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## Indirect Tax Chat

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*October 2020*



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# Issue 10.2020

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## Greetings from Deloitte Malaysia's Indirect Tax team

Greetings readers, and welcome to the October 2020 edition of our Indirect Tax Chat.

In recent months, the Royal Malaysian Customs Department (RMCD) has begun conducting service tax verification exercises under its *Informed Compliance* operation. The focus of these verification exercises have been on adjustments claimed from the issuance of credit notes and offsets claimed for tax paid to foreign service providers. In addition to this, we have seen queries in relation to the exempt taxable services reported in the SST-02 returns.



The RMCD has recently released multiple service tax guides over the past month and we discuss these in detail below. Two of the most critical guides released, being the Guide on Management Services and Guide on Warehousing Management Services were addressed in our Special Alert issued earlier this month, which you can access [here](#).

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

- Finance Minister Tengku Datuk Seri Zafrul Tengku Abdul Aziz said widening the Sales Tax and Service Tax (SST) is one of the many options available to expand the government's revenue base but the timing has to be right. He said that the ministry cannot discount any possibility or any avenues of taxation as long as it is fair taxation. The government needs to optimise its existing tax collection, adding that there are a lot of leakages that needed to be reviewed. For more information, please click [here](#).
- The Socio Economic Research Centre (SERC) has asked the government to give an early alert if it plans to introduce the goods and services tax (GST) again or any new form of tax system in the near future. The SERC said during a talk on the "Economic Outlook and 2021 Budget Expectations" that the government could announce it when tabling Budget 2021 next month. For more information, please click [here](#).
- The local automotive sector is enjoying brisk vehicle sales as customers take advantage of the sales tax holiday granted by the government till the end of the year. Malaysian Automotive Association president Datuk Aishah Ahmad said the vehicle total industry volume (TIV) received a boost since the sales tax exemption went into effect in mid-June. For more information, please click [here](#) and [here](#).

The Federal Budget is scheduled to be tabled on the 6<sup>th</sup> of November. We anticipate that the Finance Bill which accompanies the Budget will contain a number of changes relevant to the SST including a widening of the scope. Please look out for our Budget Alerts which will contain our in-depth analysis.

We hope you find this month's tax chat informative, and that you continue to stay safe and well.

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

## 1. Withholding tax implications of inbound services subject to service tax

As we have covered in earlier editions, the Malaysian service tax imposes services tax on inbound services into Malaysia in two ways:

1. Imported service tax which is self-accounted by the Malaysia service recipient whenever it imports a service that would meet the definition of a prescribed 'taxable service'
2. Service tax on digital services ("SToDS") which requires foreign service providers who provide electronic services to register and charge service tax

In both scenarios, the question has often be asked as to how Malaysian withholding tax ("WHT") interacts with these service tax requirements and what should Malaysia service recipients do. We address the common questions and misconceptions below:

*If I am paying service tax, is there a need for me to pay WHT and vice versa?*

Service tax is a tax on consumption, similar to a GST or VAT. It is intended to tax any prescribed services, whereas WHT is a tax on income. The taxes are covered in different pieces of legislation, and administered by different authorities - the RMCD for service tax, and the Malaysian Inland Revenue Board (MIRB) for WHT.

The mechanics of each tax are also considerably different. The service tax is intended to be borne by the service recipient, for e.g. in an imported services scenario the service recipient is expected to 'gross-up' the amount paid by 6% and pay this amount to the RMCD and likewise under SToDS, the foreign service provider can increase their price to include the 6% service tax.

WHT on the other hand is an amount that is 'withheld' from what is to be paid to the foreign service provider and is not intended to be borne by the service recipient (though commercially this liability could be passed onto the service recipient).

*What value is the service tax and WHT tax calculated on, and am I paying tax on tax?*

Service tax is calculated on the transaction value and this can be referenced by the amount invoiced or paid. In the case of imported service tax, it is this amount that needs to be grossed up. In the case of SToDS, the foreign service provider calculates the service tax and includes it on their invoice issued to the local service recipient.

WHT is calculated on the onshore service or royalty payment made to the non-resident.

