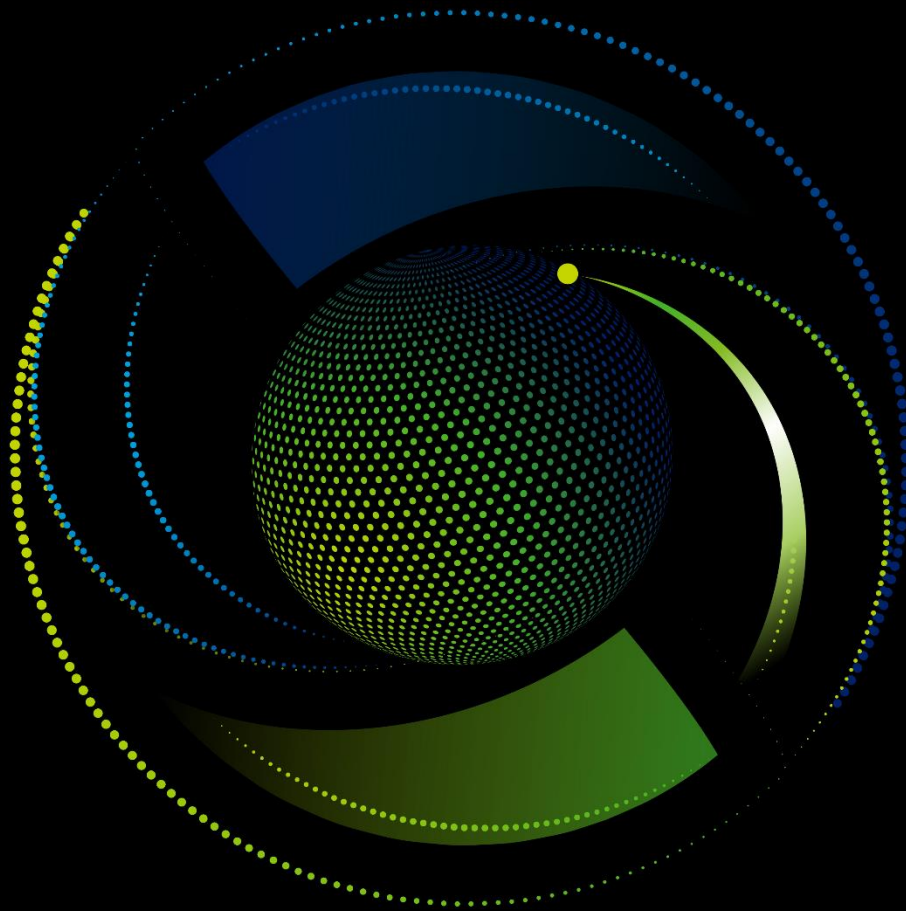


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## Indirect Tax Chat

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

*November 2022*



# Issue 11.2022

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## Greetings from Deloitte Malaysia's Indirect Tax team

Greeting's readers, and welcome to the November 2022 edition of our Indirect Tax Chat.

Malaysia held its 15th Federal Election on the 19 November 2022, and Datuk Seri Anwar Ibrahim has been named the 10<sup>th</sup> Prime Minister of Malaysia. We are awaiting the announcement of his cabinet including the new Finance Minister. We expect that the Federal Budget will be tabled in December 2022 once Parliament is called for a sitting. We await to see if there will be any significant changes to Budget 2023 that was announced in October 2022, but not tabled by the previous Government.



Moving on to other matters, the imposition of sales tax on low value goods (“LVG”) has been postponed from 1 January 2023 to 1 April 2023. The postponement was announced by the Royal Malaysian Customs Department (“RMCD”) on its website [here](#) and [here](#). For more information on LVG, please refer to our [August 2022 Chat](#).

This month, we look at indirect tax issues addressed in the Customs-Private Sectors Consultative Panel, a service tax exemption, as well as amendments made to the Excise Act 1976 and Free Zones Act 1990.

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

- According to the Small and Medium Enterprises Association of Malaysia (“Samenta”), Malaysia’s decision to ratify two trade pacts has shown that the country is serious about business and that it supports a fair and transparent trade regime. Samenta’s Chairman, William Ng said SMEs had considered both the pros and cons of ratifying the Regional Comprehensive Economic Partnership (“RCEP”), and Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“CPTPP”). They have concluded that the pros outweighed the cons. For more information, please click [here](#).

