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## Indirect Tax Chat

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

*January 2021*



# Issue 1.2021

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## Greetings from Deloitte Malaysia’s Indirect Tax team

Greetings readers, and welcome to the January 2021 edition of our Indirect Tax Chat. We hope that you had a wonderful new year, and are continuing to stay safe and well. Unfortunately as the new year began, we have also seen an increase in COVID-19 cases in Malaysia. The Government has thus reinstated the Movement Control Order (“MCO”). In line with this, our Deloitte offices are closed throughout the country. However, our team continues to operate on a work-from-home basis.



Moving onto indirect tax matters, as what has become customary over the last few years, various pieces of amendments to the Indirect Tax Laws were gazetted in the last week of the year, this time particularly on 31 December 2020. All of these amendments took effect on 1 January 2021 and were covered in our alert which is available [here](#). We also touch on some additional Legislative Amendments below.

In December 2020, we saw an increase in activity from the Royal Malaysian Customs Department (“RMCD”), particularly in the area of audits. In the area of GST closure audits, the RMCD auditors have been more active in finalising them. In our informal discussions with the RMCD, we understand that this is part of a wider push internally to complete the GST closure audits. A further area of activity has been the retroactive registration by RMCD of foreign service providers who had previously registered late for the service tax on digital services. We further discuss this in detail below.

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

- The 100% sales tax exemption on locally assembled cars and 50% exemption for fully imported vehicles, that was due to end on 31 December 2020, has been extended to 30 June 2021. The Ministry of Finance said in a [press release](#) that the exemption was to continue to drive the momentum in the development of the automotive sector. This tax extension was announced once again by the Prime Minister, Tan Sri Muhyiddin Yassin in the PERMAI speech. Public Investment Bank Bhd said the sales tax exemptions would provide car buyers some financial relief as car prices will likely continue to be cheaper (between 3% to 5%), depending on the models. For more information, please click [here](#) and [here](#).

We hope you find this month’s tax chat informative, and we would like to wish all who are celebrating a very happy Thaipusam.

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

# 1. Amendments to Sales Tax and Service Tax Legislation

## Sales Tax

Recently the following sales tax legislations were gazetted:-

[Sales Tax \(Imposition of Sales Tax in Respect of Designated Area\) \(Amendment\) \(Order\) 2020](#)

[Sales Tax \(Amendment\) \(No.2\) Regulations 2020](#)

[Sales Tax \(Persons Exempted from Payment of Tax\) \(Amendment\) \(No.3\) Order 2020](#)

We have summarised the key points of the updates below:-

### ***Sales Tax (Imposition of Sales Tax in respect of Designated Areas) (Amendment) Order 2020***

With effect from 1 January 2021, the importation of the following goods into the designated areas (“DA”) of Labuan, Langkawi, Tioman, and Pangkor will also be subject to sales tax at the prevailing rate:

- Cigarettes
- Tobacco products
- Smoking pipes (including pipe bowls)
- Electronic cigarettes and similar personal electric vaporising devices
- Preparation of a kind used for smoking through electronic cigarette and electric vaporising device, in forms of liquid or gel, not containing nicotine

### *Deloitte’s comments*

We understand that the imposition of sales tax on the above mentioned goods into the DA is one of the measures adopted by the Malaysia Government to address concerns raised by the Industry with respect to the smuggling of cigarette and tobacco products from the duty free islands for onward sale within the Principal Customs Area. As a result of this change, tourists and visitors to the islands would not be able to purchase tax-free cigarettes and tobacco products.

### ***Sales Tax (Amendment) (No.2) Regulations 2020***

With effect from 1 January 2021, the drawback of sales tax is allowed on the following goods where sales tax has been paid when imported into a free zone for the purpose of re-export (from the free zones as approved by the Minister) and the re-exportation was made at the same free zone of importation:

- Cigarettes
- Tobacco products
- Smoking pipes (including pipe bowls)
- Electronic cigarettes and similar personal electric vaporising devices
- Preparation of a kind used for smoking through electronic cigarette and electric vaporising device, in forms of liquid or gel, not containing nicotine

Based on the Budget 2021 FAQ (updated on 30 December 2020) published in the official [Customs website](#), the sales tax drawback is subject to conditions.