*If a transaction is subject to service tax, does this automatically mean WHT would apply and vice-versa?*

The short answer is not necessarily. As we have noted above, we are talking about two different taxes operating under separate pieces of legislation and administered by two different tax authorities.

Service Tax as we have mentioned in earlier discussions can only apply where the service falls within the prescribed list of taxable services and does not qualify for any exemptions.

Fundamentally, WHT is imposed on the income of a non-resident. While there are grounds to take the position that WHT should not be deducted on the service tax portion, this is yet to be tested in courts and we are aware of differing views.

*Will the existence of a service tax registration for an FSP create a permanent establishment for income tax purposes and likewise would the existence of a permanent establishment create a presence for service tax or sales tax purposes?*

Malaysian service tax registration should have no bearing on determination of a permanent establishment (“PE”) or taxable presence for a non-resident (NR). The determination of PE or taxable presence will be based on the existing income tax law and double tax agreement. Essentially, a PE will arise if there is a fixed place of business in Malaysia which is at the disposal of the NR.

In a similar vein, the existence of a PE would have no bearing for SST as the concept does not exist under the respective Sales Tax and Service Tax legislation.

### Final Thoughts

Managing the tax impact of cross border services is not a simple exercise. It is for that reason that it is often the focus of audits by tax authorities. In Malaysia, the situation is no different, and businesses need to place greater focus and emphasis in ensuring that these transactions are classified appropriately, and the right amount of tax is paid both from a direct and indirect tax perspective.

*This article was contributed by Tan Hooi Beng (Malaysia International Tax Leader) and Tan Chia Woon (Associate Director – International Tax)*

### **Brought to you by:**



**Tan Hooi Beng**  
Executive Director  
Kuala Lumpur



**Tan Chia Woon**  
Associate Director  
Kuala Lumpur

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## 2. Public Ruling on Review Application and Drawback Facility

The RMCD has issued two new public rulings in the national language on review application and drawback facility on imported goods, which are subsequently re-exported, both of which took effect from 29 July 2020.

We append below a summary of the rulings and the relevant procedures in respect of the application/facility:

### a) Review Application ([Public Ruling No 1/2020](#))

Who can submit a review application?	Any person aggrieved by a <b>formal written decision</b> obtained from the Director General (DG) of RMCD may make an application for review.
What decisions of DG are capable of a review?	<ul style="list-style-type: none"> <li>Any formal written decisions of DG made pursuant to Customs Act 1967 (CA), Excise Act 1976 (EA), Sales Tax Act 2018 (SATA), Service Tax Act 2018 (STA) and Departure Levy Act 2019 (DLA) relating to Customs Ruling Decisions.</li> <li>Other decisions that are final and conclusive.</li> </ul>
What does the decision of the DG include?	<ul style="list-style-type: none"> <li>The decision of the DG;</li> <li>The decision of any senior officer of RMCD with the title of Deputy DG of Customs, Assistant DG of Customs, Customs Director, Deputy Director of Customs, Assistant Director of Customs made on behalf of the DG under CA and EA;</li> <li>The decision of any senior officer of the sales tax or service tax department on behalf of DG made under SATA and STA; and</li> <li>The decision of any senior officer made on behalf of DG under DLA.</li> </ul>
What are the provisions of law pursuant to which a review application can be made?	<ul style="list-style-type: none"> <li>Section 143 of CA</li> <li>Section 47 of EA</li> <li>Section 96 of SATA</li> <li>Section 81 of STA</li> <li>Section 59 of DLA</li> <li>Regulation 57 of Customs Regulations 2019</li> <li>Regulation 60B of Excise Regulations 1977</li> <li>Regulation 32 of Sales Tax Regulations 2018</li> <li>Regulation 25 of Service Tax Regulations 2018</li> <li>Regulation 17 of Departure Levy Regulations 2019</li> </ul>
Which decisions of DG are not eligible for review?	<ul style="list-style-type: none"> <li>Compound</li> <li>Decision pursuant to Section 128(3) of CA</li> <li>Decision pursuant to Section 67(3) of EA</li> <li>Appeals pursuant to Free Zone Act 1990</li> <li>Appeals pursuant to Tourism Tax Act 2017</li> <li>Decisions made pursuant to Goods and Services Act 2014</li> </ul>
What are the conditions to comply	<ul style="list-style-type: none"> <li>A review application must be made within 30 days <b>from the date of notification</b> of the decision made by DG.</li> </ul>