We hope that you are keeping safe and well!

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

## 1. Updates from the SST Technical Committee

The Customs-Private Sectors Consultative Panel (“CPSCP”) addressed several issues pertaining to sales tax and service tax (“SST”) which have been incorporated in the minutes of Meeting No.1/2022 dated 1 August 2022. We have summarised the relevant key issues raised to the CPSCP below.

### Guidance on Compounding of Offence

Under Section 131 of the [Customs Act 1967](#) (“CA 1967”), the Minister of Finance (“MoF”) is empowered to make regulations prescribing the type of offences that are compoundable, the criteria, method and procedure for compounding the offences. Any senior officer of the RMCD may, with written consent of the Public Prosecutor, compound any compoundable offence for an amount of money not exceeding 50% of the maximum fine for that offence.

Currently there is no guidance published by the RMCD as to the manner in which the amount of compound is to be determined, for example if the amount of compound is to be determined based on a fixed amount for each transaction (i.e. per invoice or import declaration), or for each type of offence, and whether there are circumstances where the compound can be waived.

The RMCD’s Enforcement Division shared that the RMCD has an internal circular on the procedure and process on the amount of compound, and these are structured according to the nature of each case/offence. Further, taxpayers who wish to appeal against the compound offered may submit the appeal to the RMCD Headquarters (“RMCD HQ”) within 60 days of the date of the written offer.

### Deloitte’s comments

Currently there are perceptions of inconsistencies in the compounding of offences. The RMCD should consider publishing the guidance on compounding of offences as that would provide clarity and certainty to the taxpayers on the imposition of compound and whether to pursue an appeal against the compound offered.

### Process to refund indirect taxes and costs due to order of customs appeal tribunal/courts

In a recent Court of Appeal decision, the Court ordered the cancellation of Bills of Demand (“BODs”) issued by a State RMCD and for the refund of indirect taxes paid by taxpayer under the BODs plus court costs. The legal counsel of the taxpayer wrote to the counsel representing the RMCD to request for the court ordered payments of the indirect taxes and court costs. However, the RMCD HQ officer requested that the taxpayer apply for refund of the indirect taxes to the State RMCD by submitting a claim for refund (via Form JKDM No. 2) together with the supporting documents such as the receipt of payment of indirect taxes. Furthermore, the legal counsel is required to separately apply for the court costs from the RMCD HQ.

It was recommended that the RMCD HQ should simplify the refund of indirect taxes and court costs since the refund of indirect taxes under BOD is due to a Customs Appeal Tribunal/court order and is not an ordinary refund of indirect tax “overpaid or erroneously paid” by the taxpayer. In addition, the Tribunal/court costs should be refunded together with the indirect taxes, instead of having to apply for the refund separately to the RMCD HQ.

The RMCD's Enforcement Division stated that the process of refund of the indirect taxes as decided by the court is subject to the order of the court involved, and the existing process for the refund of indirect taxes and court costs must be adhered to.

### Deloitte's comments

In general, the pursuit of any refund by a taxpayer from the RMCD is a complicated and time-consuming process. The refund process is further compounded where the process involves obtaining approvals from more than one RMCD station/department/state. In view that the refund of taxes and costs have been approved by the Courts, the relevant actions/steps/process required to obtain the refunds should be simplified and made publicly available for the taxpayer, so that the amounts can be refunded expeditiously. The RMCD should take into consideration the financial burden borne by the taxpayer due to unnecessary delays in the refund process.

### GST Refunds for amendment of Returns after 31 December 2018

According to section 8(1) of the GST Repeal Act 2018, any input tax which has not been claimed before the appointed date (i.e. 31 August 2018) shall be claimed in the return furnished within 120 days from the appointed date (i.e. by 31 December 2018). That particular claim shall be considered as the final claim for all input tax. Further, under section 8(2) of the GST Repeal Act 2018, any refunds for input tax shall be paid by the Director General within 6 years from the appointed date.