Deloitte's comments

As the sales tax drawback is only allowed for re-export from the approved free zones and subject to stringent conditions, businesses need to ascertain from RMCD as to which “free zones” are approved for such sales tax drawback as well as the conditions to be complied with.

***Sales Tax (Persons Exempted from Payment of Tax) (Amendment) (No.3) Order 2020***

With effect from 1 January 2021, a franchise holder, distributor, or dealer of motor vehicle including motorcycle approved by the Minister of Finance are exempted from payment of sales tax, if it's for sale to any Federal or State Government Department of Malaysia. The sale is subject to the conditions outlined below.

Item no	Persons	Goods exempted	Conditions	Certificate to be signed by
5A.	Franchise holder, distributor or dealer of motor vehicle including motorcycle approved by the minister	Locally manufactured motor vehicle including motorcycle	<p>(a) The goods are purchased from a registered manufacturer by the person in column (2);</p> <p>(b) That the goods are to be supplied to any Federal or State Government Department in Malaysia through his appointed agent;</p> <p>(c) That the appointed agent notifies in writing to the Senior Officer of Sales Tax –</p> <p>i) That the person in column (2) purchased the goods from the registered manufacturer;</p> <p>ii) That the goods are to be supplied to the Federal or State Government Department;</p> <p>iii) That the goods are to be supplied at a price exclusive of sales tax in accordance with the terms of contract;</p> <p>iv) That the goods are used solely for the official use of the Federal or State Government Department; and</p>	The person in column (2)

			<p>v) That the cost of the goods is charged to a departmental vote appearing in the Federal or State Estimates and are not purchased out of any other funds;</p> <p>(d) That the application for the certificate of exemption by the person in column (2) shall be submitted together with the written notification mentioned in paragraph (c); and</p> <p>(e) Any other conditions as the Director General may deem fit to impose</p>	
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Deloitte's comments

The exemption will reduce the cost of the purchase of motor vehicles by the Federal or State Government.

**Service Tax**

The Service Tax (Amendment) (No. 2) Regulations 2020 and Service Tax (Digital Services) (Amendment) (No. 2) Regulations 2020 were gazetted on 31 December 2020 and came into effect 1 January 2021.

We have provided a summary of the significant updates to these regulations below.

**[Service Tax \(Amendment\) \(No. 2\) Regulations 2020](#)**

Amendment to Regulation 11 - Issuance of credit note and debit note

Sub-regulations (1), (2)(a) and 2(c) have been amended by substituting the words “a person” to “any registered person”.

Sub-regulation (2)(b) has been amended to the following paragraph:

“in the case of a registered person who has ceased to be a registered person, such person shall make a deduction or addition of service tax in the return for the last taxable period during which he was registered.”

Deloitte's comments

The amendment to regulation 11 clarifies that this would only be applicable to service tax registrants under section 13 or section 14 of the Service Tax Act 2018.

This new amendment is to specify that it is only applicable to a local service tax registrant and does not include foreign registered person. For foreign registered person, the new Regulation 6A has been introduced in the Service Tax (Digital Services) (Amendment) (No. 2) Regulations 2020.

Our comments on the amendments to the Service Tax (Digital Services) (Amendment) (No. 2) Regulations 2020 are as below.

[Service Tax \(Digital Services\) \(Amendment\) \(No. 2\) Regulations 2020](#)Amendment to Part IIA

Heading Part IIA of the Service Tax (Digital Services) Regulations 2019 is amended by inserting before the words “a foreign registered person” the words “a foreign service provider or”

Amendment to Regulation 5A

The amendment was made to include the words “foreign service provider or” before the words “foreign registered person”.

Amendment to Part III

The heading of Part III of the Service Tax (Digital Services) Regulations 2019 was amended by substituting the word “invoice” to the words “Invoice, credit note and debit note”.

New Regulation 6A

The Service Tax (Digital Services) (Amendment) (No. 2) Regulations 2020 inserted a new regulation 6A on the issuance of credit note and debit note. Sub-regulations (1) and (2) have similar wordings to the regulation 11 of the Service Tax Regulations 2018.