with for a review application?	<ul style="list-style-type: none"> <li>The decision made by DG has not been appealed to Tribunal or High Court using the same decision received.</li> <li>Any duty, tax or levy that is due and payable must be paid first even though an application for review has been made.</li> </ul>
What is the procedure for a review application?	<ul style="list-style-type: none"> <li>Application must be made using JKDM Form No 4, SST-03 Form or DL-03 Form and the relevant form must be signed by the applicant or authorised personnel by the applicant only. Tax agents or lawyers are not allowed to sign the forms on behalf of the applicant.</li> <li>Supporting documents to be submitted together with the application are the decision letter issued by DG and any other relevant document to support the reason for the review application made.</li> </ul>
What is the duration to obtain a decision on the review application?	<ul style="list-style-type: none"> <li>The DG shall make the review and notify the decision of the review to the person within 60 days or a period deemed reasonable from the date of receipt of complete application.</li> <li>The applicant shall be informed of any incomplete information in the application made. However, the 60-day duration for a decision on the review may not apply where aggrieved party provides incomplete information or document.</li> </ul>

**b) The application of Section 93 of the Customs Act 1967 and Section 19A of the Excise Act 1976 in relation to Drawback Claims ([Public Ruling No 2/2020](#))**

Drawback claims here refers to claims of import duty or excise duty which has been paid on goods imported in accordance with Section 93 of the Customs Act 1967 (CA) and Section 19A of the Excise Act 1976 (EA).

The ruling sets out the application of section 93 of the CA and section 19A of the EA which have been amended through amendment Act A1593 and A1594 with regard to drawback claims on goods imported before, on or after 1 January 2020.

Before 1 January 2020	On or after 1 January 2020
<ul style="list-style-type: none"> <li>The period for goods to be re-exported for drawback claims under section 93 of the CA and section 19A of the EA was within twelve (12) months upon which the import or excise duty was paid.</li> </ul>	<ul style="list-style-type: none"> <li>The period for goods to be re-exported under the amended section 93 of the CA and section 19A of the EA has been shortened to three (3) months upon which the import or excise duty was paid.</li> </ul>
<ul style="list-style-type: none"> <li>The amount of drawback claim in respect of any one consignment of re-exported goods shall not be less than RM50.</li> </ul>	<ul style="list-style-type: none"> <li>The amount of drawback claim in respect of any one consignment of re-exported goods is not less than RM200.</li> </ul>

The amended section 93 of the CA and section 19A of the EA shall be **applicable only to goods imported on or after 1 January 2020** and not applicable to goods that were imported before 1 January 2020.

Deloitte's comments

These public rulings aim to provide further clarification and guidance on the steps that can be taken by taxpayers when applying for a review application or making a claim for drawback.

While these public rulings provide some clarification on the procedures involved, it does not introduce any new information apart from that provided for in the law. For instance, in respect of the public ruling on review application - while it is clear that an aggrieved party has 30 days to respond from the date of notification of DG's decision, the ruling does not provide guidance on the term "notification".

**Brought to you by:**



**Eliza Azreen Kamaruddin**  
Manager  
Kuala Lumpur



**Lekhashinii Nadarajan**  
Tax Assistant  
Kuala Lumpur

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### 3. Updated Service Tax Guide on Consulting, Training and Coaching

The RMCD released an updated guide pertaining to service tax on Consulting, training and coaching services as at 15 September 2020, which you may access [here](#). Following our [February 2019](#) Indirect Tax Chat which covered a previous version of the guide, below are some key changes made in this latest version.

