50.

Malaysia

Introduction

Transfer pricing is a key area of focus for the Malaysian Inland Revenue Board (MIRB). Malaysian transfer pricing legislation and regulations are based on the arm's-length principle in the Organisation for Economic Co-operation and Development (OECD) Guidelines. Recent developments include the introduction of the Income Tax (Transfer Pricing) Rules 2012 (TP Rules 2012) and Income Tax (Advance Pricing Arrangement) Rules 2012 (APA Rules 2012) in May 2012, and the revised Malaysian Transfer Pricing Guidelines (Malaysian Guidelines) and Advance Pricing Arrangement Guidelines (APA Guidelines) in July 2012. The Malaysian Guidelines provide taxpayers with further guidance on the application of the arm's-length principle espoused in Section 140A of the Malaysian Income Tax Act, 1967 (MITA) and the TP Rules 2012, and the extent of documentation required to be maintained by taxpayers with related party transactions.

Given the focus by the MIRB, multinational companies (MNC) should ensure that their transfer pricing practices are consistent with the arm's-length principle, and that appropriate documentation is maintained as required under the TP Rules 2012 and Malaysian Guidelines.

Statutory rules

Legislative reference to transfer pricing in Malaysia can be found in Section 140A of the MITA, which was introduced on 1 January 2009. This provision is established to empower the Director General to make adjustments on transactions of goods, services or financial assistance carried out between associated persons based on the arm's-length principle.

The key provisions of Section 140A can be summarised as follows:

- Section 140A(2) requires that the arm's-length price be determined and applied where a person enters into a transaction with an associated person for the acquisition or supply of property or services.
- Section 140A(3) allows the Director General to substitute transfer prices that are not arm's length for any related-party property or services acquired.
- Section 140A(4) allows the Director General to disallow any interest, finance charge, or other consideration payable for losses suffered in respect of all excessive intercompany financial assistance in relation to fixed capital, thereby introducing the concept of thin capitalisation.

The TP Rules 2012 were introduced on 11 May 2012, with retrospective effect from 1 January 2009. The Rules apply to controlled transactions for the acquisition or supply of property and services, and specifically address the method and manner in which compliance with the arm's-length principle should be demonstrated.

Malaysia

The MIRB issued the revised Malaysian Guidelines on 20 July 2012. The revised Guidelines supersede the Guidelines previously issued in July 2003, and provide detailed guidance to taxpayers on how to comply with the requirements of Section 140A and the TP Rules 2012.

The salient features of the TP Rules 2012 and Malaysian Guidelines are further discussed in the following paragraphs.

Documentation requirements

The TP Rules 2012 require taxpayers to prepare contemporaneous transfer pricing documentation to justify the arm's-length nature of their related party transactions.

To comply with the contemporaneous documentation requirement under the TP Rules 2012, taxpayers should have transfer pricing documentation in place upon:

- developing or implementing a controlled transaction, and
- where the transaction is reviewed and there are material changes, the documentation should be updated prior to the due date for furnishing the tax return for that year of assessment (i.e. seven months after the taxpayer's financial year end).

Transfer pricing documentation is not required to be submitted with the taxpayer's tax return. However, the documentation should be made available to the MIRB within 30 days of the MIRB's request.

The TP Rules 2012 provide a list of documents required to comply with contemporaneous transfer pricing documentation requirements. The list, however, is not meant to be exhaustive, and the MIRB could request for more documents, depending on the specific circumstances of the taxpayer.

The list of documents required under the TP Rules 2012 is as follows:

- Organisation structure (including an organisation chart covering persons involved in the controlled transactions).
- Nature of the business/industry and market conditions.
- Details of the controlled transactions (e.g. parties involved, nature, terms and pricing).
- Assumption, strategies and information regarding factors that influenced the setting of pricing policies.
- Comparability, functional and risk analysis.
- Selection of the transfer pricing method.
- Application of the transfer pricing method.
- Documents that provide the foundation for or otherwise support or were referred to in developing the transfer pricing analysis.
- Index to the documents.
- Any other information, data or document considered relevant in determining the arm's-length price (such as official publications, studies, market research, technical publications, agreements and correspondence).

Further details on information that should be included in the transfer pricing documentation may be found in the Guidelines.

In the context of a transfer pricing audit or tax audit, the MIRB may also seek information from a treaty partner under the ‘Exchange of information’ article, which facilitates the process of reviewing a taxpayer’s compliance with the arm’s-length principle.

Scope of the Malaysian Guidelines
The Guidelines are applicable to controlled transactions between associated persons, where at least one party is assessable or chargeable to tax in Malaysia, i.e. cross-border and domestic related party transactions are within the scope of the Guidelines. The Guidelines also cover transactions between a permanent establishment (PE) and its head office or its other related branches.

