RDS
ADVOCATES & SOLICITORS

Non-Reviewable Contracts In The Context Of Service Tax

1 August 2025

For more information, please contact:

Datuk D P Naban
naban@rdslawpartners.com

S Saravana Kumar
sara@rdslawpartners.com

Amira Azhar
amira@rdslawpartners.com

The Service Tax (Amendment) Regulations 2025 (Regulations) came into effect on 1.7.2025, where among others, Regulation 3(j) adds scope for service tax to include construction works under Group L.

Pursuant to Regulation 2, the definition of "construction works" includes the construction, extension, installation, alteration of buildings, roads, drainage, any electrical work and so forth.

In other words, effective from 1.7.2025, the provision of any construction works is subject to service tax at the rate of 6%. However, such services exclude the construction of residential buildings and public facilities related to residential buildings.

Non-Reviewable Contracts

By virtue of Section 34(3)(a) of the Service Tax Act 2018 (STA), a non-reviewable contract is exempted from service tax for a period of 1 year from 1.7.2025. The conditions to qualify as a non-reviewable contract are further clarified in the Service Tax Policy No. 3/2025 (Service Tax Policy No.3) issued by the Customs on 29.6.2025. The said conditions are:

(a) The service provider is a registered person for service tax;

(b) The contract does not contain a price revision clause or any value adjustment mechanism;

(c) The contract is made in writing, signed and duly stamped on or before 9.6.2025;

(d) The contract clearly states:

  (i) the type of service provided;

(ii) a fixed contract value (non-variable);

(iii) the contract duration; and

(e) The contract remains in force after 1.7.2025;

(f) If the contract includes a Variation Order (VO), the exemption is eligible until 30.6.2026 if:

(i) the variation relates to technical implementation and does not affect the overall contract value; and

(ii) the variation has been incorporated into the contract through a written document signed and duly stamped on or before 9.6.2025.

(g) If the contract includes an Extension of Time (EOT), the exemption is eligible until 30.6.2026 if:

(i) the EOT is based on the original contract that meets conditions (a) to (b);

(ii) the original contract value remains unchanged;

(iii) the original contract ends on or before 9.6.2025; and

(iv) the EOT document is signed and duly stamped before the expiry of the original contract period.

To date, the conditions set out in the Service Tax Policy No.3 have not been gazetted. While the Service Tax Policy No.3 does not, in itself, carry the force of law, it may nevertheless be referred to as a source of guidance.

In practice, due to the complex nature of engineering and construction contracts, it is often not possible to determine the full scope of work at the time of tender. Thus, it is common practice for these construction contracts to include a variation clause which allows for a change in the scope of work from what was originally contracted.

The concept of a non-reviewable contract first arose in the repealed Goods & Services Tax Act 2014 (GSTA). Section 187 of the GSTA provides that a taxable supply made pursuant to a contract with no opportunity to review may be treated as a zero-rated supply for a period of five years. Section 187 was enacted to deal with situations of contracts entered into prior to the implementation of the goods and services tax (GST) where the contracts are silent as to whether the GST can be passed by the supplier to the service recipient.

The High Court's decision in *Konsortium CMC Engineering Sdn Bhd – Colas Rail SA – Uni-Way Sdn Bhd v Ketua Pengarah Kastam, Jabatan Kastam Diraja Malaysia* [2023] 12 MLJ 393, which was later affirmed by the Court of Appeal, sheds some light on the principles in determining non-reviewable contracts.

Our firm's Tax, SST & Customs partner, S. Saravana Kumar and associate, Estine Lim Chinn Wei successfully represented the taxpayer in the *Konsortium CMC Engineering Sdn Bhd* case.

The *Konsortium CMC Engineering* Case

In *Konsortium CMC Engineering Sdn Bhd*, the taxpayer was a consortium formed by three companies to deliver the system works package for the Kelana Jaya Line Extension Project (Contract) by Prasarana Malaysia Berhad (Prasarana). The taxpayer took the position that the Contract is a "non-reviewable contract" under Section 187. Notwithstanding, based on the advice of the Director General of Customs (Customs), the taxpayer registered as a GST-registered person and issued tax invoices charging GST at 6%.

The Customs took the position that the existence of a variation order has opened up the opportunity to review the Contract, which was subject to 6% GST. The taxpayer disagreed with the Customs' position and subsequently, applied for a refund of the GST paid amounting to RM 26,729,336.11 pursuant to Section 57(1)(a) of the GSTA.

Aggrieved, the taxpayer filed a judicial review application against the Customs.

