

Insights into Managing GST Audits and Investigations

by Janice Tan Ying

Since the imposition of the goods and services tax (“GST”) on 1 April 2015, the Royal Malaysian Customs Department (“Customs”) has been conducting audits and tax investigations with increasing frequency to combat GST fraud and to increase tax compliance among taxpayers. According to the Economic Report 2017/2018 released in conjunction with the Budget 2018 announcement, regular audits and tax investigations conducted by Customs resulted in the identification of 14,578 tax evasion offences between April 2015 and July 2017. Of this, a total of 2,907 cases were prosecuted, with fines imposed in 928 cases.¹

Since September 2016, Customs has launched the Customs Blue Ocean Strategy Operation (“Ops CBOS”) in phases to audit GST-registered companies.² Last year, Customs set a RM3 billion target in GST collection through its CBOS 3.0.³ As a result of the ambitious collection target, Customs has intensified efforts to enhance compliance through various measures. For example, the signing of a standard operating procedure between Customs and the Inland Revenue Board (“IRB”) will see both departments sharing information and conducting joint audits in an effort to plug tax leakages in the system.⁴ In line with the government’s effort to target tax evaders through the sharing of data and intelligence, a collective intelligence arrangement between Customs, the IRB and the Companies Commission of Malaysia was set up in 2017. The same year, the GST Electronic Information System was also introduced to ensure that

GST declarations by businesses are consistent with their sales. In light of these initiatives, Customs is likely to adopt a stricter stance in its attitude towards audits and tax investigations in 2018.

Understanding the GST audit process

The process entails the verification of the compliance of a business with the relevant laws and regulations on GST through a systematic examination of its accounts and records. Generally, there are two types of tax audits by Customs: the Desk Audit and the Field Audit.

- (i) A desk audit is conducted at the Customs office through correspondences of letters and/or emails between the Customs officer and the taxpayer, who may be called for an interview at the Customs office if further information is required. Customs officers may also require the taxpayer to present relevant documents.
- (ii) A field audit takes place at the taxpayer’s premises, and generally involves an examination of his business records. Usually, a taxpayer will be given prior notice of a field audit.

Powers and responsibilities of a Customs officer

It is crucial that taxpayers are aware of the various powers and responsibilities of a Customs officer in the face of an impending GST audit and investigation. The Director General (“DG”) confers power on Customs officers under the Goods and Services Tax Act 2014 (“the GST Act”) in respect of all duties or services relating to the GST Act.⁵ Key powers and responsibilities of a Customs officer in relation to GST audits and investigations include:

1 Economic Report 2017/2018, Chapter 4, Public Sector Finance <<http://www1.treasury.gov.my/pdf/economy/er/1718/chapter4.pdf>>
 2 “Customs to audit GST-registered firms from Sept 1”, *The Star Online* (29 August 2016) <<https://www.thestar.com.my/business/business-news/2016/08/29/customs-to-audit-gst-registered-firms-from-sept-1/>>
 3 “Customs Dept targets RM3b GST collection through CBOS this year”, *The Malay Mail Online* (20 February 2017) <<http://www.themalaymailonline.com/money/article/customs-dept-targets-rm3b-gst-collection-through-cbos-this-year#TvocxbYDSRwCrDMg.97>>
 4 “Customs, IRB to do joint audit on all companies”, *The Star Online* (30 Aug 2017) <<https://www.thestar.com.my/business/business-news/2017/08/30/customs-and-irb-to-do-joint-audit-on-all-companies/>>
 5 Goods and Services Tax Act 2014 (“GST Act”), s 5

- (i) Powers of enforcement, inspection and investigation⁶

In essence, a senior Customs officer has the powers of a police officer as provided for under the Criminal Procedure Code in relation to enforcement, inspection and investigation.

- (ii) Power to access place or premises and records of information⁷

Under s 81 of the GST Act, a senior Customs officer has access to any premises where a person carries on business. He has the power to request, examine and seize any document and information relating to any goods or material as he deems necessary.

- (iii) Power to search with/without warrant⁸

Unless provided for by law, e.g. under the Anti Money Laundering and Anti-Terrorism Financing Act 2001 (“AMLA”) or s 83 of the GST Act, a proper notice or search warrant must be provided where a Customs officer wishes to search the premises to seize any goods, document or thing which may be evidence of the commission of an offence under the GST Act. Even if raids are conducted under the AMLA, the authorities must satisfy the statutory conditions laid down in such provisions.

