

Client Alert

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For further information, please contact:

Adeline Wong
+603 2298 7880
adeline.wong@wongpartners.com

Krystal Ng
+603 2298 7937
krystal.ng@wongpartners.com

GST Malaysia - Updated Requirements For Transfer of Going Concern

Updated Requirements for Notification

On 24 May 2016, the Royal Customs of Malaysia ("Customs") issued a new GST guide ("Guide") on the transfer of a going concern ("TOGC"), which states that it is a requirement for the transferor to notify the Customs by the date of transfer of any business sold or transferred irrespective of whether the transferor continues his business or ceases business on the date of the transfer.

The notification must be done by the way of completing and complying with a prescribed format of notification which must be submitted to the Customs accompanied by a list of specific supporting documents, including the sale and purchase agreement and a clause or declaration that the sale of business is TOGC.

The sale and purchase agreement for the transfer of business must include a specific clause or declaration that the sale of the business is a TOGC. Otherwise, parties will need to produce a separate declaration. The purchase price of under the agreement must also exclude GST.

It should be noted that the submission of the prescribed notification must be done immediately on or after the date of the business transfer. Failure to notify the Customs is an offence under the law and on conviction, will result in a fine of up to RM30,000 or imprisonment for a term of up to two years or both.

GST in Malaysia

In Malaysia, goods and services tax ("GST") is imposed at 6% on the standard rated supplies of goods or services made in Malaysia by a taxable person in the course or furtherance of business in Malaysia. GST is also charged and levied on goods imported into Malaysia. Certain transactions are classified as special cases or matters to be treated as neither a supply of goods nor a supply of services under the Second Schedule of the Goods and Services Tax Act 2014. TOGC is listed as a matter under the Second Schedule.

GST Treatment of TOGC

The supply of a business or part of a business as TOGC by one taxable person to another taxable person (who is or is to be a taxable person by virtue of the transfer) is treated as neither a supply of goods nor a supply of services if the conditions for qualifying as TOGC are fulfilled.

TOGC may involve the transfer of a whole or part of a business as a going concern from a taxable person to another taxable person. In the case where only part of the business is transferred, that part of the business must be capable of operating on its own.

If the business transfer qualifies as TOGC, there would be no output tax charged or received by the transferor on the transfer of the business and no payment of GST by the transferee to the transferor for the transfer of the business of part of a business under the TOGC.

Incorrect Treatment of TOGC

In the event a transfer of assets is incorrectly treated as TOGC, then the consequences are as follows:

- (a) the supply of assets will have taken place at the date of the transfer;
- (b) GST will be due from the transferor to the Customs according to the assets transferred;
- (c) the transferor must issue a GST tax invoice to the transferee; and
- (d) the transferor must pay penalties due for late payment of GST.

In view of the new updated notification requirements imposed by the Customs, it would be prudent to be aware of TOGC requirements. It is also recommended for businesses to review current or past transactions involving business transfers to determine if there is a need to immediately comply or make good past-non compliance ahead of GST audits that will be conducted by the Customs.

www.wongpartners.com

Wong & Partners
Level 21, Suite 21.01
The Gardens South Tower
Mid Valley City
Lingkaran Syed Putra
59200 Kuala Lumpur