

Transfer Pricing Country Summary Malaysia

September 2018

Legislation

Existence of Transfer Pricing Laws/Guidelines

The legal framework for transfer pricing is found in Section 140A, Malaysian Income Tax Act, 1967 (“the Act”) and Income Tax (Transfer Pricing) Rules 2012 (“the Rules”). The Inland Revenue Board of Malaysia (IRBM) issued the Transfer Pricing Guidelines (“the Guidelines”) on 20 July 2012, which replaces the one issued on 2 July 2003. Section 140A of the Act requires the application of arm’s length principle for controlled transactions between a person with his associated person, including cross-border and domestic transactions.

Definition of “Associated Person” and “Companies in the Same Group”

Section 140A(5) explains that a “transaction between associated persons” shall refer as a transaction between:

- (a) Persons one of whom has control over the other;
- (b) Individuals who are relatives of each other; or
- (c) Persons both of whom are controlled by some other persons.

In this regard, a person includes a company and the term “control” has been defined under Section 139 of the Act. With respect to corporations, pursuant to the Guidelines, two companies are associated companies with respect of each other, if:

- (a) one of the companies participates directly or indirectly in the management, control or capital of the other company; or
- (b) the same persons participate directly or indirectly in the management, control or capital of both companies.

The interpretation of related companies or companies in the same group (referred to in the context of holding and subsidiary companies) is provided under Section 2(4) of the Act,

“Where:

- (a) two or more companies are related within the meaning of section 6 of the Companies Act 1965;
- (b) a company is so related to another company which is itself so related to a third company;
- (c) the same persons hold more than 50% of the shares in each of two or more companies; or

(d) each of two or more companies is so related to at least one of two or more companies to which paragraph (c) applies,

all the companies in question are in the same group for the purposes of this Act.”

Corporations are deemed to be related to each other if a corporation:

- (a) is the holding company of another corporation;
- (b) is a subsidiary of another corporation; or
- (c) is a subsidiary of the holding company of another corporation, that first-mentioned corporation and that other corporation shall for the purposes of this Act be deemed to be related to each other.”

Transfer Pricing Scrutiny

Transfer pricing inspections are carried out by the Inland Revenue Board of Malaysia (“IRBM”) regularly. The areas of focus include provision of intra-group services, e.g. a management service fee is charged by parent company to its affiliates and cost allocation of the head office. In addition, a company with financial ratios and figures that are outliers to industry average, multinationals that report consistent losses while continue to expand operation can expect to be scrutinized from the tax authority. In addition, intra-group financing arrangements are also being examined. A transfer pricing audit can be conducted up to 7 preceding years.

Although transfer pricing documentations are only required to be submitted to the IRBM when requested, corporate taxpayers are required to disclose in their annual corporate income tax return (“Form C”) whether a transfer pricing documentation has been prepared for that particular year of assessment. The Guidelines set the minimum threshold referenced to the gross income or the amount of intra-group financing for the preparation of a comprehensive set of documentation aimed at reducing administrative burdens on companies, as follows: -

- A business with gross income exceeding RM 25 million, and the total value of related-party transactions exceeding RM 15 million;
- Where a person provides financial assistance, the Guidelines on financial assistance are only applicable if the value of the financial assistance exceeds RM 50 million;

Taxpayers who fall outside the above scope may opt to fully apply all relevant guidance as well as fulfill all transfer pricing documentation requirements in the Guidelines; or alternatively may opt to comply with simplified version of the transfer pricing documentation requirements under paragraph 11.2.4(a), (c) and (d) of the Guidelines only.

