

SST e-Alert

14 MARCH 2019

Service Tax On Imported Taxable Services

One of the most notable changes to the Service Tax Act 2018 (**the Act**) recently is the imposition of service tax on imported taxable services.¹ It is said that the amendment was made to ensure that local service providers are not unfairly disadvantaged against foreign competitors.²

However, it must be noted that “imported taxable service” is defined under Section 2 of the Act as any taxable service acquired by any person in Malaysia from any person who is outside the country. An imported service will be subject to service tax if the same service is a taxable service if provided in Malaysia. This is regardless of whether the total value of the taxable service of the overseas provider exceeds the threshold prescribed in Column 3, First Schedule of the Service Tax Regulations 2018 (**the Regulations**).

When Service Tax On Imported Taxable Services Is Due?

As opposed to service tax on taxable services which is due on a payment basis, the service tax on imported taxable services is due at the time when:

- (a) Payment is made; or
- (b) Invoice is received for the service,

whichever is earlier.³

Furnishing Relevant Declaration

Pursuant to Section 26A of the Act, non-service tax registered businesses that acquire imported taxable services have to account and pay for service tax due in a prescribed declaration, i.e. Form SST-02A.

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¹ [Act 807], s 7(b)
² See Malaysian Budget 2019
³ *Supra*, n 1, s 11(1)(b)

This form shall be furnished and the service tax on imported taxable services shall be paid to Customs by the last day of the following month in which service tax is due.

As for existing service tax registrants that acquire imported taxable services, such declaration can be made in the existing service tax return, i.e. Form SST-02, in accordance with the service tax due date above.

Service Tax Exemption For Imported Taxable Services

Pursuant to Paragraph 3, First Schedule of the Regulations, where a company in a group of companies provides any taxable service specified in items (a) to (i) in Column 2, Group G of the First Schedule to any company within the same group of companies, such service shall not be a taxable service (**Intra-Group Relief**).

Subsequent to the imposition of service tax on imported taxable services, Paragraph 3A is has been inserted into the First Schedule of the Regulations, which states that the Intra-Group Relief above does not apply to any imported taxable services acquired by a company in Malaysia from any company within the same group of companies outside the country.

However, based on the Customs' Guide on Imported Taxable Service⁴ (as at 9.1.2019) and the official announcement on Service Tax Amendments 2019 on its website,⁵ we understand that a ministerial exemption has been given, via an approval letter issued by the Ministry of Finance (**MoF**) in respect of imported taxable services under items (a) to (i) of Group G, First Schedule of the Regulations.

The exemption will be applicable to any company in Malaysia that acquires a taxable service that falls within items (a) to (i) of Group G from any company within the same group of companies outside Malaysia, provided that the conditions as stated in Paragraphs 4 to 8 of the First Schedule have also been fulfilled.

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⁴ <https://mysst.customs.gov.my/IndustryGuides>

⁵ <https://mysst.customs.gov.my/assets/document/Annoucement/SERVICE%20TAX%20AMENDMENTS%202019.pdf>

Exemption Checklist

Based on the Customs Guide, in order to qualify for the said exemption, the following conditions must be fulfilled:

- (i) The imported taxable service acquired falls within the ambit of items (a) to (i) of Group G, First Schedule of the Regulations;⁶
- (ii) The imported taxable service was acquired from a foreign company within the same group; and
- (iii) The foreign company does not provide the same service to any person outside the group of companies in Malaysia.⁷
- (iv) For the purpose of condition (ii) above, two companies can be considered to be within the same group of companies if one controls the other.⁸ A company is considered to control another company if the first directly or indirectly holds more than 50% of the issued share capital;⁹ or, directly or indirectly holds less than 50% but has exercisable powers to appoint or remove all or a majority of the directors¹⁰ and the shares are not held through nominees, in a fiduciary capacity or by virtue of the provision of debenture holding, trust deed for securing debentures or money lending activities.¹¹

It must be noted that the conditions laid down by Customs must be strictly adhered to. If any of the conditions is not fulfilled, Customs may raise an assessment based on the value of the imported taxable services and impose a penalty upon an audit.

Accordingly, it remains a challenge for businesses to ensure that all the conditions are duly complied with, especially condition (iii) above.

Viability Of Exemption

Groups of companies, especially multinational corporations, would welcome the said exemption as it eases administrative burdens and addresses cash flow concerns. However, Paragraph 8 of the Regulations is quite an impractical provision

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⁶ Paragraph 3 of the Regulations
⁷ *Ibid*, para 8
⁸ *Ibid*, para 4
⁹ *Ibid*, para 5(a)
¹⁰ *Ibid*, para 5(b)
¹¹ *Ibid*, para 6

as in order to avail itself of the said exemption, the foreign related company that provides the service to the Malaysian company cannot render the same taxable service to another company or person outside the group in Malaysia.

This has placed the Malaysian company in a rather difficult position as it would have the burden of monitoring whether the foreign related company provides any services to another company or person outside the group in Malaysia.

Minister's Exemption is 'Sulit'

It is noted that the MoF exercised its power under Section 34(3) of the Act and granted the exemption. However, it comes as a surprise that the "Intra-Group Exemption" for imported taxable services is not given through or reflected in the amendment to the First Schedule of the Regulations but via a MoF letter which, we understand, is not made publicly available.

Businesses have no other option but to rely on the Customs' Guide on Imported Taxable Services (as at 9.1.2019) and the public announcement on its website for the applicability and qualifying conditions of the exemption given by the Minister of Finance.

Lack Of Certainty To Businesses

In light that Customs has, in the past and from time to time, amended its existing guidelines, policies and the Director General's Decisions, the fact that the MoF letter is not made publicly available provides no certainty and poses immense difficulties to businesses that qualify for the ministerial exemption to implement or enjoy the commercial benefit of such exemption.

In this regard, we take the view that the MoF should comply with Section 34(2) of the Act and Customs should ensure that the MoF letter is accessible by the public. Alternatively, the exemption given by the Minister on imported taxable services should be reflected in the amendment to the First Schedule of the Regulations.

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Conclusion

The imposition of service tax on imported taxable services would result in higher operating costs for non-service tax registered businesses that would now be required to file a separate declaration and to account for service tax on imported taxable services procured from a foreign services provider.

Contrary to the reverse charge mechanism in the GST era, the imposition of service tax on imported taxable services is a cost to businesses given that there is no input tax credit mechanism under the service tax regime. This would be burdensome to businesses that are already paying withholding tax on the imported services procured.

If you have queries pertaining to the above or require assistance in matters pertaining to sales tax and service tax, please contact our tax partners **Datuk D P Naban** or **S Saravana Kumar** at tax@lh-ag.com

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