

## Our Comments on the Service Tax Bill 2018

Clauses of the Service Tax Bill 2018	Comments
<p>Clauses 7 and 8</p>	<p>There is a lack of definition of "Malaysia" in the Bill. In general, service tax is only imposed on taxable services (to be prescribed in regulations) provided in Malaysia and thus, if a service is not prescribed under the service tax regulations or the taxable services are not provided in Malaysia, the services would not be taxable.</p> <p>In the SST presentation slide, exported services have been proposed not to be subject to service tax, but the concept of exported services is not found in the Bill. Therefore, this concept has to be looked out for in the relevant regulations.</p> <p>Further, the 'charging' clause 7 seems to impose service tax on any "registered person" in relation to taxable services provided (by such registered person) in Malaysia in carrying on his business.</p> <p>The concept of "taxable person" is still in the Bill and defined to mean "registered person or person liable to be registered". However, by <u>not</u> using the term "taxable person" to impose service tax under this clause, the Bill seems to have fundamentally narrowed the charging section to registered persons only. Comparing the previous Act's imposition of service tax on the wider basis of "taxable person", the Government should take steps to make the necessary amendment to the Bill to reflect the term "taxable person" in the charging clause.</p> <p>Also, the term "carrying on ... business" is used in clause 7 instead of "in the course of business" (the latter term was used in the SST presentation slide). This difference could potentially be critical, in light of case law under the previous Act, which indicates that the former term (which seems similar to the term used in clause 7) is narrower in scope.</p>
<p>Clause 9</p>	<p>The provision of free taxable goods and services are still subject to service tax at arm's length and the basis for valuing the good/service would be appear to be based on its open market value.</p> <p>Clause 9(1)(b)(i)(B)(iii) provides that free services given to connected persons will also be subject to services tax.</p> <p>Under Clause 9(1)(c), the scope of taxable services have been expanded to cover betting and gaming. Nevertheless, the value of such services can only be ascertained upon the release of the relevant regulations.</p>

Clauses of the Service Tax Bill 2018	Comments
<p>Clause 11(1) &amp; 11(2), read together with clause 21 and clause 25 – when tax is due, invoicing and taxable period</p>	<p>Service tax would be due when payment has been received or 12 months from the date invoice issued. Clause 21 stipulates that the registered person must issue an invoice for taxable service provided but the particulars required to be on the invoice are to be prescribed under regulations.</p> <p>Service tax due in a taxable period is to be reported in a service tax return, to Customs. The taxable period is generally 2 months and the deadline to file the service tax return is the last day of the month following a taxable period.</p> <p>However, different due date will be prescribed for betting and gaming services.</p>
<p>Clause 11(3)(c), contrasted with Clause 93</p>	<p>These clauses are transitional provisions for taxable services provided during certain periods and in certain circumstances.</p> <p>Clause 11(3)(c) is for 'arrangement' or 'agreement' for the provision of taxable service by any taxable person, in the period 1 June 2018 to the day before the effective date of service tax (i.e. 31 August 2018, based on the proposed effective date of 1 September 2018), in the circumstance where the services are <u>provided or performed</u> on or after the effective date of 1 September 2018. This clause deems any arrangement or agreement, invoice and payment received, within the period of 1 June 2018 to 31 August 2018 as taking place on the date the taxable service is <u>provided or performed</u> (which seems to be assumed to be on or after 1 September 2018), and the service tax is also treated as due on the date the taxable services is <u>provided or performed</u>.</p> <p>This provision seems to be an 'anti-avoidance' provision for the 'tax holiday' period of 1 June 2018 to 31 August 2018, where the rate of GST is 0%. It intends to catch any taxable person who brings forward any arrangement/agreement, invoicing and receives payment for goods, all within the tax holiday period, but provides or performs the services post 1 September 2018, so as to avoid any service tax. The point is service providers may have bona fide commercial reasons to carry out service transactions in such manner, where obtaining a tax advantage due to the tax holiday period was not the primary factor. However, such safeguards for bona fide commercial transactions are not provided in this 'anti-avoidance' provision. It should be noted, however, that services by non-taxable persons, would not be caught by this provision.</p> <p>Also, with taxpayers used to different GST time of supply concepts such as when services are performed etc, the proposed service tax concepts of when services are <u>provided or performed</u> could be subject to interpretation.</p>