Subtopic	Description
Terminology	<ul style="list-style-type: none"> <li>• Pangkor has been included under “Designated Area”.</li> <li>• Petroleum supply bases (Section 77B, Customs Act 1967) has become “Special Area”.</li> </ul>
General industry operations	<ul style="list-style-type: none"> <li>• Para 8 has been amended to expand the scope of consulting services to any customer or stakeholder to include <u>certification, verification, accreditation or other services that require the expertise of the service provider in a particular field, and is not limited to any special credentials of the service provider.</u></li> <li>• A new example of consulting services are consulting services in the form of <u>technical advice / experts</u> on any matter through the <u>use of specialized equipment.</u></li> </ul>
Training services	The definition of training services has been amended to mean the <u>process</u> of teaching or self-development on any specific skills or knowledge to improve one's ability, capacity, productivity or performance.
Coaching services	The definition has been amended to further describe a coach as “ <u>someone who is knowledgeable or experienced in giving all kinds of advice and teaching to customer.</u> ”
Educational services	<ul style="list-style-type: none"> <li>• “(ECCE)” has been added with its full term as “[Early Childhood Care &amp; Education (ECCE)]”.</li> <li>• Further clarifies that in the case of informal education, only those services provided by a centre <u>registered with the Education Act 1996</u> is considered an education service provider and not subject to service tax.</li> </ul>
Taxable services	<ul style="list-style-type: none"> <li>• New Examples 20 and 21 have been added providing examples on the treatment of a service as education or training by considering the persons providing the service, charging the students, and issuing the certificates for the course.</li> <li>• New paragraph i.e. Para 25(d)[(i)-(iii)] has been added to the list of consulting services that are not considered a taxable service. <ul style="list-style-type: none"> <li>➤ The paragraph is about training or coaching services by any training or coaching centre to any person holding valid OKU Card issued under the Disabled Persons Act 2008 [Act 685].</li> <li>➤ New Examples 33 and 34 have been added.</li> </ul> </li> </ul>

Deloitte's comments

The amendments to the guide are largely to rearrange certain paragraphs and to refine certain definitions for clarity.

**Brought to you by:**



**Larry James Sta Maria**  
Director  
Kuala Lumpur



**Tamil Selvan Chandran**  
Manager  
Penang

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## Contact us – Our Indirect Tax Team



**Tan Eng Yew**  
Indirect Tax  
Leader  
[etan@deloitte.com](mailto:etan@deloitte.com)  
+603 7610 8870



**Senthuran Elalingam**  
Global Indirect Tax Clients &  
Industries Leader  
[selalingam@deloitte.com](mailto:selalingam@deloitte.com)  
+603 7610 8879



**Wong Poh Geng**  
Director  
[powong@deloitte.com](mailto:powong@deloitte.com)  
+603 7610 8834



**Chandran TS Ramasamy**  
Director  
[ctsramasamy@deloitte.com](mailto:ctsramasamy@deloitte.com)  
+603 7610 8873



**Larry James Sta Maria**  
Director  
[lstamaria@deloitte.com](mailto:lstamaria@deloitte.com)  
+603 7610 8636



**Irene Lee**  
Associate Director  
[irlee@deloitte.com](mailto:irlee@deloitte.com)  
+603 7610 8825



**Nicholas Lee**  
Associate Director  
[nichlee@deloitte.com](mailto:nichlee@deloitte.com)  
+603 7610 8361



**Wendy Chin**  
Senior Manager  
[wechin@deloitte.com](mailto:wechin@deloitte.com)  
+603 7610 8163

Name	Email address	Telephone
Leong Wan Chi Manager	wanleong@deloitte.com	+603 7610 8549
Eliza Azreen Kamaruddin Manager	eazreen@deloitte.com	+603 7610 7271
Atika Hartini Suharto Manager	asuharto@deloitte.com	+603 7610 7986
Emeline Tong Assistant Manager	emtong@deloitte.com	+603 7610 8733
Naresh Srinivasan Assistant Manager	narsrinivasan@deloitte.com	+603 7650 6459

## Other offices

Name	Email address	Telephone
Susie Tan Johor Bahru and Melaka	susietan@deloitte.com	+607 268 0851
Ng Lan Kheng Penang	lkng@deloitte.com	+604 218 9268
Lam Weng Keat Ipoh	welam@deloitte.com	+605 253 4828
Philip Lim Kuching and Kota Kinabalu	suslim@deloitte.com	+608 246 3311

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