interpreting the tax statute as per *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue* [1993] 4 CLJ 339 ("*National Land Finance*").
- (h) By stipulating their own conditions, the DG and the RMCD have exceeded their powers. Therefore, the decision (to issue the BOD) was unlawful.
- (i) Lastly, based on the decision in *Paramount Malaysia (1963) Sdn Bhd v Pesuruhjaya Khas Cukai Pendapatan & Anor (2002) MSTC 3908*, WMSB had a legitimate expectation that it would be entitled to enjoy the sales tax exemption for the entire term accorded to it.

Deloitte's comments

The HC's reasoning effectively rejects the DG's grounds for issuing the BOD i.e. (1) WMSB's description of goods and tariff codes declared in the K2s (export declaration forms) do not match the packaging materials purchased (*the mismatch was presumably due to the description and tariff codes on the K2s being for 'edible oils' and not the packaging materials per se that contained the edible oils*); and (2) the sales tax exemption is not intended for value added or processing activity (on the taxable goods i.e. packaging materials, that were purchased).

The HC essentially found that the above grounds of the BOD are not explicitly stipulated as conditions of the sales tax exemption under item 57, Schedule A, Exemption Order i.e. the conditions of the exemption do not require the K2 export declarations to state the goods purchased with exemption and do not impose any restriction on what could be done with the goods purchased prior to their export.

Instead, the HC’s reasoning seems to be that WMSB’s business operation should be considered in “totality” for the purpose of the exemption, i.e. it would suffice for the exemption that the goods purchased (packaging material) be exported as packaging of other goods (edible oils) - a point of fact that does not seem to be in dispute.

On this basis, the HC found the conditions for exemption to be met, and the DG or RMCD cannot reject the exemption at their own discretion, including to interpret that the exemption is not intended for value added or processing activity on the packaging materials. The landmark interpretative principle of ‘no intendment in tax statutes’ as emphasised by the 1993 Supreme Court judgment in *National Land Finance*, is a most welcome reiteration by the HC.

Note:

1. In our view, there is potential controversy in the HC decision as to whether promissory estoppel would be available against the Government. However, this should not detract from the essential reason of the HC that the conditions of the exemption were fulfilled in this case.
2. The Minister of Finance has since amended item 57, Schedule A, Exemption Order with effect from 6 October 2020 (after WMSB’s case), to include two additional conditions of exemption viz., (1) “*that the goods shall not be used or carry out [sic] any further process after purchased or acquired [sic]*” and (2) “*any other conditions as the Director General may deem fit to impose*”. These additional conditions could potentially create difficulty for taxpayers with factual circumstances similar to WMSB’s case, to fulfil them for any exemption that may be granted effective 6 October 2020.

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