Meaning of ‘control’ and ‘associated persons’
The Malaysian Guidelines refer to the definition of ‘control’ in Section 139 of the MITA, which defines control as both direct and indirect control. The Guidelines further refer to Section 2(4) of the MITA, where the definition of a related company is provided in the context of holding and subsidiary companies. A ‘controlled company’ is defined in Section 2(4) as one having not more than 50 members, and is controlled in the manner described by Section 139, by not more than five members.

The Guidelines have a wider definition of ‘associated companies’ than the MITA. Under the Guidelines, “two companies are associated companies with respect to each other if one of the companies participates directly or indirectly in the management, control or capital of the other company; or the same persons participate directly or indirectly in the management, control or capital of both companies”.

Thresholds
The Guidelines have introduced a threshold to ease the compliance burden on taxpayers. The thresholds are as follows:

- Gross income exceeding 25 million ringgit (MYR), and total amount of related party transactions exceeding MYR 15 million.
- For financial assistance, the Guidelines are only applicable if the financial assistance exceeds MYR 50 million. Financial assistance rendered by financial institutions (primarily covering banking institutions) is excluded from the scope of the Guidelines.

Taxpayers who fall beneath the thresholds may opt to provide a ‘condensed’ version of transfer pricing documentation under the Rules and Guidelines, and apply any method other than the five methods prescribed in the Guidelines (i.e. the OECD methods) to justify the arm’s-length nature of their related party transactions.

The Guidelines need not be applied to domestic controlled transactions, where it can be proven that any transfer pricing adjustments made under the Section 140A will not alter the total tax payable by both parties.

However, these thresholds do not apply to PEs.

Methods for determining the arm’s-length price
The TP Rules 2012 require taxpayers to determine their transfer prices in accordance to the five methods prescribed under the OECD Guidelines:

- Comparable uncontrolled price (CUP).
- Resale price method.
- Cost plus method.
- Profit split method.
- Transaction net margin method (TNMM).

The TP Rules 2012 and Malaysian Guidelines state a preference for the traditional transactional methods (i.e. the first three methods). Transactional profit methods (i.e. the profit split method and TNMM) should be applied only when the traditional transactional methods cannot be reliably applied. However, in any given case, the most appropriate method (i.e. the method that requires the least adjustments and provides the most reliable measure of the arm's-length price) should be selected.

The MIRB may accept any method other than the prescribed methods, provided that the method provides results in accordance with the arm's-length principle.

Comparability analysis

Comparability factors

A comparability analysis is required in the application of all transfer pricing methods. An uncontrolled transaction is deemed comparable if the following attributes of the controlled transaction and uncontrolled transaction are sufficiently similar, or reasonably accurate adjustments can be made to eliminate any differences:

- Characteristics of the property or services.
- Functions performed, assets employed and risks assumed.
- Contractual terms.
- Economic circumstances.
- Business strategies.

Tested party

In performing a comparability analysis, the MIRB does not accept foreign tested parties where information is neither sufficient nor verifiable.

Comparable period

The arm's-length price should be determined by comparing the results of the controlled transactions with the results of uncontrolled transactions on a year-on-year basis.

The period used should be comparable e.g. when assessing the results of a tested party for the financial year ended 31 March 2010, data for the financial year 2009 for a comparable company with a financial year end of 31 December would be more comparable than data for the financial year 2010.

Arm's-length range

The MIRB refers to both the range, and point in a range, that will provide the most reliable estimate of an arm's-length price. In practice, the MIRB generally uses the median as reference of the arm's-length price.

Separate and combined transactions

Transfer prices should ideally be set on a transaction-by-transaction basis. However, the Guidelines recognise that where transactions are so closely linked (or continuous) that they cannot be evaluated on a separate basis, determination of transfer pricing based on bundled transactions may be considered. In such cases, the Guidelines require taxpayers to demonstrate that it is normal industry practice to set one price for a combination of transactions, or that there is insufficient reliable data to set the price for each transaction individually.

It is generally accepted that group intangibles associated with the product or service provided cannot be disaggregated and are bundled into a packaged deal with all associated costs being included in the price of the product. As such, it is reasonable to assess the arm's-length nature of related party transactions in such instances on a consolidated basis.

Re-characterisation of transactions
Under the TP Rules 2012, the MIRB may re-characterise a controlled transaction where:

- the economic substance of the transaction differs from its form, or
- when viewed in totality, the arrangements made in relation to the controlled transactions differ from that which would have been adopted by independent persons behaving in a commercially rational manner.

Losses
Taxpayers are expected to maintain contemporaneous documentation to justify that losses incurred are commercially realistic, and is not a result of their controlled transactions.