Sub-regulation (3) sets out that credit note or debit note issued by a foreign registered person must contain prescribed particulars. If the foreign registered person contravenes this regulation, it is an offence under Regulation 6A(4).

Amendment to Regulation 10

Sub-regulation (1) has been amended to “any person who is eligible to claim for refund under paragraph 38(1)(a), subsection 34(6) or 40(3) of the Act shall apply to the DG in the form and manner as he may determine.”

Section 40(3) is where a person has been granted remission, is entitled to a refund of the amount of service tax, surcharge, penalty, fee or other money which had been remitted.

### Deloitte's comments

The amendments to Regulation 5A widen the scope to include both foreign registered person and foreign service provider (an overseas company that is not registered for service tax).

The new Regulation 6A of the Service Tax (Digital Services) (Amendment) (No. 2) Regulations 2020 addresses a deficiency in the Law with respect to the inability for foreign registered persons to issue credit notes and debit notes for the purpose of adjustments. This deficiency has now been rectified with this amendment. In addition to this, the RMCD in a recent webinar has clarified that these regulations only take effect from 1 January 2021. Credit notes issued in the recent taxable period (October – December 2020) in relation to past invoices accounted for in past taxable periods would have to be accounted for by amending the returns in which the corresponding invoices relate to.

The other notable change is including section 40(3) into Regulation 10(1) of the Service Tax (Digital Services) (Amendment) (No. 2) Regulations 2020 as one of the manners in claiming refund. Previously, under the Service Tax (Amendment) Act 2019, section 40(4) explicitly states that section 40 does not apply to a foreign registered person. Based on the amendments gazetted in the [Service Tax \(Amendment\) Act 2020](#), Section 40(4) has been removed from the Act.

The change to the regulation provides avenue to foreign registered persons to apply for remission for any overpaid tax or penalties under the section 40(3) of the Service Tax Act 2018.

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## 2. Building Maintenance Charges and the applicability of Service Tax

The service tax treatment of building maintenance charges imposed by landlords to commercial tenants has been subject to considerable confusion and uncertainty since the reintroduction of service tax in 2018. The confusion has largely arisen due to the lack of clarity of RMCD's own interpretation of what constitutes a 'management service'. The RMCD has in recent months tried to address this issue through the release of, and then subsequent revision of its guidance. We discuss the evolution of this view below.

The service tax laws provide that the 'provision of all types of management services including project management or project coordination,..." are subject to tax. The relevant laws were amended to expand or clarify the scope of management services on 1 January 2019, and it included a few examples of what constitutes management services including the category of "maintenance management services".

However, despite these amendments, the term 'management services' is not sufficiently defined anywhere in the enacted laws covering service tax. The [initial guidance](#) issued by the RMCD on 25 August 2018 included a number of sections that implied that the building management charge could be taxable. At sub-paragraph 9(viii) it stated that taxable management services included 'building maintenance services' and FAQ(2) indicated that "building maintenance services are regarded as management services and subject to service tax." Nevertheless, it was unclear if this referred to third party building management services acquired by a building owner or the building management charge imposed by a landlord to a tenant. This Guide was subsequently withdrawn in 2019 and not replaced until recently.

In the interim period between the withdrawal of the original Guide and the release of the new guidance, we have seen inconsistent approaches taken in the market. In considering the uncertainty, some building owners had taken a conservative view to apply service tax while others took the view that there are no management services being provided and no tax to be applied. To add to the confusion, a number of taxpayers have obtained written confirmation from the RMCD that service tax should not apply to the building management charge.

The RMCD appeared to finally address this issue through its [new Management Guide](#) which was published on 1 October 2020. In the Guide, the RMCD made a distinction between the maintenance of assets belonging to the client, which are taxable, and maintenance services provided on the service provider's own assets which are not taxable. On the issue of the building management charge issue itself, it included example 5 which dealt with a company (Kayaraya Sdn Bhd) that owns a building (Kompleks Vaganza) and rents out the shop lots at the building, while charging rent and a monthly charge to maintain the rented lots. The Guide provided that the monthly charge was not taxable as the service provider company (Kayaraya Sdn Bhd) is managing and maintaining its own asset (the lots), and not that of the tenants'. The example and guidance appeared consistent with the written confirmations that RMCD had provided to individual taxpayers previously that the building management charge should not be taxable.