Transfer Pricing Penalties

As set out in the Guidelines on Transfer Pricing Audit Framework issued by the IRBM, depending on the quality of transfer pricing documentation, the penalty regime for understatement of income arising from transfer pricing arrangements are as follows:

Understatement or omission of income arising from transfer pricing arrangement	Penalty Rate		
	After audit commences	Voluntary disclosure after the case is selected for audit but before audit commences	Voluntary disclosure before selection for audit
Taxpayer did not prepare transfer pricing documentation	35%	30%	15%
Taxpayer prepared transfer pricing documentation but did not fully comply with the requirements under the Guidelines	25%	20%	10%
Taxpayer prepared a comprehensive set of documentation that complies with all the requirements set out in the Guidelines	0%	0%	0%
Non-disclosure (discovery during audit)	100% of tax undercharged		
Repeated offences	Increased by 20% for each repeated offence but not exceeding 100%		

Advance Pricing Agreement (APA)

APA came into effect from 1 January 2009. Application can be made for future transactions on unilateral, bilateral or multilateral basis for a period of minimum 3 years or maximum 5 years (with a possible renewal). The decision on whether the application is successful for unilateral APA generally takes between 6 to 12 months, whereas an application for bilateral or multilateral APA may take up between 1 to 2 years. Effective 1 January 2018, a non-refundable fee of RM5,000 will be charged for every application and renewal of APA pursuant to the Income Tax (Advance Pricing Arrangement) (Amendment) Rules 2017.

Documentation and Disclosure Requirements

Tax Return Disclosures

All intercompany transactions as well as ownership information during the reporting year must be disclosed, including:

- Total sales to related companies;
- Total purchases from related companies;
- Other payments to related companies;
- Lending to and borrowing from related companies; and
- Receipts from related companies.

Other than the above, taxpayers are required to declare in the corporate income tax return ("Form C") on whether a transfer pricing documentation has been prepared.

Level of Documentation

The information to be contained in the transfer pricing documentation includes:

1. Organizational structure
 - a. Worldwide organisation and ownership structure covering all associated persons whose transactions directly or indirectly affect the pricing of the documented transactions.
2. Company's organisation chart and a description of management structure. Nature of the business / industry and market conditions
3. Controlled transactions
4. Pricing policies.
5. Assumption, strategies and information regarding factors that influenced the setting of pricing policies
6. Comparability, functional and risk analysis
7. Selection of the transfer pricing method
8. Application of the transfer pricing method
9. Company's financial information (i.e. financial accounts)
10. Taxpayers should keep readily available documents and information that were used in preparing the transfer pricing documentation as they are necessary to support the transfer pricing analysis.

Effective 1 January 2017, Malaysia has introduced specific rules on country-by-country reporting requirements to facilitate the operation of mutual administrative assistance arrangement globally.

Record Keeping

Taxpayers are required to keep sufficient records for seven years from the end of the tax year to which any income from the business related to enable the tax authority to ascertain the income or loss from that business.

Language for Documentation

All relevant documentation should be in, or translated into, Malay or English.

Deadline to Prepare Documentation

To be considered as contemporaneous, the transfer pricing documentation should be prepared at the time of entering into the controlled transactions or for on-going transactions, by the date of filing the annual corporate income tax return (the deadline of which is 7 months after the last day of the basis

period, e.g. 31 July following the basis year if the basis year is the calendar year). The documentation does not need to be filed with the annual return to the IRBM.

Deadline to Submit Documentation

Upon request by the IRBM, taxpayers are required to submit their transfer pricing documentation to the IRBM within 14 days from the date of the letter.

Transfer Pricing Methods

The Malaysian legislation follows the recommendation of the OECD Guidelines. The following methods are acceptable:

- Comparable uncontrolled price method;
- Resale price method;
- Cost plus method;
- Profit split method;
- Transactional net margin method.

If none of the above is applicable, the taxpayer may apply other methods provided the prices arrived at is in accordance with the arm's length principle.

Comparables

Local Malaysian comparables are preferred and IRBM is not prepared to accept foreign comparables especially where such information is neither sufficient nor verifiable. Currently, foreign comparables do not meet the comparability factors of economic circumstances (i.e. geographic location of market, size of market).

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