



cutting through complexity

Global Transfer Pricing Review

Malaysia

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TAX



Malaysia

KPMG observation

The Malaysian tax authority has been very active in monitoring taxpayer's compliance with the applicable transfer pricing regulations. In addition to the introduction in 2014 of a new field in tax returns (Form C) which requires taxpayers to declare whether transfer pricing documentation has been prepared, the Malaysian Inland Revenue Board (MIRB) is now handing out "Transfer Pricing Awareness Survey" forms (TPAS) to selected taxpayers. The objective of the TPAS is to gauge the transfer pricing awareness of the selected taxpayer's local management.

Whilst the taxpayer may not need to have sound transfer pricing knowledge in completing the TPAS, local management needs to exercise due care when completing it. This is to avoid the MIRB misinterpreting the responses provided by local management, which may then impact the manner in which a transfer pricing audit is subsequently conducted.

The MIRB, in January 2015, published an article with the title "Base Erosion and Profit Shifting (BEPS) — A Malaysian Perspective." The MIRB is highly aware of the BEPS action plan and BEPS-related issues, and is endeavoring to combat base erosion and profit shifting out of Malaysia. The article outlined BEPS issues that are of significance in Malaysia, as well as the challenges faced by the MIRB in combating tax base erosion. The MIRB has also been actively attending OECD working party meetings as observers from developing countries.

The MIRB recently issued Mutual Agreement Procedure (MAP) Guidelines. The purpose of these guidelines is to provide guidance on obtaining assistance from the Malaysian Competent Authority (CA) to persons that fall within the scope of an effective Tax Treaty that Malaysia has with its Treaty Partners. This assistance is provided to taxpayers in order to try to resolve international tax disputes involving double taxation and inconsistencies in the interpretation and application of a Tax Treaty.

Transfer pricing study snapshot

The purpose of a transfer pricing study

	Applicable	Required to be contemporaneous	Thresholds apply/exist
Legal requirements	●	●	●
Protection from penalties	●		
Reduce risk of adjustment	●		
Shifts burden of proof	●		

Basic information

Tax authority name

Lembaga Hasil Dalam Negeri (Malaysian Inland Revenue Board or MIRB).

Citation for transfer pricing rules

The arm's length provision is set out in Section 140A of the Malaysian Income Tax Act 1967 (the Act). Section 140A requires taxpayers to determine and

apply the arm's length price for their transactions with an associated person for the acquisition or supply of property or services. Along with the introduction of Section 140A, the concept of thin capitalization was also introduced, but

implementation has been deferred until the end of December 2015.

Income Tax (Transfer Pricing) Rules 2012 (TP Rules 2012) were released to the public on 11 May 2012. The scope of TP Rules 2012 applies to the acquisition and supply of goods (including tangible and intangible goods), services between associated persons and intra-group financing. Both local and cross-border transactions are covered under TP Rules 2012.

Effective date of transfer pricing rules

- Section 140A became effective from 1 January 2009. Prior to this date, transfer pricing adjustments were made based on the general anti-avoidance provision.
- TP Rules 2012 are applied retroactively, from 1 January 2009.
- The transfer pricing guidelines issued in 2003 were revised in July 2012.

What is the relationship threshold for transfer pricing rules to apply between parties?

The scope of TP Rules 2012 applies to transactions between 'associated persons.' Generally, a relationship is deemed to exist if there is a shareholding relationship of more than 50 percent. However, the Malaysian transfer pricing guidelines also consider a relationship to exist if one party participates directly or indirectly in the management, control, or capital of the other party or the same person participates directly or indirectly in the management, control and capital of both companies.

What is the statute of limitations on assessment of transfer pricing adjustments?

The statute of limitation for non arm's length transaction is seven years upon the expiration of a particular year of assessment, except in cases of investigations, fraud, willful default, or negligence.

Transfer pricing disclosure overview

Are disclosures related to transfer pricing required to be submitted to the revenue authority on an annual basis (e.g. with the tax return)?

Yes. With effect from year of assessment 2014, taxpayers are required to declare in the annual tax return forms whether they have prepared transfer pricing documentation.

Besides that, the amount of transactions with associated persons are also needed to be disclosed in the annual tax return forms.