The case ultimately raised two key issues for determination:

(a) Whether the taxpayer was entitled to rely on Section 57 of the GSTA to claim a refund; and

(b) Whether the Contract constituted a contract with no opportunity to review under Section 187 of the GSTA?

The crux of the Customs' case:

(a) The taxpayer's refund application was denied on the basis that the taxpayer failed to submit a review application under Section 124(1); and

(b) The Contract did not qualify as a non-reviewable contract under Section 187 as the variation orders of the Contract provided a general review of consideration.

On the contrary, the taxpayer submitted that:

(a) Variation clauses are standard in construction contracts due to the technical nature and unpredictability of infrastructure projects. Such clauses allow for adjustments in design or the inclusion of supplementary works, not a general review of consideration. Any review of consideration was expressly prohibited under clauses 12 and 68.2 of the Contract, which state that:

> *"12. Sufficiency of Contract Price*
>
> *The Contractor shall be deemed to have satisfied himself as to correctness and sufficient of the Contract Price and of the prices stated in the Schedule of Prices which prices shall, subject only to the Clause of these Conditions of Contract which expressly entitle him to additional payment, cover all his obligations under and in relation to the Contract and all matters and things necessary for the proper design and Execution of the Works whether the same is expressly provided for in the Contract or is to be reasonably inferred thereform.*
>
> *...*
>
> *68. Payment*
>
> *...*
>
> *68.2 Unless otherwise expressly provided in the Contract, the Contract Price is a fixed lump sum price and shall not be subject to adjustment or recalculation should the actual quantities of the words, goods or materials supplied or performed differ from the Proposal or the Schedule of Prices..."*

(b) Relying on the Australian case of *MTAA Superannuation Fund (R G Casy Building) Property PTY LTD v Commissioner of Taxation* [2013] FCAFC, the taxpayer argued that a "general review of the consideration" entails a "complete or almost universal" review of the consideration or a review of "nearly all of the consideration".

(c) The taxpayer also referred to *Ketua Pengarah Kastam & Ors v George Kent – Lion Pacific JV & Anor* [2022] MLJU 1542, where the Court of Appeal held that a variation clause merely permits changes to the scope of work rather than a review of the original contract price. Any changes in the total consideration due to a variation would purely be incidental to the change of the scope of work pursuant to the variation. In addition, a variation clause does not provide for a general review of consideration and consequently, it does not disqualify the contract from being a contract with no opportunity to review.

The High Court's Decision

The High Court held that the Contract fell within the purview of Section 187 as a non-reviewable contract and accordingly should be treated as a zero-rated supply. The High Court arrived at this decision on the basis that the scope of variation was confined to design and supplementary works not included in the initial scope of the Contract. More importantly, the Contract also provides that the contract price was a fixed lump sum that was not subjected to adjustment or recalculation. Consequently, the taxpayer should not have been required to pay GST and was entitled to claim the amount erroneously paid.

The Court Of Appeal's Decision

The Court of Appeal reaffirmed that the variation clause in the Contract did not give rise to a review opportunity under Section 187. The court further held that all conditions under Section 187 were satisfied, and the Contract qualified as a zero-rated supply. Accordingly, the taxpayer was not required to charge or remit GST and was entitled to a refund.

Conclusion

The introduction of service tax on construction services under the SST regime marks a significant policy shift aimed at broadening the tax base. In navigating this change, the concept of a "non-reviewable contract" plays a critical transitional role, providing a limited window of relief for existing contractual arrangements.

The line between a reviewable and non-reviewable contract lies not in the presence of variation clauses, but in their purpose. As affirmed by the Court of Appeal, standard variation terms integral to complex construction contracts do not necessarily open the door to a review of consideration. As such, businesses must look to judicial interpretation to assess eligibility for the 12-month service tax exemption as non-reviewable contracts. As the SST framework continues to evolve, taxpayers must not only ensure contractual clarity but also monitor for official updates.

KUALA LUMPUR
Level 16, Menara 1 Dutamas No. 1, Jalan Dutamas 1, Solaris Dutamas, 50480 Kuala Lumpur
T: +603 6209 5400
F: +603 6209 5411
enquiry@rdslawpartners.com

PENANG
Suite S-21E & F21st Floor, Menara Northam No. 55, Jalan Sultan Ahmad Shah, 10050 Penang
T: +604 370 1122
F: +604 370 5678
generalpg@rdslawpartners.com

JOHOR BAHRU
8-35, Menara Delima Satu, Jalan Forest City 1, Pulau Satu, 81550 Gelang Patah, Johor Bahru
T: +607 585 6414
F: +607 509 7614
generaljb@rdslawpartners.com