

# Tax alert

Issue 5 | March 2024

## Government to refund GST of \$1.5 million wrongly charged per year — An understanding of the GST Act as it applies to the Government

### Introduction

The Ministry of Finance (MOF), in its press release of 14 February 2024, announced that the Government is to refund GST which has been wrongly charged by six public agencies (namely HDB, URA, LTA, SFA, the Council of Estate Agencies and the Office of the Public Guardian), amounting to \$1.5 million per year in respect of 18 Government fees. The over-collection was on account of the mischaracterisation of the nature of the services that were provided by the Government agencies for GST purposes. In this tax alert, we shall explain the characterisation of the Government supplies in the application of the GST Act and discuss the GST (Amendment) Bill 2024 (No. 12/2024) which has been tabled before Parliament, to deal with charging of GST on the Government services going forward.

### Application of the GST Act to the Government

It is trite that the State promulgates laws for its subjects. It does not promulgate laws to regulate or govern itself unless it is clearly expressed otherwise in the statute itself. In this regard, section 54 of the Interpretation Act 1965 provides that 'no Act affects in any manner the rights of the Government unless it is therein expressly provided, or unless it appears by necessary implication, that the Government is bound thereby'.

For example, under the Property Tax Act, property tax is charged on immovable properties, but the Act does not apply to the Government properties and there is no property tax on such properties. Such property tax treatment is also for a good policy reason, as otherwise the Government would have to budget for the tax to pay itself and both revenue and expenditure numbers would have notionally increased by the same amount but be of no real benefit.

On the same vein, the Government would not have been governed by the GST Act and would not have to impose GST for all its fees and charges, unless specific provisions have been made in the GST Act for the statute to apply to the Government. However, unlike the case of property tax where there is clearly no policy reason to impose the tax on the Government buildings, not imposing GST for some of the supplies that the Government makes will put those supplies at a competitive advantage and may artificially distort the demand for those supplies. For example, ambulance services are provided by the Government as well as by private sector suppliers who would have to charge GST on their supplies. To put the Government supplies on an equal competitive footing, GST has also to be imposed on those supplies. However, public agencies also charge fees for regulatory activities (e.g. HDB may charge fees for applications to allow the renting out of HDB flats) and there is no good policy reason to charge GST on those regulatory charges, aside from enlarging the GST pool.



The extent to which the GST Act is to apply to the Government was made clear in the White Paper published in 1993 on the introduction of GST in Singapore, where it was stated that the intention was to charge GST on the Government supplies only where they are in competition with those of the private sector, in order to ensure a level playing field. This intention has found statutory expression in section 28(1) of the GST Act which reads as follows:

*This Act applies in relation to taxable supplies made by the Government in the course or furtherance of a business (other than such taxable supplies as the Minister may, by order in the Gazette, prescribe) as it applies in relation to taxable supplies made by a taxable person in the course or furtherance of a business.*

Section 28(1) ties back to the charging provisions in section 8(1) of the Act which reads as follows:

*Tax is charged on any supply of goods or services made in Singapore where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by the taxable person.*

Section 8(1) read with section 28(1) therefore requires the Government to charge GST on 'taxable supplies'<sup>1</sup> made by the Government 'in the course or furtherance of a business'. The supplies made by the Government commercially such as the supplies of sports facilities are taxable supplies made 'in the course or furtherance of a business', and therefore

attract GST. However, services which are regulatory in nature (e.g. the processing of applications to rent out HDB flats) are not supplies made 'in the course or furtherance of a business'<sup>2</sup>. Hence, no GST is to be charged in relation to fees charged by public agencies on regulatory services.

### **How did the mistakes on GST collection arise?**

As may be seen, in deciding whether or not to charge GST on the Government fees and charges, one has to make a judgement as to whether the fees are for regulatory purposes or otherwise. Where they are for regulatory purposes, no GST is to be charged, whereas where the fees and charges are for non-regulatory supplies (such as the use of sports facilities, rental fees for hawker stalls and exhibition spaces), GST would be charged.