In July 2011, Form MNE [2/2012] (latest version being [4/2015]) was introduced by the MIRB to collect certain information from taxpayers relating to their cross-border transactions. This is issued only to selected taxpayers and aims to complement the information already disclosed in the annual tax returns.

What types of transfer pricing information must be disclosed?

The annual tax return forms require taxpayers to declare whether they have prepared transfer pricing documentation, as well as the disclosure of the amount of transactions with associated persons for the following type of transactions:

- sales to associated persons
- purchases from associated persons
- other payments to associated persons
- loans to/from associated persons; and
- receipts from associated persons.

On the other hand, the Form MNE [4/2015] can be segregated into four sections:

- general information
- particulars of transactions with foreign related companies
- particulars of financial assistance with foreign related companies
- other information including: (i) a declaration whether transfer pricing documentation has been prepared for the relevant year, (ii) a declaration of any business restructuring for the taxpayer and its related parties in the group during the year or the last five years (and to indicate the

relevant date if business restructuring took place), and (iii) an overall characterization of the company.

With regards to the TPAS, there are six different sections in total which require the taxpayer to rank the degree of their transfer pricing awareness:

- a) knowledge of transfer pricing taxation
- b) involvement of top management
- c) establishment of global transfer pricing policy
- d) determination of transaction price in view of transfer pricing methodologies
- e) communication with MIRB
- f) awareness of Mutual Agreement Procedure (MAP).

What are the consequences of failure to submit disclosures?

For disclosures which are an integral component of the annual tax return forms, failure to furnish information relating to the disclosures could render the annual tax return form as an incorrect return, which could result in a fine not less than 1,000 Malaysian ringgits (MYR) and not more than MYR10,000.

However, if the taxpayer defaults in furnishing the annual tax return forms, on conviction, could result in a fine not less than MYR200 and not more than MYR20,000.

Transfer pricing study overview

Can documentation be filed in a language other than the local language? If yes, which ones?

Yes. The documentation can be prepared in Bahasa Malaysia or English.

When a transfer pricing study is prepared, should its content follow Chapter V of the Organisation for Economic Co-operation and Development (OECD) Guidelines?

Yes, for all transactions.

Does the tax authority require an advisor/tax practitioner to have specific designation in order to prepare or submit a transfer pricing study?

Yes.

Transfer pricing methods

Does your country follow the transfer pricing methods outlined in Chapter II of the OECD Guidelines? If exceptions apply, please describe.

No. The transfer pricing methods outlined in Chapter II of the OECD Guidelines are applicable to Malaysia. However, the TP Rules 2012 provide that traditional transactional methods should be considered first before transactional profit methods.

Transfer pricing audit and penalties

When the tax authority requests a taxpayer's transfer pricing documentation, are there timing requirements for a taxpayer to submit its documentation? And if so, how many days?

Yes, 30 days.

When the tax authority requests a taxpayer's transfer pricing documentation, are there timing requirements for a taxpayer to submit its documentation? Please explain.

Documentation should be made available to the MIRB within 30 days from the date of request.

If an adjustment is proposed by the tax authority, what dispute resolution options are available?

Taxpayer can approach the dispute resolution panel (DRP) set up by the MIRB to resolve matters prior to court proceedings. With respect to the judicial system, the first level of the appeal is generally to the Special Commissioner of Income Tax through the submission of a Form Q.

If an adjustment is sustained, can penalties be assessed? If so, what rates are applied and under what conditions?

Transfer pricing adjustments made during a tax audit which result in additional tax payable will be subject to a general penalty rate of 35 percent of the additional taxes payable. A lower penalty rate of 25 percent will apply where transfer pricing documentation is prepared and nil where the transfer

pricing documentation meets the contemporaneous requirement.

To what extent are transfer pricing penalties enforced?

Always.

What defenses are available with respect to penalties?

The availability of a local contemporaneous transfer pricing documentation will assist taxpayers to appeal for a lower penalty rate. In addition, the MIRB will also take into account if the taxpayer has acted in good faith and fully cooperated during the tax audit.

What trends are being observed currently?

Transfer pricing audits have intensified and are expected to continue to intensify in Malaysia. In addition to the usual focus on transactions involving sales and purchases of goods, the MIRB is also increasing their scrutiny on payments for intra-group services as well as looking into intra-group financing arrangements and payments in relation to intangible properties.