Clauses of the Service Tax Bill 2018	Comments
	<p>Further, clause 93 is for taxable services provided under an agreement for a period or progressively over a period commencing before 1 June 2018 and ending on or after the effective date of 1 September 2018. Under this clause, the proportion of the services attributed to the period post-1 September 2018 would be subject to service tax, except where GST has already been paid on the services. Questions could arise what would be services provided under a progressive or periodic agreement, how to attribute the proportion of services to the period post-1 September 2018 (the test of services provided or performed is not prescribed, unlike in clause 11(3)(c), above), whether the services must be provided by taxable persons only (it should be so, similar to clause 11(3)(c)).</p> <p>The Bill does not seem to have transitional provisions for non-progressive/non-periodic service transactions by any taxable person pre-June 2018 where the services may be provided or performed post-1 September 2018, and service transactions under progressive or periodic agreements commencing on 1 June 2018 and ending on or after 1 September 2018.</p>
Clause 12	Although the Bill provides that the determination of turnover for the purposes of registration may be determined based on the historical method or future method, clarity should be provided that the total value of taxable services is calculated on a revolving method.
Clauses 21, 22 and 23	What constitutes the 'prescribed particulars' (the invoice details) are still pending the release of relevant regulations. Based on the previous SST model, the amount of service tax must be clearly stated and separate from the taxable value on the invoice. As businesses would need lead time to set up their processes and systems to comply with the document format, the prescribed particulars should be released promptly for businesses to prepare.
Clause 26	Clarity should be given for payments of service tax made via cheques where the clearance of such cheques would not be able to complete on the last day of the taxable period due to banking constraints. Flexibility should be given for cheques that have been honoured and submitted on the last day to not be deemed as late payment. In this regard, the MySST system should be adjusted to ensure that no late payment penalties are automatically generated to the taxpayer.

Clauses of the Service Tax Bill 2018	Comments
Clause 35 and 36	<p>The claiming of bad debts is allowed if the following criteria are met:</p> <ul style="list-style-type: none"> <li>• Within 6 years from the date the taxable services is provided</li> <li>• Subject to conditions determined by the Director General</li> <li>• According to a prescribed formula</li> </ul> <p>These provisions appear to follow the same principles as that of its counterpart under the GST laws for calculation. Additionally, while the provisions seem wide enough to allow claims by individuals, they are silent on whether the bad debt relief can be adjusted via the Service Tax returns.</p>
Clauses 37 and 38, read together with clause 34(3)(b)	<p>Under the previous Act, Customs was empowered to demand any unpaid service tax subject to a time-bar of 3 years. Under clause 37, this period has been extended to 6 years.</p> <p>However, under clause 38, the taxpayer can only claim from Customs a refund of service tax overpaid or erroneously paid within 1 year, as in the previous Act. Any claim beyond the 1-year period would require an application to be first made to the Minister of Finance, under clause 34(3)(b). As the taxpayer is merely collecting the service tax on behalf of Customs, any refund claim to Customs should be subject to a time-limit of 6 years, equal to the expanded time-bar of 6 years for Customs to demand unpaid service tax.</p>
Clauses 42, 43 and 44	A more liberal customs rulings framework (compared to GST) seems to be proposed.
Clauses 47, 48, 49 and 50	The provisions for Designated Areas ("DA") appear to adopt the current GST treatment for DA – albeit, with some improvements. In particular, the Bill has introduced a 'principal place of business' test. Hence, a registered person who has a principal place of business outside of a DA must charge service tax on a taxable service provided to the DA. Under the GST Act, this lack of clarity was a gap, which caused much confusion to businesses.
Offences including clause 71 – Evasion of Tax	The penalties for offences under the Bill have been generally enhanced, compared to the previous Act, in line with the enhanced penalties for offences, under the GST Act.