It was highlighted that there are some businesses that have identified compliance mismatches at a later date i.e. after the submission of the final return. However, the GST input tax are no longer claimable. The RMCD's clarification had been sought in relation to the claim for GST input tax after 31 December 2018 for cases where the taxpayers do not have any ill-intention to avoid taxes. These are law-abiding taxpayers who have already been subject to cash flow disadvantage by not making the GST input tax claim earlier for the input tax that they have paid to their vendors, and particularly where the vendor has already accounted and paid the output tax.

It was also mentioned that recently businesses that have any under declaration of GST have been offered an avenue to voluntarily disclose any under-declaration of GST, under the voluntary disclosure and amnesty ("VA") Programme. The RMCD also has up to year 2024 under the GST Repeal Act to issue demands in respect of any under-declaration of GST. On the contrary, there is no avenue for businesses to claim eligible GST input tax credits that have been inadvertently omitted in the final return.

The RMCD has reiterated that according to section 8(1) of the GST Repeal Act 2018, any input tax claimed by 31 December 2018 are considered as the final claim for input tax, and there is no further mechanism for the claim of GST input tax after that date. Notwithstanding the above, the RMCD has taken note of the matter and would consider whether to review the policy for the claim of GST input tax made after 31 December 2018.

Deloitte's comments

The current process 'unjustly enriches' the Ministry of Finance as the GST was not intended to be a cost for transactions between GST registered taxpayers. However, due to the repeal of the GST Law, the Law has been drafted in such a way that the liability to pay tax remains, but the recipient who is liable to pay that tax is denied the ability to claim a credit or refund. The practice for doing is entirely inconsistent with how the GST should operate. As the Law is deficient, the Ministry of Finance and / or the RMCD should seek to provide an administrative concession to address this issue, either by allowing the refund or waiving the requirement to pay any additional GST if it can be demonstrated that the recipient would have been entitled to a full input tax credit.

Service Tax on Sterilisation Services

Pursuant to item 13 in Group I of the First Schedule to the Service Tax Regulations 2018, provision of any cleaning service in relation to goods, land or commercial or industrial building are prescribed taxable services subject to 6% service tax. Cleaning services in relation to the following are excluded from service tax:

- a) goods, land or building for religious, educational, residential or agricultural purposes;
- b) laundry services using any machine or device operated by coins, tokens of the like.

According to the guide on cleaning services as of 22 January 2019 published by the RMCD, cleaning service means any cleaning activity performed either manually, chemically or mechanically to remove dirt or other unwanted things on an item, building or location.

Based on the above RMCD's definition of cleaning activities, the RMCD is of the view that sterilisation services or disinfection services falls within the scope of taxable cleaning services subject to service tax under item 13 Group I of the First Schedule to the Service Tax Regulations 2018.

Deloitte's comments

In line with the RMCD's view, companies providing disinfection or sterilisation services should review their tax treatments and assess whether to pursue an appeal against the RMCD's position from an industry perspective.

**Brought to you by:**

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## 2. Service tax exemption for non-bank service providers of digital payment services

Back in August 2022, the RMCD released the Service Tax Policy No. 1/2022 ("[STP 1/2022](#)") followed by an [amendment](#) shortly after that was available only in the national language. We had previously covered this in our [August 2022 Chat](#) and [September 2022 Chat](#). As a brief recap, the salient points of this policy are as follows:

1. The policy exempts the recipients (customers) of digital payment services from having to pay service tax on services acquired from local non-bank service providers.
2. From 1 August 2022 to 31 July 2025, the following local (Malaysian) service providers are exempted from charging service tax to its customers: non-bank payment instrument issuers, non-bank merchant acquirers, and non-bank payment system operators.
3. The local non-bank service providers who are eligible for the exemption are those:
  - a) registered for service tax under the [Service Tax Act 2018](#);
  - b) **regulated** by the Bank Negara Malaysia ("BNM") under the [Financial Services Act 2013](#) or [Islamic Financial Services Act 2013](#); and
  - c) provides digital payment services in Malaysia.

As the policy is available only in the national language, the second condition for eligibility (under point 3 above) states "*dikawal selia oleh Bank Negara Malaysia*". There was confusion in the industry if this should be interpreted as "*regulated* by BNM" or "*governed* by BNM". We have since obtained clarification from the Service Tax Policy department at the RMCD that it should be interpreted as "**regulated** by BNM".

This provides clarity to the local financial services industry on the eligibility criteria for the exemption, due to the subtle differences between the terms "regulated" and "governed".