Common audit triggers include companies exhibiting consistent losses, fluctuating profitability or those making very low profits. Companies with significant amounts of related party transactions, especially payments for intra-group services, royalties or intangible property and companies that have undergone supply chain or business restructurings are also likely to be selected for a tax audit.

Special considerations

Are secret comparables used by tax authorities?

No.

Is there a preference, or requirement, by the tax authorities for local comparables in a benchmarking set?

Yes, MIRB prefers to use local companies as comparables. The use of foreign comparable companies in a benchmarking analysis will most likely not be sufficient to convince the MIRB of the arm's length outcome.

Do tax authorities have requirements or preferences regarding databases for comparables?

In Malaysia, a local benchmarking analysis is carried out manually based on publicly available directories and by extracting financial accounts from the Companies Commission of Malaysia. At present, there are no good quality commercial databases for local companies.

Does the tax authority generally focus on the interquartile range in a TNMM analysis?

Yes, sometimes.

Does the tax authority have other preferences in benchmarking? If so, please describe.

Pursuant to TP Rules 2012, in determining the arm's length price, the comparison between a controlled transaction and uncontrolled transaction(s) shall be on a year-by-year basis. Further, for tax audit purposes, the MIRB often uses the median of the range as a starting point when evaluating whether related party transactions are at arm's length.

What level of interaction do tax authorities have with customs authorities?

Presently low, however, the MIRB and the Royal Malaysian Customs Department have signed a memorandum of understanding on joint audit, where auditors from both departments will work together.

Are there limitations on deductibility of management fees beyond the arm's length principle?

Yes, some. Management fees are generally deductible except for those relating to shareholder or custodial activities, duplicative services, services that provide incidental or passive association benefits and on-call services (note: the deductibility of on-call services can be reviewed on a case-by-case basis), or when taxpayers fail to provide evidence to support the receipt of management services and commercial benefits accrued to the local entity. The MIRB is intensifying their review on

payments for intra-group services during transfer pricing audits to determine whether the payments comply with the arm's length principle. The MIRB has been very strict and in many recent transfer pricing audits, companies are finding it difficult to produce sufficient and reliable evidence to justify the arm's length nature of their payments.

Are management fees subject to withholding?

Yes.

Are there limitations on the deductibility of royalties beyond the arm's length principle?

Yes. Other than arm's length principle, one shall also determine the benefits of paying such royalty. For example, should a taxpayer continue paying the same royalty rate for certain know-how or technology that was developed a number of years ago. If the dependence on the know-how or technology has reduced, the MIRB might disallow some portion of the claim on the royalty payment.

Are royalties subject to withholding?

Yes.

Are taxpayers allowed to file tax return numbers that differ from book numbers?

Yes. However, they may attract enquiries from MIRB and there are also indirect tax implications to be considered in respect of such adjustments.

Other unique attributes?

None.

Tax treaty/double tax resolution

What is the extent of the double tax treaty network?

Extensive.

If extensive, is the competent authority effective in obtaining double tax relief?

Sometimes.

When may a taxpayer submit an adjustment to competent authority?

Normally, a taxpayer may initiate a MAP if there is a risk of double taxation and there is a treaty agreement with the foreign counterparty. In most cases, this is after being issued the Notice of Additional Assessment.

May a taxpayer go to competent authority before paying tax?

Yes. The taxpayer is permitted to initiate a competent authority negotiation even before the issuance of the Notice of Additional Assessment and paying taxes. Once the Notice of Assessment/Notice of Additional Assessment is issued, the taxpayer needs to remit payment within 30 days; otherwise a penalty for late payment will be imposed.

Advance pricing agreements

What APA options are available, if any?

Unilateral, bilateral, multilateral.

Is there a filing fee for APAs?

No. At the moment, to encourage taxpayers to apply for APAs, no fees are imposed. However, taxpayers will bear any overseas traveling and accommodation expenses incurred by the Malaysian government in relation to bilateral or multilateral APAs.

Does the tax authority publish APA data either in the form of an annual report or through the disclosure of data in public forums?

No.

Are there any difficulties or limitations on the availability or effectiveness of APAs?

Not applicable.

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