## Our Comments on the Sales Tax Bill 2018

Clauses of the Sales Tax Bill 2018	Comments
Clause 3 – Meaning of “manufacture”	<p>The definition of “manufacture” for goods other than petroleum, has been slightly modified to include any change in the “composition” or “quality” of organic and inorganic materials into a new product. This appears to be a slight modification compared to the definition in the previous Sales Tax Act 1972 (“previous Act”).</p> <p>However, the definition of “manufacture” for petroleum, has been substantially expanded compared to the previous Act. The new definition means “any process of separation, purification, refining, conversion and blending”. This could potentially be wide enough to include upstream processes, but with the proposed exemption of sales tax (based on customs tariff code and description) on crude oil and natural gas (in gaseous state), these key upstream products should not result in registration obligation for upstream players.</p> <p>However, the industry would still have to consider whether the tariff code and description of any <u>other</u> oil and gas products or by-products arising from these wide “manufacturing” processes, fall within the proposed sales tax-exempted list, or, the yet-unpublished taxable petroleum list at specific rates of sales tax, or, the residual ad valorem rates of 10% or 5%.</p> <p>Further, for manufacturing sales tax-exempted products like crude oil and natural gas (in gaseous state) <u>for export</u>, there could potentially be benefits of sales tax exemption on materials and components used directly in these manufacturing processes, which need to be confirmed once the sales tax exemption order is published.</p>
Clause 8 – Imposition and scope of sales tax	<p>This ‘charging’ clause seems to impose sales tax on any “registered manufacturer” in relation to the manufacturer’s sale, use or disposal of taxable goods, and any importer of taxable goods.</p> <p>The concept of “taxable person” is still in the Bill and defined to mean “registered manufacturer or manufacturer liable to be registered”. However, by <u>not</u> using the term “taxable person” to impose sales tax under this clause, the Bill seems to have fundamentally narrowed the charging section to registered manufacturers only. Comparing the previous Act’s imposition of sales tax on the wider basis of “taxable person”, the Government should take steps to make the necessary amendment to the Bill to reflect the term “taxable person” in the charging clause.</p>

Clauses of the Sales Tax Bill 2018	Comments
<p>Clause 11(1) &amp; 2(a), read together with clause 25(1) &amp; (2) - When sales tax is due and taxable period</p>	<p>The general timing of when tax is due follows the previous Act i.e. when taxable goods are sold, disposed of otherwise than by sale or first used otherwise than as material in the manufacture of taxable goods, by a taxable person.</p> <p>With taxpayers used to different GST time of supply concepts such as when goods are removed etc., the proposed basic sales tax concepts of when goods are sold etc. could be subject to interpretation.</p> <p>Sales tax due in a taxable period is to be reported in a sales tax return, to Customs. The taxable period is generally 2 months and the deadline to file the sales tax return is the last day of the month following a taxable period.</p> <p>However, different due date and taxable period will be prescribed for petroleum.</p>
<p>Clause 11(2)(b) and clause 108 – transitional provisions</p>	<p>These clauses are transitional provisions for sale of taxable goods during certain periods and in certain circumstances.</p> <p>Clause 11(2)(b) is for sale of taxable goods by any taxable person, in the period 1 June 2018 to the day before the effective date of sales tax (i.e. 31 August 2018, based on the proposed effective date of 1 September 2018), in the circumstance where the goods are <u>delivered</u> on or after the effective date of 1 September 2018. This clause deems any sale, invoice and payment received within the period of 1 June 2018 to 31 August 2018 as taking place on the date the goods are <u>delivered</u> (i.e. on or after 1 September 2018), and the sales tax is also treated as due on the date the goods are <u>delivered</u>.</p> <p>This provision seems to be an 'anti-avoidance' provision for the 'tax holiday' period of 1 June 2018 to 31 August 2018, where the rate of GST is 0%. It intends to catch any taxable person who brings forward invoicing and receives payment for goods within the tax holiday period, but delivers the goods post 1 September 2018, so as to avoid any sales tax. The point is manufacturers may have bona fide commercial reasons to carry out sales in such manner, where obtaining a tax advantage due to the tax holiday period was not the primary factor. However, such safeguards for bona fide commercial transactions are not provided in this 'anti-avoidance' provision. It should be noted, however, that sales by non-taxable persons e.g. non-manufacturers, would not be caught by this provision.</p> <p>Further, clause 108 is for sale of taxable goods under an agreement for a period or progressively over a period commencing before 1 June 2018 and ending on or after the effective date of 1 September 2018. Under this clause, the proportion of the sale attributed to the period post-1 September 2018 would be subject to sales tax, except where GST has already been paid on the sale of the goods. Questions would arise what would be sale of taxable goods under a progressive or periodic agreement, how to attribute the</p>