- (iv) Power of arrest⁹

Under s 87 of the GST Act, any Customs officer has the power to arrest without warrant in the following circumstances: Any person

found committing or attempting to commit or employing or aiding any person to commit or abetting the commission of an offence under the GST Act, any person who he may reasonably suspect to have in his possession any goods or documents or thing liable to seizure under the GST Act, or any person who he may reasonably suspect to have committed an offence under the GST Act. Such persons can be detained at the police station or in Customs’ custody.

- (v) Seizure of goods¹⁰

When Customs has a reasonable cause to suspect that an offence has been committed, all goods or documents which may reasonably be believed to have a bearing on the case may be seized. Customs must give notice in writing of such seizure, and the grounds of seizure, to the owner of such goods. Customs must also make inquiry, have a valid basis and must state their grounds and reasons in order to satisfy the test of having “reason to suspect”.¹¹ In *Loh Kam Hon v Ketua Pengarah Kastam Diraja Malaysia*,¹² it was held that “reasonable cause to suspect” as provided under s 114(1) of the Customs Act 1967¹³ must exist before or at the time of seizure of the said goods, and not anytime after the seizure.

Preparing for an audit

As a rule of thumb, taxpayers should keep proper records of their business transactions to comply with the record keeping requirements under the GST Act. Under s 43(3), tax liability can be evaluated and assessed by auditors up to six years from the date on which the tax was due and payable.¹⁴

6 *Ibid*, s 80

7 *Ibid*, s 81

8 *Ibid*, ss 82 and 83

9 *Ibid*, s 87

10 *Supra* n 5, s 85

11 *Shhaban & Ors v Chong Fook Kam & Anor* [1969] 2 MLJ 219 (PC)

12 [2012] 2 MLJ 682 (HC)

13 This section is in *pari materia* with s 85 of the GST Act 2014

14 The time limit does not apply to fraud cases

It is pertinent that documents such as tax invoices, purchase orders, delivery notes, receipts, debit notes, credit notes and relevant import and export declaration documents be kept for seven years.¹⁵ All records must be accurate, complete and readable. Where the record is in an electronically readable form, it should be readily accessible and convertible into writing. Where the record is originally in a manual form and is subsequently converted into an electronic form, the record should be retained in its original form prior to conversion (i.e. the hard copy of the record must be preserved).

Prior to an audit, the Customs officer will make a preliminary review of the taxpayer selected for audit (“the auditee”) for a general overview. For field audits, the auditee will be notified of the Customs visit by way of fax, email or the MyGST system. A letter confirming the visit is usually preceded by a phone call. The letter will indicate the records that should be made available for audit, the intended date of visit, and the names of the officers who will conduct the audit. The notification will generally be made 14 days prior to the date of audit. However, special audits may be conducted without prior notice of an audit visit.

Managing desk audits

When a desk audit is carried out, the auditee should ensure that all information provided to the Customs officers be documented in writing. When queried, the auditee should provide the officers with a comprehensive written explanation. Having said that, the auditee needs to bear in mind that documents used in correspondences may be tendered in a court of law in future.

Therefore, whenever there is a settlement or concession as to GST payable, the auditee should classify it on a “without prejudice basis” in writing because the admission of liability in correspondences may be fatal. When in doubt, the auditee should consult a tax agent or legal adviser before putting any representation in writing.

Managing field audits

On the day of the field audit, it is crucial that the auditee provide full co-operation to the audit officer, including providing all relevant information pertaining to the issue at hand. The auditee should take note to provide reasonable facilities and assistance to enable the audit officer to carry out his duties. This may include the preparation of records, books of accounts and providing access to information systems, providing access to the business premise, and providing facilities for copying electronic records onto tapes.

The audit usually starts off with a brief interview, in which the auditee will be asked about his business activities, as well as accounting and record keeping system. Generally, this would be a member of the board of directors or the company accountant. Companies should refrain from sending junior or inexperienced staff to deal with Customs officers. When responding to queries posed by the audit officer, the auditee should endeavour to provide prompt responses. The auditee should be mindful and ensure great care when responding to queries. It may be helpful to note that auditees may request for their tax agent and/or lawyers to be present during an interview.

