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Outstanding GST Refunds and Statutory Time Frame for GST Assessment

In light of the global economic downturn due to the COVID-19 pandemic, there have been pleas for the government to expedite the process of GST input tax credits (ITC) refunds owed to businesses. Consequently, the Royal Malaysian Customs Department (**Customs**) announced on 16.6.2020 that a “pay first and audit later” approach would be adopted in processing all outstanding ITC refunds.



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On 3.8.2020, the Deputy Finance Minister, Mohd Shahar Abdullah, was reported as saying that the government still has to pay ITC refunds amounting to some RM4.8 billion that are outstanding.¹ However, at the Dewan Rakyat sitting, the ministry assured that Customs is improving the lengthy audit verification processes adopted previously and these ITC refunds are expected to be resolved by the end of the year.

Customs' announcement on 16.6.2020

Based on Customs' announcement on 16.6.2020, the following verification procedures would be implemented in respect of ITC refunds:²

ITC refund <RM100,000

- For businesses that are entitled to ITC refunds which are less than RM100,000 in total, the refund can be made after the company has gone through a desk review process.

ITC refund >RM100,000

- For businesses that are entitled to ITC refunds that amount to RM100,000 or more in total, the refund can be made after the company has gone through a risk rating and desk review process. If the GST registrant fails the risk rating process, ITC can still be refunded upon fulfilment of the following conditions:



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¹ Adam Aziz, “RM4.763b GST refund still outstanding, says MoF” *The Edge Markets* (3 August 2020) <<https://www.theedgemarkets.com/article/rm4763b-gst-refund-still-outstanding-says-mof>>

² Goods and Services Tax (Repeal) Act 2018, s 3

- i. The claim has gone through a desk review process;
 - ii. The company's director has declared that the information provided is correct and has agreed to pay any shortfall in tax and penalty; and
 - iii. The company has provided a bank guarantee amounting to 10% of the amount of ITC refundable as at 1.1.2019.
- A field audit will be carried out subsequently and the bank guarantee given by the company will be refunded if the audit outcome confirms that there is no shortfall in GST.

We understand that businesses with outstanding ITC refunds have received letters/emails from Customs requesting supporting documents in respect of their ITC claims. Normally, these letters/emails would stipulate a time frame (generally within seven days) for businesses to provide the requisite supporting documents. If businesses fail to furnish the supporting documents on time, Customs may reject the claim for ITC refund on the basis that the business has failed to respond within the requisite time period. Thus, it is important that supporting documents requested by Customs be provided in a timely manner to avoid the claim for ITC refund being rejected on a technical ground. Alternatively, businesses can always request an extension if more time is required to furnish these supporting documents.

Based on our experience, common pitfalls/risk areas for GST audits include the following:

- (a) Whether supplies have been correctly zero-rated;
- (b) Whether supplies have been correctly exempted;
- (c) Whether conditions for group registration have been strictly complied with;
- (d) Whether the ITC claims are supported with proper documents such as Form K1, tax invoices, credit notes and debit notes;
- (e) Whether the open market value has been adopted for transactions between connected persons (especially where the recipient is not GST registered); and
- (f) Whether the time of supply rules have been complied with.

How long can Customs conduct GST audits/raise GST assessments?

Businesses are reminded repeatedly in the Customs' Frequently Asked Questions (FAQ) issued on 16.6.2020 that any ITC refund made now is subject to audit within six years from 1.9.2018 pursuant to s 8 of the Goods and Services Tax (Repeal) Act 2018 (**GST Repeal Act**).³ However, upon closer examination of the relevant provisions, Customs' power to raise a GST assessment may, in certain circumstances, extend beyond six years from 1.9.2018.

Suffice to say, there is no statutory time frame as to when Customs

can conduct a GST audit as there is no time bar to raise an assessment in cases of fraud or wilful default.⁴ Section 8 of the GST Repeal Act cited by Customs is, in our view, irrelevant for the purposes of determining the statutory limitation period for GST audits as it only provides the time period within which the Director General of Customs must pay the ITC refunds, i.e. six years from 1.9.2018.

Section 4(1) of the GST Repeal Act states that notwithstanding the repeal of the GST Act, **any liability incurred may still be enforced or any GST due, overpaid or erroneously paid may be collected,** refunded or remitted under the GST Act **as if the GST Act has not been repealed.** Accordingly, one should refer to s 43(3) of the Goods and Services Tax Act 2014 (**GST Act**) to determine the statutory time frame for Customs to raise a GST bill of demand. Section 43(3) of the GST Act states that an assessment raised under s 43(1) and (2) **shall not be made more than six years from the date on which the GST was due and payable or from the date on which the refund was made** except where there is fraud or wilful default.

In this regard, our view is that Customs has the power to raise an assessment:

- **In the case of underpayment of GST output tax**, six years from the date GST was due and payable; and
- **In the case of overpayment of ITC refunds**, six years from the date the refund was made.

Accordingly, Customs' power to raise a GST bill of demand, in certain circumstances, may extend beyond six years from 1.9.2018. If the ITC was refunded by Customs, say, in August 2020, the statutory timeframe to conduct the GST audit for ITC would be six years from August 2020. However, if the assessment is related to underpayment of GST output tax, the statutory time frame for such assessment should be calculated six years from the date GST was due and payable.

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