Clauses of the Sales Tax Bill 2018	Comments
	<p>proportion of sale to the period post-1 September 2018 (the test of delivery of the goods is not prescribed, unlike in clause 11(2)(c), above), whether the sale of taxable goods must be by taxable persons only (it should be so, similar to clause 11(2)(c)).</p> <p>The Bill does not seem to have transitional provisions for non-progressive/non-periodic sale transactions by any taxable person pre-June 2018 where the goods may be delivered post-1 September 2018, and sale transactions under progressive or periodic agreements commencing on 1 June 2018 and ending on or after September 2018.</p>
<p>Clause 12 – Liability to be registered</p>	<p>The wording is similar to the same provision for registration in the GST Act 2014 where the manufacturer must determine the total sales value of taxable goods for the past 11 months or the future 11 months to determine whether the registration threshold has been exceeded.</p>
<p>Clauses 21 and 23 – Invoices, Credit Notes and Debit Notes</p>	<p>What constitutes the ‘prescribed particulars’ (the invoice details) are still pending the release of relevant regulations. Based on the previous Act, the amount of sales tax must be separately stated from the prices/quantities of the goods sold. It is not certain whether this past invoice requirement would be adopted or modified.</p> <p>Clause 23 allows the issuance of credit notes and debit notes under circumstances to be prescribed in regulations.</p> <p>As businesses would need lead time to set up their processes and systems to comply with the document format, the prescribed particulars should be released promptly for businesses to prepare.</p>
<p>Clauses 38 and 39, read with clause 35(3)(c) – demand for unpaid sales tax by Customs and refund claim/application by taxpayer</p>	<p>Under the previous Act, Customs was empowered to demand any unpaid sales tax subject to a time-bar of 3 years. Under clause 38, this period has been extended to 6 years.</p> <p>However, under clause 39, the taxpayer can only claim from Customs a refund of sales tax overpaid or erroneously paid within 1 year, as in the previous Act. Any claim beyond the 1-year period would require an application to be first made to the Minister of Finance, under clause 35(3)(c). As the taxpayer is merely collecting the sales tax on behalf of Customs, any refund claim to Customs should be subject to a time-limit of 6 years, equal to the expanded time-bar of 6 years for Customs to demand unpaid sales tax.</p>

<b>Clauses of the Sales Tax Bill 2018</b>	<b>Comments</b>
Clause 40 – Drawback	Drawback facility is available (except for petroleum) in relation to export of taxable goods, subject to regulations to be prescribed.
Clauses 43 to 47	A more liberal customs rulings framework (compared to GST) seems to be proposed.
Clauses 48 to 54 – Designated Areas (Labuan, Langkawi, Tioman)	The provisions for Designated Areas (“DA”) appear to adopt the current GST treatment for DA and the previous Act. However, unlike the previous Act, the manufacturing of petroleum in DA will now be subject to registration, a curious anomaly considering that manufacturing of petroleum in Special Areas are not subject to registration.
Offences including Clause 86 – Evasion of Tax	The penalties for offences under the Bill have been generally enhanced, compared to the previous Act, in line with the enhanced penalties for offences, under the GST Act.