Generally, the Customs officer will not take possession of any record in the course of an audit unless it is deemed necessary. Under these circumstances, the officer will seek the auditee’s permission and provide a list of the records obtained. An acknowledgement letter will also be issued to the auditee. It is the auditee’s responsibility to check and make copies of the list of records taken.

Power to examine persons

During a field audit, a Customs officer can summon any person who appears to be acquainted with the facts and circumstances of the case to attend before him to be examined orally. The person must answer all questions relating to the case but he may refuse to answer any question to which the answer would potentially expose him to a criminal charge or penalty or forfeiture. The

15 *Supra* n 5, s 36

person's statement will be recorded in writing, and upon him reading and verifying the same, he shall sign on the statement.

Any admission or confession made during statement-taking shall be admissible as evidence in any court proceedings. Denial of the same will be used to impeach his creditability as a witness. Therefore, it is crucial that taxpayers understand their legal rights and appreciate the legal consequences of their actions especially in making incriminating statements when dealing with Customs officers. An admission will only be unenforceable if there are elements of inducement, threat or promise during the statement-taking stage.

Obstruction of performance of duty

The auditee is not to obstruct the audit officer from performing his duties. Such obstruction is an **offence** under s 92 of the GST Act, which states:

“Any person who —

- (a) in any way assaults, hinders or obstructs the officer of goods and services tax in the performance of his duties under this Act; or
- (b) fails to give reasonable facilities or assistance to any officer of goods and services tax in the performance of his duties under this Act,

commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding seven years or to a fine not exceeding one hundred thousand rringit or to both.”

The auditee is prohibited from providing false information or concealing any facts, documents and/or information. Under no circumstances should an auditee provide any form of gifts, rewards, compensation and/or payment to the audit officer. Additionally, an auditee should not at any time make any business transactions with the audit officer during the audit process.

Audit exit conference: Round table discussions

Following the completion of the audit process, a round table discussion will be held between the auditee and Customs in order for Customs to inform them of any tax deficiency detected or any offences committed under the GST Act. The round table discussion also serves as an ideal opportunity for the auditee to respond to any questions or provide clarification as to any issues that may have been raised by the Customs officer during the audit process. The auditee should ensure that the discussions are recorded thoroughly because verbal statements are generally not admissible as evidence. Therefore, it is crucial to have a record of the minutes of the round table discussion in writing.

Thereafter, it would be advisable to provide the said minutes of the meeting to Customs for verification and confirmation purposes. The auditee is also encouraged to prepare a PowerPoint slideshow for the purpose of the round table discussion. Slides summarising the issues in the matter in a clear and succinct manner would certainly ease the facilitation of the discussion.

Customs' decision and entity's obligation to pay GST

If there are no adjustments to be made, Customs will issue a letter to the auditee to inform that the audit has been finalised without any adjustments. If there are tax adjustments to be made, the auditee will receive a

notification and will be given 14 days to state his view on the findings. If no objection is made within the 14 days, the auditee is deemed to have agreed to the proposed tax adjustments. Pursuant to the GST Act, Customs will issue a decision and consequently a bill of demand if there is additional GST payable upon conclusion of an audit. Section 43 of the GST Act states:

- “(1) Where any taxable person —
- (a) fails to apply for registration under Section 21;
 - (b) fails to furnish a return under section 41; or
 - (c) furnishes a return which to the Director General appears incomplete or incorrect,

the Director General may assess to the best of his judgment the amount of tax and the penalty under subsection 41(8), if any, due and payable from the taxable person and shall forthwith notify him of the assessment in writing.”

Payment must first be made, notwithstanding any appeal or objection against the assessment.¹⁶ That is, unless an appeal has been made by way of a judicial review and a stay order has been granted by the court. Under the GST Act, an auditee may apply to the DG within 30 days from the date of notification of the decision made by the audit officer.¹⁷ In the event that the auditee is aggrieved by the DG’s decision, the auditee may lodge an appeal against the DG’s decision to the GST Appeal Tribunal within 30 days of the date of decision of the DG.¹⁸ The time of payment of the tax deficiency is at the discretion of

Customs. By convention, however, the auditee is required to pay the tax deficiency within 14 days.