Business restructuring
The MIRB recognises that it is commercially rational for a multinational group to restructure in order to obtain tax savings. However, a reduction in profits is acceptable only if the taxpayer is able to justify that there is a reduction in the level of functions performed, assets employed and risks assumed. As such, taxpayers undertaking business restructuring exercises should ensure that defence documentation is prepared to justify a reduction in profits.

Specific transactions
The TP Rules 2012 and Malaysian Guidelines provide specific requirements when applying the arm's-length principle in relation to the following specific transactions.

Intra-group services
The MIRB regularly scrutinises payments of management fees/intra-group service fees to parent companies or affiliates. Under the TP Rules 2012, taxpayers with intra-group service fee payments are required to justify:

- that intra-group services have been rendered, and that the taxpayer has received the benefits from these services, and
- that the charge for the intra-group services is at arm's length.

The TP Rules 2012 also state that an intra-group services charge will be disregarded if it involves:

- shareholder activities
- duplicative services
- services that provide incidental benefits or passive association benefits, and

- on-call services.

The Guidelines further clarify the exclusion of on-call service charges, by stating that there are exceptional circumstances where on-call services could be considered as chargeable services. However, it must be proven that an independent person in comparable circumstances would incur the charge to ensure the availability of such services when the need for them arises.

The Guidelines state a preference for the direct charge method when charging for intra-group services. However, where the direct charge method is impractical, the indirect charge method may be used. Taxpayers should ensure that the allocation key used is appropriate to the nature and purpose of the intra-group service. The analysis undertaken in arriving at the choice of allocation key(s) must be documented.

The MIRB will not accept sales as an allocation key, unless the taxpayer can justify the correlation between sales and the costs incurred in providing the service/benefits derived from the service.

Cost contribution arrangements (CCA)
Cost contribution arrangements (CCA) are defined under the Guidelines as a framework agreed among business enterprises to share the costs and risks of developing, producing and obtaining assets, services or rights, and to determine the nature and extent of the interests of each participant in those assets, services or rights.

In practice, if a service arrangement does not result in any property being produced, developed or acquired, the principles for dealing with intra-group services will apply even if the arrangement has been described as a CCA.

Allocation of costs in a CCA must be made at arm's length. In addition, where there is an entry, withdrawal or termination by a party in a cost contribution payment, there should be payments made to the relevant parties based on the arm's-length value of the transferred interest/reallocation of interests in the cost contribution arrangement.

Intangible properties
Where the legal ownership of the intangible does not vest with the person who developed the intangible property, the developer should receive an arm's-length consideration for the development of such property. Under the Guidelines, this could be in the form of a cost reimbursement plus an arm's-length mark-up, or lump-sum compensation equal to the value of the intangible property if the developer bore all the expenses and risks associated with the development.

Where the person who is not the owner of a trademark or trade name undertakes marketing activities (and bears the costs and risks associated with these activities) in excess of an independent comparable person, the person should be entitled to an arm's-length share of the intangible-related returns from the owner of the trademark or related intangibles.

Intra-group financing
Under the TP Rules 2012, the MIRB may impute/adjust the interest rate on intra-group financing transactions if the interest rate is not at arm's length. The Guidelines consider the CUP method to be the most reliable method to determine the arm's-length interest rate. When determining the arm's-length interest rate, appropriate indices such as the

Kuala Lumpur Inter Bank Offered Rate (KLIBOR), prime rates offered by banks and/or specific rates quoted by banks for comparable loans can be used as reference points. Adjustments are then required on those rates to arrive at the arm's-length interest rate applicable to the intra-group financing transaction under review.

Legal cases

No legal cases concerning transfer pricing have been decided by the courts to date. However, there are cases currently being heard by the courts. Most of the cases involving disputes on transfer pricing issues have been settled out of court, and the details have not been published.

Burden of proof

Under the Self-Assessment System, the burden of proof lies with the taxpayer to clear any alleged non-compliance with transfer pricing legislation. The intention of the Rules and Guidelines are to assist taxpayers in their efforts to determine arm's-length transfer prices and at the same time comply with the local tax laws and the administrative requirements of the MIRB.

In this connection, upon a tax audit or enquiry, taxpayers must be able to substantiate that their transfer prices have been determined in accordance with the arm's-length principle as prescribed under the TP Rules 2012 and Malaysian Guidelines.