## **GST (Repeal) Bill 2018**

### **Summary**

1. The Bill proposes to repeal the GST Act 2014 ('GSTA') effective from a date to be appointed (i.e. 31 August 2018\*), except that the GSTA will continue to operate as if it had not been repealed, to the following extent:
  - a. Any liability under the GSTA may be enforced.
  - b. Any GST due, overpaid or erroneously paid may be collected, refunded, or remitted.
  - c. Any liability, tax due, overpaid or erroneously paid under the Sales Tax Act 1972 and Service Tax Act 1975, may be collected, refunded, remitted or enforced, as per section 178 and 181 of the GSTA.
  - d. The provisions relating to claim for special refund of sales tax for goods held on hand, under section 191 of the GSTA, are preserved.
  - e. Any pending application for review under section 124(1) of the GSTA, may be dealt with.
  - f. Any decision made by the Director General under section 124(2) of the GSTA, which is appealable to the GST Tribunal, shall be appealable to the Customs Appeal Tribunal.
  - g. Any appeal before the GST Appeal Tribunal which is pending will be continue to be heard and decided by the Customs Appeal Tribunal.
  - h. Any appointment or employment of any person other than an officer of customs, for any duty or service relating to GST, under section 5(3) of the GSTA, whether before or after repeal of the GST Act (i.e. 31 August 2018\*), would be still valid, until expiry or revocation, whichever is earlier.
2. Furnishing of GST return by taxable persons (GST Registrants) in respect of the last taxable period commencing before and ending after the repeal of the GSTA:
  - a. The last taxable period will be deemed to end on the appointed date (yet to be fixed) under the GST (Repeal) Act. (For example, if the appointed date of the GST (Repeal) Act is 31 August 2018\*, the last taxable period would be August 2018 for monthly filing and July and August for quarterly filing.)
  - b. The last return shall be furnished and payment will need to be made not later than 120 days from the appointed date of the GST (Repeal) Act. (For example, if the appointed date of the GST (Repeal) Act is 31 August 2018\*, the deadline for filing the last return will be 28 December 2018.)
3. For non-taxable persons, furnishing of the last GST-04 return and payment will be due no later than 30 days after the appointed date. (For example, if the appointed date is 31 August 2018\*, the deadline for the last GST-04 return will be on 30 September 2018.)



4. Any input tax under the GSTA which has not been claimed before the appointed date of the GST (Repeal Act) (i.e. 31 August 2018\*), will need to be claimed in the final GST return as highlighted under item 2 above. The claim of input tax made in the final GST return is considered as the final claim for all input tax.
5. Subject to verification, audit or investigation, any refund of input tax under section 38 of the GSTA that has yet to be made by Customs as at the appointed date of the GST (Repeal) Act (i.e. 31 August 2018\*), or, any input tax claimed in the final GST return as highlighted under item 2 above, shall be paid within 6 years from the appointed date of the GST (Repeal) Act (i.e. 31 August 2018\*).
6. Any person employed under subsection 5(3) of the GSTA shall continue to perform the duty or services until the person's appointment or employment expires or is revoked by the DG, whichever is earlier.
7. Tax Agents can continue to act on behalf of any person for any matter until the tax agent approval expires or is revoked by the Minister of Finance, whichever is earlier.

\*Assumption that appointed date would be 31 August 2018, in view that SST is to be implemented on 1 September 2018.

## **Our comments**

### **Liability**

Businesses should be aware that any GST liability under the GSTA will continue to exist based on the provisions of the GST Act, even after the repeal of the GST Act and going into the proposed SST. Therefore, it is advisable that GST 'health checks' are done now to proactively prepare for any future RMCD GST closure audit. Early detection of potential GST issues would allow businesses to ascertain any potential risks of over claiming of input tax or underpayment of output tax in the past, and support positions taken to the extent possible. As mentioned in RMCD SST FAQ released earlier, RMCD will start conducting GST closure audits starting from 1 September 2018.

### **Furnishing of final GST return and claiming of input tax**

Based on powers given in the GST Act, the Minister of Finance had prescribed a general 6-year time-limit to claim input tax, under the GST Regulations 2014 ("GST Regulations"). Under the GST Act, output tax liability is generally subject to a 6-year time-bar for RMCD to demand. This general equality in time-limit of output tax liability vs input tax claims is not reflected in the GST (Repeal) Bill. The GST (Repeal) Bill allows Customs to enforce output tax liability based on the general 6-year time-bar but has curtailed the general 6-year time-limit to claim input tax to 120 days after the repeal of the GST Act on 31 August 2018\*, as highlighted in item 2 above. A question arises whether this unequal treatment infringes the constitutional protection of equality before the law.