The list of both bank and non-bank regulatees are available on BNM's website [here](#).

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### 3. Legislative updates on Excise Duty and Free Zones

On 3 August 2022, the House of Representatives (*Dewan Rakyat*) of Parliament passed the Free Zones (Amendment) Bill 2022 and Excise (Amendment) Bill 2022 to respectively amend the [Free Zones Act 1990](#) and [Excise Act 1976](#). The [Free Zones \(Amendment\) Act 2022](#) and [Excise \(Amendment\) Act 2022](#) were then gazetted on 18 October 2022.

This article analyses and provides an understanding of the key amendments to indirect taxes, brought about by the Amendment Acts.

#### a) Free Zones (Amendment) Act 2022

Current law	Amendment	Deloitte's comments
<p><b><u>Power to extend period</u></b></p> <p>Currently there is no provision in the Free Zones Act 1990 ("FZA") to extend the period to perform/complete an action/task by a person as required by the FZA</p>	<p>Introduction of new Sec. 48A of the Free Zones Act 1990:</p> <p>Where, by this Act, a period is specified within which an act or thing is to be done by a person, and the Minister is satisfied that the act or thing could not be completed in that period due to the occurrence of public emergency or public health crisis, the Minister may, upon such terms and conditions as the Minister thinks fit, extend the period for the completion of the act or thing before the expiration of the period.</p>	<p>The amendment seeks to empower the Minister to extend the period if he is satisfied that the action could not be completed within the specified period due to the occurrence of a public emergency or public health crisis.</p> <p>In order to facilitate trade, we are of the view that extension of period should also be granted based on commercial reasons.</p>
<p><b><u>Power to modify terms and conditions imposed under the FZA</u></b></p> <p>N/A</p>	<p>Introduction of new Sec. 48B of the Free Zones Act 1990:</p> <p>1) Where terms and conditions are imposed pursuant to this Act, the Minister may, on the advice of the Director General, from time to time modify the terms and conditions for the purpose of carrying out the objects of this Act.</p> <p>2) Before modifying the terms and conditions, notice must be given to the person bound by the terms and conditions stating—</p> <p>(a) the terms and conditions as modified; and</p>	<p>The amendment seeks to empower the Minister to modify, from time to time, any terms and conditions imposed pursuant to the FZA provided that reasonable notice is given to the person bound by the terms and conditions.</p>



	<p>(b) the date the terms and conditions as modified take effect.</p> <p>3) The modified terms and conditions shall not take effect in less than 14 days from the date the notice is issued under subsection (2).</p> <p>4) Where the terms and conditions were initially imposed by the Director General or Authority pursuant to this Act, the terms and conditions as modified by the Minister shall be deemed to have been imposed by the Director General or Authority, as the case may be.</p> <p>5) For the purposes of this section, “modify” means add to, delete or vary.”.</p>	
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#### b) Excise (Amendment) Act 2022

Current law	Amendment	Deloitte’s comments
<p><b><u>General amendments relating to prescribed forms stated in the following provisions under the Excise Act 1967 (“EA”):</u></b></p> <ul style="list-style-type: none"> <li>• Section 5A(1) - Application for customs ruling to the Director General;</li> <li>• Section 13(1)(b)- Refund of excise duty or other charges overpaid or erroneously paid;</li> <li>• Section 19B - Declaration by claimant for drawback purposes</li> <li>• Section 47(2)]- review and appeal against decision of</li> </ul>	<p>a) The amendment to these provisions is to replace the words “<u>in the prescribed form</u>” to the words “<u>in the form and manner as determined by the Director General</u>”.</p> <p>b) The amendment to these sections is to replace the words “substantially in the prescribed form giving particulars of the goods transported in such vehicles, vessels or aircraft” to words “<u>in the form and manner as determined by the Director General</u>”.</p>	<p>The amendment seeks to empower the Director General of Customs to determine the form and manner as required under the relevant sections of the EA.</p> <p>To facilitate business, the Customs is recommended to upload all the relevant forms in the Customs portal for easy reference.</p>

