

Client Alert

27 August 2019

For further information, please contact:

Adeline Wong

Partner

+603 2298 7880

adeline.wong@wongpartners.com

Yvonne Beh

Partner

+603 2298 7808

yvonne.beh@wongpartners.com

Sarah Sheah

Associate

+603 2298 7804

sarah.sheah@wongpartners.com

Update on the Malaysian Service Tax on Imported Digital Services

With effect from 1 January 2020, registered foreign service providers ("**FSPs**") who provide any digital services to a consumer in Malaysia would be required to charge 6% service tax on the digital services.

Since our previous [client alert](#), the Service Tax (Amendment) Act 2019, which seeks to impose the service tax on imported digital services, has received its Royal Assent on 28 June 2019 and has been gazetted into law on 9 July 2019.

As the Amendment Act has been passed into law, the subsidiary legislations providing for the details of the implementation of the service tax on imported digital services should be made available soon.

On 20 August 2019, the Royal Malaysian Customs Department ("**Customs**") published its Guide on Digital Services ("**Guide**") and this client alert aims to provide a summary of the salient clarification provided by Customs in its Guide and some of the outstanding issues which require further clarity from Customs.

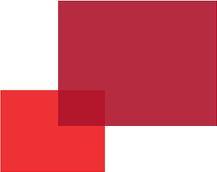
1. Scope of "digital services"

It is clarified under the Guide that, in order for a service to fall within the scope of digital services¹, the services must be delivered through an information technology ("**IT**") medium with minimal or no human intervention from the service provider. Accordingly, where the transmission of the services is via e-mail and the delivery of the services requires some form of human intervention on the part of the service provider, such services would not fall under the scope of digital services. Unfortunately, the Guide does not provide any further clarification on the meaning of "minimal human intervention" or what it means where delivery of services are "essentially automated".

The Guide also provides for a non-exhaustive list of services that could be regarded as digital services:

- (a) online licensing of software, updates and ad-ons website filters and firewalls;
- (b) mobile applications and video games;
- (c) provision of digital content, for e.g., music, e-book, film, images, text and information;

¹ Pursuant to the Service Tax (Amendment) Act 2019 ("**Amendment Act**"), "digital service" is defined to mean any service that is delivered or subscribed over the internet or other electronic network and which cannot be obtained without the use of information technology and where the delivery of the service is essentially automated.

- 
- (d) advertisement platform, for e.g., provision of online advertising space on intangible media platform;
 - (e) online platform, for e.g., offering of a platform to trade products or services;
 - (f) search engines services;
 - (g) social networks;
 - (h) database and hosting, e.g., website hosting, online data warehousing, file-sharing and cloud storage services;
 - (i) internet-based telecommunication;
 - (j) online training, for e.g., provision of distance teaching, e-learning, online courses and webinars;
 - (k) online newspapers and journals subscription; and
 - (l) payment processing services.

2. Who would be regarded as a Foreign Service Provider ("FSP")?

The Guide provides that the following persons would be regarded as a FSP²:

- (a) a person who sells digital products directly to consumers;
- (b) a person who (i) sells digital products indirectly through intermediaries such as an online platform; and (ii) issues the invoice for such a sale; and
- (c) an online platform who (i) makes sale transactions on behalf of an overseas service provider; and (ii) issues an invoice under its name ("**Platform Operator**").

This definition would include foreign providers of digital services as well as foreign Platform Operators who sell products or services on its platform.

However, it is unclear if a foreign Platform Operator who makes sale transactions on behalf of a local service provider would be regarded as a FSP who is required to charge 6% service tax on sales made via its platform.

3. Definition of "consumer" – residence proxy

In determining whether a person resides in Malaysia (which is one of the three proxies used in determining whether a person is a "consumer"), FSPs may rely on the following information:

- (a) the billing address of the service recipient;
- (b) the home address of the service recipient; or
- (c) the service recipient's country selection.

² Pursuant to the Amendment Act, "FSP" is defined to mean any person who is outside Malaysia providing any digital service to a consumer and includes any person who is outside Malaysia operating an online platform for buying and selling goods or providing services (whether or not such person provides any digital services) and who makes transactions for provision of digital services on behalf of any person.



Unfortunately, no further clarification has been provided in the Guide in relation to the other two proxies, namely the payment proxy³ and the access proxy⁴.

4. Exemption from reverse charge requirement for imported taxable services

As highlighted in our previous [client alert](#), a business who fulfills two out of the three proxies would be regarded as a "consumer", and Customs has confirmed that it is indeed intended for businesses in Malaysia to be caught under the digital service regime.