This certainty though proved to be short-lived as the RMCD subsequently updated its [Guide on 15 January 2021](#) to alter its example 5 and include a new example 5A. The amended example 5 no longer mentions building maintenance charges, and this issue is entirely addressed in the new example 5A. Example 5A deals specifically with a building owner (Natasha Sdn Bhd) that owns a building (Tinkerbelle Complex) and rents out the shop lots to various tenants. It charges rent and maintenance management charges separately. The Guide indicates that while the rent is not taxable, the maintenance charges are now taxable in RMCD's view.

There is further confusion by the fact that the Guide continues to make the distinction that the maintenance of one's own assets is not a taxable service. In our informal discussions with the RMCD, we understand that in their view, under a tenancy arrangement, the rights to 'common property' are in fact transferred from the landlord to the tenant, and then the tenant under the lease agreement effectively requires the landlord to maintain this common property on their behalf and for which they pay the building maintenance charge in return. While this interpretation of the legal and contractual rights of the parties involved is certainly not free from debate, it forms the basis for RMCD's view that the maintenance charge should be subject to service tax.

As a final note, for those building owners and landlords that had received prior written confirmation that service tax should not apply, the assumption is that those confirmations are now superseded by this Guide. As a consequence, it is not likely that these confirmations can be relied upon from 15 January 2021 onwards. We would recommend revisiting such arrangements in light of these new developments to ensure you are correctly accounting for service tax going forward.

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### 3. Backdating of registration date for late SToDS registrants

Since late December, the RMCD has been making a concerted effort to contact foreign service providers (“FSPs”) who have registered for service tax on digital services (“SToDS”) in relation to what should be their appropriate effective registration date. This has caught many FSPs off guard, as late applications for registration had previously given forward dates for registration rather than a retrospective effective date.

What we understand from our discussions with RMCD is that this shift in approach is a result of internal discussions within RMCD and a decision to recover any underpaid taxes and additional penalties from these foreign service providers.

As per the service tax legislation, FSPs are required to lodge an application for registration by the end of the month following the month in which the prescribed threshold is exceeded. For example, an FSP which exceeds the prescribed threshold of RM 500,000 in the month of June, is required to lodge an application for registration by the end of July.

The effective date of registration shall be on the first day of the month following the month made in which the application is made or from such earlier date as the Director-General may determine but such date shall not be earlier than the date the FSP becomes liable to be registered. In the example above, the effective date of registration would be 1st of August.

Due to the complexities with the SToDS regime in Malaysia and the confusion among many FSPs on whether they ought to be registered or not, many FSPs submitted their application to the RMCD later than required. Although these applications were submitted late, and often with a disclosure that the date the threshold was earlier, in practice, the RMCD was registering these FSPs with a forward date. If we take the example mentioned above, if that FSP had not submitted its application by July but had instead submitted it in September, it would have received a registration effective date in October rather than August.

What we are now seeing is that the RMCD are contacting such FSPs with a view to confirm that the registration is indeed late, and then seeking to retrospectively apply for the registration. If we again go back to the earlier example, the FSP would then be registered from 1 August and would need to file the earlier returns, pay any taxes and applicable penalties.

The RMCD’s approach poses a number of concerns and issues. Based on the reading of the relevant sections of the Service Tax Act, the onus is on the Director General to determine the effective registration date. It is arguable that this was done previously when the RMCD had considered the applicant’s information and still provided a subsequent date for registration. It is thus unclear if the RMCD’s actions are allowable under the Law.

There are also a number of practical issues and concerns, in relation to the earlier transactions where the FSP has not accounted for tax, but the local service recipient has paid tax under the reverse charge on imported services. We understand from the RMCD that the local service recipient would need to go through the process of seeking a refund from the RMCD on the overpaid tax and no exemption would be given to the FSP from charging tax on such transactions.

We also understand that penalties would be auto levied in the MySToDS portal upon filing of the return. However, the FSP would be allowed to make an application for remission of the penalties through MySToDS portal itself.

We have been told additional information and guidelines in relation to the process for seeking remission will be available soon.

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