

TRANSFER PRICING



What are the latest TP Developments in Malaysia?

1. Failure to Furnish Contemporaneous TP Documentation

With effect from 1 January 2021, a new Section 113B(1) of the Income Tax Act 1967 provides that where a company fails to furnish Contemporaneous TP Documentation upon request by the IRB, the taxpayer may be prosecuted and, upon conviction be subject to a fine of between RM20,000 and RM100,000 and/or imprisonment of up to 6 months.

This applies regardless of whether the company is taxable or not and the Court may still order the taxpayer to furnish the TPD within 30 days or such other period as the Court deems fit.

Where prosecution is not instituted, the taxpayer may nevertheless be subject to a penalty of between RM20,000 and RM100,000 per year of assessment for failure to submit the TPD.

2. Surcharge on the Transfer Pricing Adjustment

Previously, taxpayers would not be subject to penalties if a TP adjustment does not result in additional tax liability.

The new Section 140A(3C) provides that a surcharge of up to 5% will be imposed on all TP adjustments and this will apply irrespective of whether there is tax payable on the adjustment.

This new provision essentially closes the net on taxpayers who previously were not subject to TP penalties notwithstanding a TP adjustment as a result of unabsorbed tax losses, capital allowances, tax incentives, etc.

3. Submission of Transfer Pricing Documentation within 14 days of a request by the IRB

On 29 January 2021, IRB has updated the Malaysian Transfer Pricing Guidelines 2012 to provide that Transfer Pricing Documentation should be made available within 14 days (as opposed to the previous 30 days) of a request by the IRB.

This requirement will apply to transfer pricing audit cases which have commenced on or after 1 January 2021.

4. Power to Disregard the Structure in a Controlled Transaction

Pursuant to Rule 8 of the Malaysian TP Rules, the Director General ("DG") has the power to disregard and re-characterise the structure in a controlled transaction to reflect arm's length economic and commercial reality. The DG's power is now inserted into the principal legislation via Section 140A(3A) and 140A(3B) of the Income Tax Act 1967.

Section 140A(3A) further fortifies the DG's power to disregard a related party transaction if the DG is of the opinion that:

- i. The economic substance of the transaction defers from its form; or
- ii. The form and substance are the same but the transaction, viewed in totality, differs from those which would have been adopted by independent parties behaving in a commercially rational manner and the structure impedes the DG from determining the appropriate transfer price.

Under Section 140A(3B) the DG has the power to re-characterise the transaction to reflect the structure that would have been adopted by an independent person dealing at arm's length having regard to the economic and commercial reality.

5. Transfer Pricing Rules 2023 Compliance

The Ministry of Finance Malaysia issued the Income Tax (Transfer Pricing) Rules 2023 ("TP Rules 2023") on 29 May 2023 which is effective from year of assessment 2023.

This replaces the Income Tax (Transfer Pricing) Rules 2012 ("TP Rules 2012") which was issued in May 2012 and deemed to have come into operation on 1 January 2009.

Summarised below are the 10 key changes on the new TP Rules 2023:

1. Definition of Contemporaneous Transfer Pricing Documentation ("CTPD")
2. Information on Multinational Enterprise Group and Person's Business
3. Date on which the CTPD is completed
4. Indication of non-applicability of information, data or documents in the CTPD
5. Timeline to furnish the CTPD
6. Hierarchy in selection of the most appropriate TP method
7. Director General's power to review and replace the TP method
8. TP adjustment to the median if price is outside the arm's length range
9. TP adjustment to the median or any other point above median even if price is within the arm's length range
10. Definition of arm's length range

Our Transfer Pricing Service Offerings



Transfer Pricing Advisory & Value Chain Optimisation

Risk Assessment, including high-level review of inter-company business model and pricing arrangements to ensure alignment with transfer pricing requirements.

Value Chain Optimisation and Business Restructuring, is often an ongoing activity within a global business. It may involve centralisation of procurement, moving production to lower cost countries, relocating senior management or integrating acquisitions. Aligning transfer pricing outcomes with business changes and commercial imperatives is essential.



Documentation & BEPS / CbCR Compliance

Documentation Support, utilising latest technologies to assist in preparation of transfer pricing documentation to mitigate against penalties and comply with local regulations across multiple jurisdictions.

Complying with BEPS requirements, including CbCR reporting, is a necessary compliance burden which requires careful management and navigation from a global perspective. Global businesses may be required to prepare CbCR, master file, local file, specific country reports and notifications. In addition, businesses should carefully review, assess and address the risks and opportunities highlighted from these various transparency measures.



Financing, Debt Pricing and Earnings Stripping Rules

Financing and Debt Structures, including preparation of supporting documentation which can be used to support group positions in the face of challenge from tax authorities.

Earnings Stripping Rules, requires comprehensive analysis to bring certainty to complex financing structures on their tax treatment by tax authorities.



Transfer Pricing Implementation and Compliance Management Systems

Governance and Risk Management, to ensure there are systems and processes in place to manage transfer pricing risk and demonstrate good governance frameworks expected by tax authorities and Boards.



Dispute Resolution and APAs

Dispute Resolution, including audit defence, representation before tax authorities, mutual agreement procedures and negotiating outcomes.

Advance Pricing Agreements (APAs), assist in negotiation of unilateral or bi/multi-lateral APAs to increase tax certainty.

BDO IN MALAYSIA'S CONTACTS

Kuala Lumpur

Level 8
BDO @ Menara CenTARa
360 Jalan Tuanku Abdul Rahman
50100 Kuala Lumpur
Malaysia
T: +603 2616 2888
F: +603 2616 2970
E: bdo@bdo.my

Penang

51-21-F Menara BHL
Jalan Sultan Ahmad Shah
10050 Penang
Malaysia
T: +604 222 0288
F: +604 222 0299
E: bdopg@bdo.my

Johor Bahru

Suite 18-04 Level 18 Menara Zurich
15 Jalan Dato' Abdullah Tahir
80300 Johor Bahru
Malaysia
T: +607 331 9815
F: +607 331 9817
E: bdojb@bdo.my

Labuan

Suites 7 & 8 W Suites
1st Floor U0114
Jalan O.K.K. Awang Besar
87021 Wilayah Persekutuan
Labuan
T: +6087 412 278
F: +6087 413 148
E: bdolabuan@bdo.my

www.bdo.my

For further information, please contact our Transfer Pricing leaders below:

TAN CHIN TECK

Executive Director, Transfer Pricing
T: +603 2616 2926
E: tanct@bdo.my

MIDORI ASO

Director, Transfer Pricing
T: +603 2616 2891
E: midori@bdo.my

BDO Tax Services Sdn Bhd (114863-K), a Malaysian Limited Liability Company, is a member of BDO International Limited, a UK company limited by guarantee, and forms part of the international BDO network of independent member firms.

BDO is the brand name for the BDO network and for each of the BDO Member Firms.

Copyright © October 2023 BDO in Malaysia. All rights reserved. Published in Malaysia.