

# Legal Commentary on the Voluntary Disclosure and Amnesty Program for Indirect Taxes

## In brief

As part of the Malaysian Budget 2022 speech last year, the Minister of Finance announced that it will introduce a special voluntary disclosure program for indirect taxes as part of concerted measures to increase tax revenue for the Malaysian Government. The guidelines<sup>1</sup> underpinning the foregoing program ("**Guidelines**") was recently published by the Royal Malaysian Customs Department ("**Customs**") with a notable inclusion of an amnesty element (discussed below) within the framework of the rebranded Voluntary Disclosure and Amnesty Program for indirect taxes ("**VA**").

For the business community in Malaysia, the VA is a reminiscence of the special voluntary disclosure program for direct taxes which was introduced in 2018 by the then Malaysian Government which has had mixed reactions from participating Malaysian taxpayers. This is primarily given the lack of guaranteed audit immunity on the disclosed compliance affairs and the potential domino effect that the voluntary disclosure may have on the participant's audit risks moving forward, which may neutralize any anticipated benefits.

Coupled with the higher collection<sup>2</sup> target announced earlier by Customs and our observed increasingly aggressive audit strategies deployed by Customs officials tasked with meeting the designated collection KPIs, interested businesses should carefully weigh any benefit that may arise from participating in the VA against any potential impact on its compliance profile and risk.

We set out below a summary of salient features of the VA, for your consideration:

## Scope of the VA

Under the Guidelines, the VA is only applicable to the following indirect tax areas:



**Import Duty**



**Export Duty**



**Excise Duty**



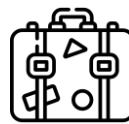
**Goods & Service Tax**



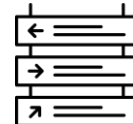
**Sales Tax**



**Services Tax**



**Tourism Tax**



**Departure Levy**

<sup>1</sup> [https://myva.customs.gov.my/GUIDELINE\\_VA\\_AS\\_AT\\_31\\_12\\_2021.pdf](https://myva.customs.gov.my/GUIDELINE_VA_AS_AT_31_12_2021.pdf)

<sup>2</sup> <https://www.thestar.com.my/aseanplus/aseanplus-news/2021/03/21/malaysian-customs-dept-targets-rm40bil-from-taxes-this-year>



**Wong & Partners' Comments #1:** Businesses should make two key preliminary assessments. First, businesses should assess what specific areas of non-compliance are covered within the VA. For example, does it cover anti-dumping duties or erroneous origin certification? Second, businesses will need to carefully consider whether its intended scope of disclosure would qualify for the VA. In particular, has the business conducted sufficient due diligence to assess all areas of non-compliance to ascertain the extent of non-compliance and the quantum of exposure at stake?

## VA categories

There are two categories of programs available under the VA, namely:

- **Voluntary disclosure program** - This subsumes disclosure of errors or non-compliances which are not known or have not been discovered by Customs at the time of disclosure.
- **Amnesty program** - This is available to companies who have been duly audited by Customs and have received a bill of demand from Customs.

Note that both programs only apply to any duty, tax, penalty, liabilities etc. outstanding on or before 31 October 2021. Any duty, tax, penalty, liabilities etc. which arose after 31 October 2021 will not qualify for the VA.

**Wong & Partners' Comments #2:** Understanding which of the two programs your business may qualify for is crucial as this determination affects the type and extent of concession that may be accessible by the business. This in turn may impact any strategic decision a business may need to make to mitigate its exposure in the most resource effective manner.

As a general rule of thumb, if a business has been audited and has received a bill of demand from Customs, it would only be able to qualify for the amnesty program. The amnesty program does not proffer incentives which are as attractive as those proffered under the voluntary disclosure program. Depending on the state of audit, businesses will need to critically assess all tactical strategies available to it to ensure that it is able to access the most favourable set of incentives available under the VA, especially bearing in mind the temporal limitations discussed below.

