

SST e-Alert

29 AUGUST 2019

Principles Of Valuation For Sales Tax

It will soon be a year since the enactment of the Sales Tax Act 2018 (**STA 2018**), which reintroduced sales tax. This e-Alert discusses the principles of valuation for sales tax purposes, which is a single stage *ad valorem* tax levied on:

- taxable goods manufactured in Malaysia by a taxable person; or
- taxable goods sold, used or disposed of by him, or on taxable goods imported into Malaysia.

All taxable goods are subject to sales tax, unless specifically exempted by the Minister of Finance (**Minister**).

Sales tax is levied at the manufacturer's level and is embedded in the price paid by the consumer. As the tax is levied on the sale value of taxable goods, the determination of sale value must comply with the STA 2018.

Determination Of Sale Value

Under Section 9(1), the sale value of taxable goods shall be determined in accordance with the regulations issued under the STA 2018, where the taxable goods are:

- (a) Sold by a taxable person; or
- (b) Manufactured by a taxable person and
 - (i) Used by him otherwise than as materials in the manufacture of the taxable goods; or
 - (ii) Disposed of by him otherwise than by sale.

In this regard, the Minister is empowered under Section 106 of the STA 2018 to make regulations on the determination of sale value for the purpose of Section 9. Pursuant to this, the Minister introduced the Sales Tax (Determination of Sale Value of

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Taxable Goods) Regulations 2018 (**2018 Regulations**), which came into effect on 1 September 2018.

Section 9(2) further provides that in the case of taxable goods imported into Malaysia, the sale value of those goods represents the sum of the following amounts:

- The value of such taxable goods for the purpose of customs duty as determined in accordance with the Customs Act 1967;
- The amount of customs duty, if any, paid or to be paid on such taxable goods; and
- The amount of excise duty, if any, paid or to be paid on such taxable goods.

2018 Regulations

The 2018 Regulations set out comprehensively the rules for the determination of sale value of locally manufactured goods. Under the Regulations, the transaction value of the taxable goods usually forms the valuation basis of the sale value of such taxable goods.

Regulation 3(1) provides that the primary basis in the determination of sale value of the taxable goods being valued shall be determined on the basis of the transaction value of the taxable goods being valued. In this regard, the transaction value is “the price for which the taxable goods being valued are actually sold when sold by the registered manufacturer to the purchaser”. Notwithstanding this, it must be noted that the transaction value of the taxable goods being valued shall not apply in certain situations, such as those specified under Regulation 3(2):

- (a) There are restrictions in respect of the disposition or use of the taxable goods being valued by the purchaser, other than restrictions that:
- (i) are imposed by law;
 - (ii) limit the geographical area in which the taxable goods being valued may be resold; or

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- (iii) do not substantially affect the sale value of the taxable goods being valued;
- (b) The sale of the taxable goods being valued or the price for which the taxable goods being valued are actually sold is subject to any conditions or consideration where its sale value cannot be determined;
- (c) Part of the proceeds of any subsequent resale, disposal or use of the taxable goods being valued by the purchaser is to accrue, directly or indirectly, to the registered manufacturer;
- (d) The purchaser and the registered manufacturer are connected at the time the taxable goods being valued are sold;
- (e) The taxable goods being valued are used or disposed of by the registered manufacturer otherwise than by sale; or
- (f) The proper officer of sales tax has reason to doubt the truth or accuracy of the transaction value.

In the case where the sale value of the taxable goods being valued cannot be determined on the basis of transaction value of taxable goods being valued under Regulation 3(2)(a), (b), (c), (e) or (f) as described above, then pursuant to Regulation 4(1), the sale value of the taxable goods being valued shall be determined in accordance with the following value and order:

- (a) The transaction value of identical goods under Regulation 5;
- (b) The transaction value of similar goods under Regulation 6;
- (c) The computed value of the taxable goods being valued under Regulation 7; and
- (d) The deductive value of the taxable goods being valued under Regulation 8.

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However, the order as specified in Regulations 4(1)(a) and (b) shall not apply and the sale value of the taxable goods being valued shall be determined based on the computed value or deductive value of the taxable goods being valued where:

- (a) The sale value of taxable goods being valued cannot be determined on the basis of transaction value of the taxable goods being valued under paragraph 3(2)(d); or
- (b) The registered manufacturer manufactured the taxable goods being valued which belongs to a person under an agreement entered into with such person that the taxable goods being valued, after being manufactured, shall be disposed of to such person or upon his instruction.

If the sale value of such taxable goods being valued cannot be determined using any of the abovementioned valuation methods, then Regulation 4(5) allows the Customs officer to use any reasonable means, one that is consistent with the generally accepted accounting principles, to determine the sale value of the taxable goods being valued in accordance with Regulation 9.

Our Comments

It is clear that there is a scheme in the STA 2018 and the 2018 Regulations to guide the Customs officer in determining the sale value of taxable goods for tax purposes. In this regard, the *prima facie* valuation method shall be the transaction value, which simply means the invoice or sale price of the goods.

In the event the Customs officer is unable to determine the sale value of the taxable goods using the transaction value, he has to proceed under Regulations 5 to 8 of the 2018 Regulations respectively. Each valuation method is comprehensively provided for in the Regulations, including the prerequisite conditions under each of the Regulations.

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In *TIM Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2017], a landmark case on sales tax valuation, the High Court held that the Director General of Customs (**Director General**) had erroneously misconstrued the Excise Act 1976 (**EA 1976**) and ignored the relevant mandatory statutory requirements in the then Sales Tax Act 1972 (**STA 1972**) and the then Sales Tax (Rules of Valuation) Regulations 2002 (**2002 Regulations**) in uplifting the value of tobacco products for the purpose of sales tax.

The High Court, in setting aside the additional sales tax assessments (which is known as bills of demand) raised by the Director General, held that the latter had not applied the clear provisions of the STA 1972 and the 2002 Regulations. Instead, the court found that the Director General had arbitrarily imposed the words of the EA 1976 into the STA 1972 and the 2002 Regulations.

The decision in the *TIM* case serves as a reminder that where there is a clear provision in the statute to address the manner in which sales tax is to be determined, the Director General must resort to that provision. He has to comply with the valuation mechanism in place and cannot choose to ignore the clear provisions of the STA 2018 and the 2018 Regulations.

The taxpayer in *TIM* was successfully represented by Datuk D P Naban and S Saravana Kumar, together with senior associate, Jason Tan.

If you have any queries in relation to sales tax matters, please contact our Tax, SST & Customs partners, **Datuk D P Naban** or **S Saravana Kumar**, at tax@lh-ag.com

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