<ul style="list-style-type: none"> <li>• Section 19(1)(d)- Drawback on excise duty paid on parts, ingredients or packing materials of any manufactured goods for export;</li> <li>• Section 19A(1)(e)- Drawback of excise duty paid on imported goods that are re-exported;</li> <li>• Section 20(1) – Licence to distil, ferment or otherwise manufacture dutiable goods</li> <li>• Subsection 23(1) - Removal of dutiable goods from licensed premises</li> <li>• Section 67(3A)(b)- referring a claim to seized goods or the proceeds of sale of the seized goods or a written application made for the release of the seized goods to a Magistrate of the First Class for decision;</li> <li>• Section 91DC and 91K- declaration in relation to goods transported from Langkawi and Tioman to the principal customs area;</li> <li>• Section 90C – declaration in relation to goods transported from Labuan to the</li> </ul>		
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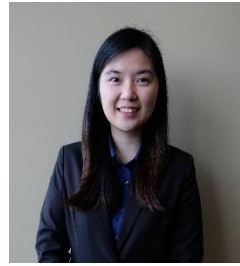
<p>principal customs area; and</p> <ul style="list-style-type: none"> <li>• Section 91W – Declaration of goods transported from Pangkor to the principal customs area</li> </ul>		
<p><b><u>Rate of excise duty</u></b></p> <p>Subsection 16(2) states:</p> <p>For the purpose of calculating the excise duty payable, the valuation applicable to any goods shall be made in the prescribed manner.</p>	<p>Deletion of Subsection 16(2)</p>	<p>The deletion is appropriate as the determination of the value for collection of excise duty purposes is already covered under the regulations made under paragraph 85(2)(bd) of the EA.</p>
<p><b><u>Power to extend period</u></b></p> <p>Currently there is no provision in the EA to extend the period to perform/complete an action/task by a person as required by the EA</p>	<p>Introduction of new section 44AA of the Excise Act 1976:</p> <p>Where, by this Act, a period is specified within which an act or thing is to be done by a person, and the Minister is satisfied that the act or thing could not be completed in that period due to the occurrence of public emergency or public health crisis, the Minister may, upon such terms and conditions as the Minister thinks fit, extend the period for the completion of the act or thing before the expiration of the period.</p>	<p>The amendment seeks to empower the Minister to extend the period if he is satisfied that the action could not be completed within the specified period due to the occurrence of a public emergency or public health crisis.</p> <p>In order to facilitate trade, we are of the view that extension of period should also be granted based on commercial reasons.</p>
<p><b><u>Power to modify terms and conditions imposed under the EA</u></b></p> <p>N/A</p>	<p>Introduction of new section 44AB of the Excise Act 1976:</p> <p>1) Where terms and conditions are imposed pursuant to this Act, the Minister may, on the advice of the Director General, from time to time modify the terms and conditions for the purpose of carrying out the objects of this Act.</p>	<p>The amendment seeks to empower the Minister to modify, from time to time, any terms and conditions imposed pursuant to the EA provided that reasonable notice is given to the person bound by the terms and conditions.</p>

	<p>2) Before modifying the terms and conditions, notice must be given to the person bound by the terms and conditions stating—                  (a) the terms and conditions as modified;                  and                  (b) the date the terms and conditions as modified take effect.</p> <p>3) The modified terms and conditions shall not take effect in less than 14 days from the date the notice is issued under subsection (2).</p> <p>4) Where the terms and conditions were initially imposed by the Director General pursuant to this Act, the terms and conditions as modified by the Minister shall be deemed to have been imposed by the Director General.</p> <p>5) For the purposes of this section, “modify” means add to, delete or vary.”.</p>	
<p><b><u>Power to make regulations by the Minister</u></b></p> <p>Subsection 85(2)</p>	<p>a) Deletion of paragraph 85(2)(bc) pertaining to forms to be used for the purpose of customs rulings</p> <p>b) Under paragraph 85(2)(e), to replace the words “this Act” to the words “<u>section 35</u>”.</p>	<p>a) In line with the amendment to empower the Director General of Customs to determine the form for customs ruling application, it is appropriate to delete Section 85(2)(bc) where currently the power to issue the form for use in customs ruling rests with the Minister.</p> <p>b) This amendment under Section 85(2)(e) seeks to provide the power to the Minister in making regulations to prescribe the forms to be used under and specifically for purposes connected with section 35 of Excise Act 1976 (i.e. type of licences).</p>

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