In the event that the unpaid taxes are not paid within the stipulated time, Customs may decide to take any or all of the following actions: compound, trade restriction, travel restriction, or court proceedings. Based on recent cases of GST investigations, it is clear that Customs will not hesitate to prosecute taxpayers who have committed serious GST offences, and may even freeze the bank accounts of taxpayers for the purpose of investigation. A recent GST arrest saw Customs freezing the bank accounts of a businessman and his wife over alleged fraudulent GST refund claims amounting to approximately RM26 million.¹⁹

Under the GST Act, non-payment within the prescribed timeline may result in the commencement of civil action.²⁰ This is unsurprising, given the IRB’s approach to commencing civil action to recover taxes, as in *Kerajaan Malaysia v Berjaya Times Square Sdn Bhd*. Non-payment of GST owing may also result in travel restrictions. Section 49 of the GST Act allows the DG to bar taxpayers or the vendors from leaving the country by issuing a notice to the Director of Immigration. As of July 2017, more than 7,000 traders have been barred from leaving Malaysia for failing to pay GST.²¹

As evidenced in the recent charges by Customs against beauty products entrepreneur Datuk Seri Hasmiza Othman (better known as Dr Vida), failure to submit GST statements and remit GST payments may result in heavy penalties. It was reported that Justice Murtazadi Amran set bail at RM1.76 million for the 16 charges against Dr Vida and ordered the confiscation of her passport and travel documents up until the disposal of the trial.²²

16 Regulation 65(3)

17 *Supra* n 5, s 124

18 *Ibid*, s 127. As of 2018, the Customs Tribunal and GST Tribunal will be merged.

19 “Couple detained for over RM25mil in fraudulent GST claims”, *The Star Online* (29 Aug 2017) <<https://www.thestar.com.my/news/nation/2017/08/29/couple-detained-for-over-rm25mil-in-fraudulent-gst-claims/>>

20 *Supra* n 5, s 46

21 D Kanyakumari, “MLM firms to be blacklisted for failing to pay GST”, *The Malaysian Reserve* (25 September 2017) <<https://themalaysianreserve.com/2017/09/25/mlm-firms-blacklisted-failing-pay-gst/>>

22 “Cosmetics queen Vida charged with avoiding RM4.2m in GST”, *The Malay Mail Online* (13 October 2016) <<http://www.themalaymailonline.com/malaysia/article/cosmetics-queen-vida-charged-with-avoiding-rm4.2m-in-gst#rPFODEtGRIS1SxTT.97>>

Taxpayers should also be aware that the entity shall be jointly and severally liable for any unpaid GST.²³ In July 2017, a director of a construction company was fined RM6,000 in default of three months' jail for failing to submit the company's GST returns for 2015 and 2016.²⁴ In relation to strict liability offences, the filing of incorrect returns can be a separate strict liability offence on its own under s 88 of the GST Act. Section 88 makes it an offence for any person who:

- (a) Makes an incorrect return by omitting any information;
- (b) Understates any output tax or overstates any input tax in a return; or
- (c) Gives any incorrect information in relation to any matter affecting his own liability to GST or liability to GST of any other person.

Upon conviction, a person could be liable to a fine not exceeding RM50,000 or imprisonment for a term not exceeding three years or to both and be imposed a penalty equal to the amount of tax which has been undercharged or would have been so undercharged if the return or information had been accepted as correct. The GST Act also covers acts, omission, neglect or default of employees, agents, or employees of agent, and thus, anyone assisting the management in the commission of an offence under the GST Act may be liable to a fine or imprisonment, or both.²⁵

Conclusion

By keeping abreast of audit requirements and developments in GST legislation, taxpayers can be better prepared in the face of an audit or investigation. Given the increasing frequency of GST audits by Customs, it is imperative that taxpayers ensure that their business practices comply with the GST regime. This can be done through proper record keeping, sufficient internal controls and consistently clarifying any areas of uncertainties with Customs.

GST audits and investigations must be properly managed in order to mitigate taxpayers' tax exposure. Otherwise, the outcome could have a negative impact on the reputation and operations of the business. Taxpayers need to perform their responsibilities conscientiously and diligently in order to ensure a seamless audit and investigation process. In this regard, they need to be aware of their legal obligations and appreciate the consequences of their actions. When in doubt, taxpayers should consult a tax agent or legal adviser. **LH-AG**

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²³ *Supra* n 5, s 53

²⁴ "Pengaruh syarikat didenda gagal kemuka cukai GST", *Utusan Borneo Online* (18 July 2017) <<http://www.utusanborneo.com.my/2017/07/18/pengaruh-syarikat-didenda-gagal-kemuka-cukai-gst>>

²⁵ *Supra* n 5, s 97(2)