



TRANSFER PRICING

TURNING COMPLEXITY INTO
OPPORTUNITY

WHAT IS TRANSFER PRICING (“TP”) IN MALAYSIA?

Transfer pricing is an area which is drawing increasing scrutiny from the tax authorities in Malaysia. TP legislation was specifically introduced into Malaysia via Section 140A of the Income Tax Act 1967 (“ITA”) in 2009. This was followed by the Income Tax (Transfer Pricing) Rules 2012 (“TP Rules”) which were gazetted in 2012. With effect from 1 January 2009, Section 140A of the ITA requires that transactions with associated persons for the acquisition or supply of property or services be carried out on an arm’s length basis.

WHO SHOULD PREPARE TRANSFER PRICING DOCUMENTATION?

The TP Rules require that Malaysian entities which enter into transactions with associated persons to prepare contemporaneous TP documentation. This applies to both cross border as well as domestic transactions.

The Transfer Pricing Guidelines 2012 further clarify that the requirement for maintaining contemporaneous transfer pricing documentation under the TP Rules will be restricted to the following:

- for a person carrying on a business, where the gross income exceeds RM25 million, and the total amount of related party transactions exceeds RM15 million; or
- in relation to financial assistance, where such financial assistance exceeds RM50 million (the Guidelines do not apply to transactions involving financial institutions).

Taxpayers who do not meet the abovementioned thresholds are still subject to Section 140A, but the documentary requirements may not be so onerous.

WHEN SHOULD THE TRANSFER PRICING DOCUMENTATION BE PREPARED AND SUBMITTED?

TP Documentation does not need to be filed with the Inland Revenue Board (“IRB”). Rather such documentation must be prepared and kept by the taxpayer until a request is made by the IRB for the documentation. All documentation should be made available within 14 days upon request by IRB. In addition, with effect from year of assessment 2014, all taxpayers that enter into controlled transactions are required to indicate in the income tax return form (Form C) whether TP documentation has been prepared for the particular year of assessment.

HOW WILL THE TRANSFER PRICING DOCUMENTATION AFFECT YOU?

The recent increase in emphasis on higher revenue collections and the number of TP audit cases has put TP under the spotlight. The IRB has wide powers under Section 140A to substitute the price in respect of related party transactions to reflect an arm’s length price if the Director General (“DG”) has reason to believe that the transacted price is either less or greater than the arm’s length price.

Similarly, where the DG has reason to believe that the interest rate imposed or would have been imposed on a controlled financial assistance is not at arm’s length, he may make an adjustment to reflect the arm’s length rate or impute interest on the controlled financial assistance. Financial assistance includes loans, interest bearing trade credits, advances or debts and the provision of any financial security or guarantee.

WHAT ARE THE LATEST DEVELOPMENTS IN TP?

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.



HOW CAN WE HELP YOU TO PREPARE TRANSFER PRICING DOCUMENTATION?

TP documentation must be prepared to be in compliance with the Malaysian TP legislation, namely, Section 140A and the TP Rules. The preparation of TP documentation will also act as a risk management tool to minimise penalties, justify and defend the taxpayer's intercompany transactions in the event of a TP Audit.

OUR TRANSFER PRICING SERVICE OFFERINGS

Transfer Pricing Advisory & Value Chain Optimisation

Documentation & BEPS / CbCR Compliance

Financing, Debt Pricing and Earnings Stripping Rules

Transfer Pricing Implementation and Compliance Management Systems

Dispute Resolution and APAs

1

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.

2

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.

3

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.

4

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.

5

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.



YOUR CONTACTS IN BDO MALAYSIA



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Bernice is currently BDO's Transfer Pricing Group Leader in Malaysia and sits on BDO's global Transfer Pricing Centre of Excellence.

Bernice advises clients on transfer pricing matters, including transfer pricing planning and risk management, preparation of transfer pricing documentation in compliance to the Malaysia transfer pricing rules and guidelines, tax efficient supply chain management as well as controversy management.

Her recent experience involved appearing at the Special Commissioners of Taxation as an expert witness. In this landmark case, her testimony helped secure the Court's decision in favour of the taxpayer.

Bernice also sits in the Chartered Tax Institute of Malaysia's Transfer Pricing Technical Committee.

She is a co-author of "Guide To Transfer Pricing - Rules, Planning and Compliance Strategies" published by CCH and has spoken at various client seminars on topical issues such as Base Erosion and Profits Shifting and the OECD's TP Covid-19 Guidance.



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Chin Teck is a director in the Transfer Pricing Group of BDO in Malaysia.

He is a member of the Institute of Chartered Accountants in England and Wales (ICAEW), the ASEAN CPA and the Malaysian Institute of Accountants (MIA).

He advises multinationals investing locally and abroad across various industries on transfer pricing compliance and advisory issues.

Chin Teck is also experienced in audit, financial and tax due diligence, GST and accounting advisory. His diverse work experience enables him to help clients review, document, manage and defend their transfer pricing policies and processes.

This publication has been carefully prepared, but should be seen as general guidance only. You should not act upon the information contained in this publication without obtaining specific professional advice. Please contact BDO to discuss these matters in the context of your particular circumstances. BDO accepts no responsibility for any loss incurred as a result of acting on information in this publication.

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