However, there are more than 5,000 fees and charges, and through the years some public agencies have made mistakes in the charging of GST. One would have thought that those public agencies could have easily checked the GST treatment with the Comptroller of GST, but apparently that was not done. In the cases which have been identified by the MOF, the public agencies have charged GST where it should not have been charged. Those agencies will attempt to refund the GST wrongly charged for the last 5 years using the records that they maintain. However, there may also be instances where GST should have been charged by public agencies but was not charged. In those cases, it would be too late to try to recover the GST from the recipients of the Government supplies of services.



<sup>1</sup> The term 'taxable supply' is defined in section 8(2A)(a) of the GST Act as 'a supply of goods or services made in Singapore other than an exempt supply' and the word 'supply' is, in turn, defined in section 10(2)(a) as 'all forms of supply ... but not anything done otherwise than for a consideration'.

<sup>2</sup> See the House of Lords case of *Institute of Chartered Accountants in England and Wales v Commissioners of Customs and Excise* [1999] 1 WLR 701, where it was held that regulatory functions performed by the Institute did not amount to the carrying on of a business.

## Legislative solution

Following the MOF press release, the GST (Amendment) Bill 2024 has been tabled in Parliament, and its purpose is two-fold as set out below:

- 1) One purpose is to prevent a recurrence of having to make refunds for wrongly charging GST by public agencies. This is to be achieved by treating all taxable supplies to be made by the Government as being made 'in the course or furtherance of a business', and thus attracting GST: see the new section 8(2) which is proposed to be inserted by the Bill<sup>3</sup>. The Government supplies that do not attract GST will have to be gazetted pursuant to the powers in the new section 8(2A). In that way, public agencies will charge GST in all cases, other than for those supplies which appear in the Government gazette to be published, pursuant to the powers of section 8(2A). With such a bright-line test, presumably no one in the public agencies would make a mistake and charge GST wrongly.

However, if the policy for not charging GST for services which are regulatory in nature is to be maintained, one would expect that there will be a long list of services which will appear in the Government gazette to be published after the coming into operation of the GST (Amendment) Act 2024, after a careful evaluation that the supplies are indeed regulatory in nature. More importantly, where new charges and fees are to be proposed by public agencies, there must be a rigorous internal process of evaluating the nature of the services to be provided, in order to determine whether GST is to be charged or otherwise. Where GST is not to be charged on account of the regulatory nature of the services, the MOF has to be notified so that the services can be added to the section 8(2A) gazetted list. If such a rigorous process is not followed and the regulatory services are not highlighted to the MOF for inclusion in the section 8(2A) gazetted list, then by default GST is chargeable for the new fees and charges on account of the 'blanket inclusion' tax treatment under the new section 8(2). Such a result, although legally correct, would be incorrect policy wise.

- 2) The other purpose of the Bill is to validate the GST collections made by public agencies before 7 March 2024 (the date of the first reading of the GST (Amendment) Bill 2024 in Parliament), other than the 18 fees identified by the MOF in its press release and which now appear in the Schedule of the GST (Amendment) Bill 2024. The Government has no doubt tried its best in identifying the regulatory services where GST has been wrongly charged and is making efforts to refund the GST. However, one cannot preclude that there may be pockets where GST has been wrongly charged but has not been discovered in the recent Government exercise. Clause 4(1) of the Bill seeks to validate such GST collections by deeming the GST 'to be and always to have been validly imposed as such tax'. Furthermore, clause 4(2) of the Bill is to provide that 'no legal proceedings may be instituted on or after 7 March 2024 in any court on account or in respect of any imposition of the sums mentioned in section 4(1) by the public agency'.



## Conclusion

The aspect concerning the charging of GST by the Government is not normally encountered by the GST practitioner in the private sector. Nevertheless, the above discussion of the GST (Amendment) Bill 2024 which has been introduced following the MOF press release on the GST wrongly charged, may provide a better understanding of the GST Act in general.

<sup>3</sup> See the Explanatory Statement to the GST (Amendment) Bill 2024, where it is stated that the extension of the application of GST to all the Government supplies is achieved by treating all taxable supplies made by public agencies as supplies made in the course or furtherance of a business.

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