## VA incentives

The VA proffers three key financial incentive elements with varying degree of concession across two key phases as summarized in the table below:

Incentive	Phase 1 (1 January '22 to 30 June '22)	Phase 2 (1 July '22 to 30 September '22)
<b>Blanket remission on the amount of shortfall in taxes and duties payable</b>	Up to 30% remission for categories of non-compliances enlisted under the voluntary disclosure program  10% remission for circumstances encompassed under the amnesty program.	Generally, half of the remission rates offered under Phase 1.
<b>Blanket remission on any penalty or surcharge</b>	100%  (However, any outstanding penalty on a bill of demand issued on or before 31 October 2021 is only eligible for 90% remission rate)	50%  (However, any outstanding penalty on a bill of demand issued on or before 31 October 2021 is only eligible for 80% remission rate)
<b>Nominal compound payable on each identified offence</b>	RM 500 compound <u>per disclosure</u> where the total amount of duties and taxes payable is less than RM 100,000.  RM 1,000 compound <u>per disclosure</u> where the total amount of duties and taxes payable is RM 100,000 and above.	



**Wong & Partners' Comments #3:** The financial incentives proffered under the VA are contingent on when a participating business makes full payment of all outstanding duties, taxes and penalties etc. As an example, if a business would like to access the incentives offered under Phase 1, all outstanding duties, taxes and penalties must be paid to Customs latest by 30 June 2022. Please note that participating businesses are given the flexibility of making one lump sum payment or partial payments by instalment. Businesses should ensure that there is no cash-flow or liquidity issue prior to any disclosure in the event that the amount payable is a significant sum.

## Audit immunities

In addition to the foregoing financial incentives, we would highlight that Customs has stated in the Guidelines the following key audit immunities that will be granted to participants of the VA:

- **No audit on activity and period disclosed** - Customs will accept all disclosures in good faith and will not conduct audit or review for the activities and periods involved in the disclosure. This is unless there is strong evidence that the disclosures were made fraudulently.
- **1-year audit immunity** - All participants of the VA will be given 1 year audit immunity from 1 October 2022.

**Wong & Partners' Comments #4:** Businesses who have participated in the special voluntary disclosure program for direct taxes introduced back in 2018 may recall that the guidelines for the said program did not expressly contain similar audit immunity guarantees. The express provision of audit immunity in the Guidelines and the FAQs for the VA as well as similar verbal guarantees emphasized by senior management of Customs in our various interactions demonstrate efforts by the Malaysian Government to provide a certain degree of comfort to encourage the business community to participate in the VA. Businesses should nonetheless be careful and strategic in weighing the benefits from participating in the VA against any potential changes to its audit risk profile moving forward.

In addition to the audit immunity guarantees, please note that Customs has shared that any voluntary disclosures made via the VA will be kept confidential and this has been clarified in our interactions with Customs to mean that all information uncovered during the course of the VA will not be shared with other government agencies. This may be a particularly important point to consider in a larger scheme of things, especially in identifying the potential risk factors associated with participating in the VA.

Nothing is in absolute terms and a similarly cautious mindset should be adopted in approaching and dissecting the VA.

## What this means for you?

The VA has been touted through our various engagements with Customs as a special once-in-a-lifetime program for indirect taxes and it may present a golden opportunity for businesses to plug in on any indirect tax compliance gaps and start on a clean slate.

For business who have not conducted an internal due diligence to identify gaps in indirect tax compliance, it would be opportune to undertake this given the VA. Such due diligence should be undertaken thoroughly to ensure that the business has in view all potential exposure at stake which would then inform the management as to whether it would be worthwhile partaking in the VA. The due diligence process should be carefully managed and findings should be kept strictly confidential (ideally, legal privilege, which is a confidentiality protection accorded as a matter of law to lawyer-client communications, should be asserted) as this document would serve as a roadmap for Customs on the business' non-compliances in the event of an audit.

As for businesses who have already received a bill of demand from Customs, a strategic determination will need to be made to determine whether the concessions proffered under the VA would justify early resolution of any dispute with Customs. This will turn on a host of factors such as the amount of exposure at stake, the merits in defending the case, the likelihood of success, the ripple effect of disputing or not disputing the bill of demand etc. and a holistic assessment will need to be undertaken to determine the best course of action for the business.



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