To address the potential double taxation issue on the same service in light of the requirement on Malaysian businesses to reverse charge on imported taxable services, the Guide has confirmed that there will be an exemption granted to Malaysian businesses from the obligation to reverse charge, if such business have already been charged with service tax by a FSP. This means that businesses who are required to reverse charge for services which fall under the imported taxable services regime, will not be required to do so, if it has already been charged service tax by a FSP under the service tax for imported digital services regime.

Currently, the exemption order to introduce this exemption has not been issued yet.

5. Mandatory registration threshold for FSPs

The Guide further confirmed that the mandatory registration threshold for a FSP is RM 500,000 annual turnover in respect of the provision of digital services to consumers in Malaysia.

For Platform Operators who are regarded as FSPs, the Platform Operator would be required to compute its annual turnover by including (i) the value of digital services it makes to consumers in Malaysia; and (ii) the value of digital services made by FSPs through its platform to consumers in Malaysia.

6. Prescribed particulars of invoices

FSPs who are registered and charge service tax on imported digital services are required to issue an invoice or a document in respect of the digital service transaction and the invoice or document must contain the following prescribed particulars:

- (a) date of invoice;
- (b) FSP's service tax registration number;
- (c) a description sufficient to identify the digital services provided; and

³ Payment proxy refers to where a person makes payment for digital services using credit or debit facility provided by any financial institution or company in Malaysia.

⁴ Access proxy refers to where a person acquires digital services using an internet protocol address registered in Malaysia or an international mobile phone country code assigned to Malaysia.

- 
- (d) total amount payable excluding service tax; the rate of service tax and the total service tax chargeable shown as a separate amount.

There is no strict requirement for FSPs to convert the amounts stated in the invoice or document to Malaysian Ringgit ("MYR") and that it is acceptable for such amounts to be stated in a foreign currency.

7. Transitional rules

The Guide provides that:

- (a) Where any digital service is provided before 1 January 2020 and the digital service spans on or after 1 January 2020, the proportion of the service which is attributed to the part of the period post 1 January 2020 is chargeable to service tax, regardless of when the invoice is issued or when the payment is made.
- (b) Where any payment is received before 1 January 2020 in connection with the provision of digital services that will be provided on or after 1 January 2020, no service tax shall be charged on the payment received.

8. Administrative matters

(a) Registration for FSPs

Customs has confirmed that the registration window for FSPs will open on 1 October 2019 and that the effective date of registration will be 1 January 2020 for all FSPs who register with Customs prior to 1 January 2020.

Registrations can be made online using the prescribed DST-01 Form.

(b) Filing of service tax returns

FSPs are required to file service tax returns on digital services by way of a prescribed DST-02 Form on a quarterly basis. The value of the digital services and the service tax amount must be declared in MYR. FSPs are allowed to convert the amounts to MYR using their own exchange rates.

If any error is made in the service tax return, the FSP may correct the errors.

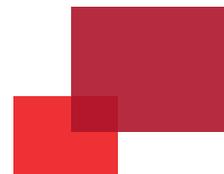
(c) Payment of service tax

Service tax is required to be paid to Customs in MYR through electronic service or at any institutional banking and is deemed to be received by Customs at the time the payment is made to any institutional banking and the amount is credited to the representative account.

Service tax can be paid from a foreign bank account.

9. Impact on FSPs

Given the relatively short lead time for implementation of the service tax on imported digital services, FSPs should immediately start to assess the impact to their businesses and consider if they would be required to register and charge



Malaysian service tax from 1 January 2020 onwards. As the regime is broader than other similar regimes in the region, in that it also captures provision of digital services to businesses, many companies may fall within the scope of the service tax regime in Malaysia.

We understand that FSPs will also need to dedicate resources and time to configure their systems in order to correctly identify the transactions whereby the service tax should be charged and thereafter the issuance of the invoices in accordance with the requirements. Incorrect classification of the transactions will lead to the filing of incorrect returns and failure to charge and remit service tax, which are offences under the Service Tax Act 2018.

There may also be companies who are uncertain about certain aspects or issues, or who may face practical difficulties in complying with the requirements. The next few months will be crucial to ensure that such companies seek the relevant confirmation from Customs and in some instances, such companies may also wish to engage with Customs to obtain certainty on the issues or to resolve their practical difficulties which hinder compliance.

www.wongpartners.com

Wong & Partners
Level 21
The Gardens South Tower
Mid Valley City
Lingkaran Syed Putra
59200 Kuala Lumpur