As it stands, businesses should start engaging with suppliers to ensure that tax invoices are issued and received in time to claim all input tax within the proposed 120-day deadline after 31 August 2018\*, as highlighted in item 2 above. It is uncertain whether the GST (Repeal) Bill would restrict the issuance of tax invoices on or after the repeal of the GST Act i.e. 31 August 2018\* (for any prior taxable supplies) and whether the corresponding input



tax claim (if any) for such tax invoices issued after 31 August 2018\* can be made in the final GST return due by 28 December 2018. Therefore, from a practical standpoint, it would be better for businesses to receive all tax invoices from suppliers by 31 August 2018\* and to claim the input tax in the final GST return by 28 December 2018.

### **Refunds**

As mentioned under item 5 above, RMCD will make refunds within a 6 year timeframe. This could mean that RMCD would pay the refund on instalment basis for a period up to 6 years. Businesses with huge refund amounts that are still pending should consider the potential impact to their cash flow considering this long instalment period.



## **Customs (Amendment) Bill 2018**

### **Summary**

1. The bill is set out to amend the Customs Act 1967 ('the CA') on the management of customs agent and the Customs Appeal Tribunal (CAT) and its proceedings.
2. Key proposed amendments relating to customs agent:
  - a. Introduce the definition of "customs agent" in the CA;
  - b. Additional requirements to qualify for a customs agent:
    - i. must be a person registered under the Service Tax Act 2018;
    - ii. shall not have been proved against him or convicted on a charge in respect of certain type of offences
  - c. Application for customs agent to be made in a form as determined by the Director General of Customs (DG)
  - d. DG may waive the "criteria to qualify as a customs agent" and grant approval to act as a customs agent subject to terms and conditions as he deems fit.
  - e. To empower the DG to suspend or cancel any approval to act as a customs agent if he commits any breach of the CA or the relevant regulations; or fails to comply with conditions imposed or any direction given the Customs
  - f. Approval for customs agent is only decided by DG. Any person aggrieved by the decision of DG may appeal to the CAT.
  - g. Higher penalty for the offence relating to a customs agent acting without approval:
    - i. Current penalty: a fine not exceeding RM500
    - ii. Proposed penalty: imprisonment for a term not exceeding 5 years or to a fine not exceeding RM100,000 or both
  - h. A person is presumed to act as a customs agent without being duly authorized if there is reasonable cause to believe that the proprietor or consignee is not in existence or the existence is unlawful.
3. Key proposed amendments relating to CAT :
  - a. To replace the words Sales Tax Act 1972 and Service Tax Act 1975 with the relevant SST legislation in the relevant provision of the CA in order to allow jurisdiction of the CAT on SST appeals.
  - b. Changes to number of Deputy Chairman and other members of the CAT.
  - c. Tax payer may conduct the appeal himself or be represented by any person duly authorized by him.



### **Our comments**

We are of the view that the proposed amendments on the management of the customs agent are stringent. With the enhanced penalty, it is hope to deter malpractices that may impact our country's image and revenue collection.

For the proposed amendments to CAT, it is a welcome move for tax payer can now engage an advocate and solicitor to represent him at the CAT. For SST matters that can be heard by the CAT, this can only be known upon the release of the SST legislation.



## **Free Zone (Amendment) Bill 2018**

### **Summary**

1. This bill is set out to amend the Free Zones Act 1990 ("FZA").
2. References made to the Sales Tax Act 1972 ("SA1972") and the Service Tax Act 1975 ("SA1975") in the FZA have been removed.
3. Implications of the new sales and service tax ("SST") system in free zones will be incorporated in the proposed Sales Tax Bill 2018 and Service Tax Bill 2018.

### **Our Comments**

The amendment is consequential to the implementation of the proposed SST, in line with the abolishment of GST.

As such, to avoid overlap of enforcement powers relating to the sales tax and service tax in the free zones, references made to the SA1972 and SA1975 in the FZA are deleted and will instead be included in the proposed Sales Tax Bill 2018 and Service Tax Bill 2018.