Tax audit procedures

Form C

In submitting their annual tax returns (i.e. Form C for companies), all taxpayers that have transactions with their related parties are required to complete Section N to declare their related party transactions for the year in the following categories:

- Total sales to related companies in Malaysia.
- Total sales to related companies outside Malaysia.
- Total purchases from related companies in Malaysia.
- Total purchases from related companies outside Malaysia.
- Other payments to related companies in Malaysia.
- Other payments to related companies outside Malaysia.
- Loans to related companies in Malaysia.
- Loans to related companies outside Malaysia.
- Borrowings from related companies in Malaysia.
- Borrowings from related companies outside Malaysia.
- Receipts from related companies in Malaysia.
- Receipts from related companies outside Malaysia.

In addition, if the taxpayer is a controlled company, it must disclose the details of its five main shareholders in Part P of Form C. The information provided is used as one of the resources by the MIRB in deciding whether the company is a potential target for a transfer pricing audit or tax audit. As the disclosure of related party transactions is part of the taxpayer's income tax return, failure to properly disclose information on its related party transactions could result in an incorrect tax return.

MNE and JCK Forms

The MIRB issued the Form MNE (Pin 2/2012) (MNE Form) and Form JCK (TP/1/2011) (JCK Form) in July and December 2011. The MNE Form addresses cross-border related-party transactions, while the JCK Form addresses domestic related-party transactions.

These forms are sent to selected taxpayers and are generally required to be completed within 30 days. The MIRB generally requests for completion of the MNE and JCK Forms for the last two to three years of assessment. These forms enable the MIRB to use a more targeted approach in identifying taxpayers for audits based on the complexity of their related-party transactions, and the level of compliance with transfer pricing legislation (e.g. availability of contemporaneous transfer pricing documentation). The Forms require taxpayers to disclose the following information:

- Information on related parties (names and locations of holding company, ultimate holding company and subsidiaries, and names of Malaysian affiliates).
- Quantum of related-party transactions (sale and purchase of finished goods, materials and other assets, receipt or payment of royalties/licence fees, receipt or payment of management fees, receipt or payment of research and development fees and other service fees, rental or leasing of assets, receipt and payment of interest and guarantee fees, and any other related-party transaction).
- Quantum of interest bearing loans and trade credit provided/received, and quantum of interest free loans provided/received. In addition to amounts borrowed or loaned during the year, the closing balance as at year end is also required to be disclosed.
- Characterisation of business activity (e.g. toll, contract or full-fledge manufacturer).
- Industry code which is relevant to the taxpayer.
- Whether the taxpayer has prepared transfer pricing documentation for the relevant year.

Selection of companies for audit

The Multinational Tax department in the MIRB principally focuses on four segments, namely, transfer pricing desk audits, transfer pricing field audits, advance pricing arrangements (APAs)/mutual agreement procedures (MAP) and transfer pricing policy-making. The selection of taxpayers for a transfer pricing audit is normally undertaken by the team located in the MIRB headquarters.

Transfer pricing/tax audits can be triggered by a number of factors, including:

- Information disclosed in Form C.
- Information disclosed in the MNE and JCK Forms.
- Outstanding tax enquiries.
- Sustained losses.
- Use of tax havens.
- Comparison of various financial ratios achieved by a similar company within the same trade or industry.
- Fluctuations in profits from year to year.
- Desk audit referrals.
- Company's past compliance record.
- Third-party information.
- Company is in a specific industry currently targeted by tax authorities.
- Company is in the process of liquidation.
- Company has not been tax audited in the past six years.

Other relevant information from public sources, such as newspaper reports, can also trigger audits.

The provision of information and duty of the taxpayer to cooperate with the tax authorities

Pursuant to the MITA, the taxpayer must keep and retain in safe custody sufficient records for a period of seven years from the end of the year to which any income from that business is related. This enables the MIRB to readily ascertain income from the business for each year of assessment or the adjusted loss from the business for the basis period for any year of assessment.

The MIRB has the right of full and free access to all buildings, places, books, documents and other papers for the purposes of enforcing the provisions of the MITA. The MIRB may make requests for information with which the taxpayer must comply with within a negotiated time frame.

The audit procedure

As part of the Self-Assessment System, the MIRB is expected to carry out tax audits, including transfer pricing audits, on taxpayers. One distinguishing factor under the Malaysian regime is that the transfer pricing review process tends to be carried out in conjunction with a field audit, whereby there is greater scrutiny of transactions, as opposed to the practice in other established countries where documentation review is generally carried out via a desk audit.

Desk audit

The transfer pricing audit process is generally initiated by a request for financial and management information, such as statutory accounts, tax computations, management accounts and transfer pricing documentation. The MIRB carries out a review of these documents and decides whether a more detailed review is required.

In straightforward cases, the MIRB corresponds with the taxpayer or requests a meeting to discuss any issues and work towards a closure of the case.

Field audit

If the MIRB's initial findings from the desk audit review warrant a field visit, the MIRB informs the taxpayer accordingly of the purpose of its visit, the officers who will carry out the audit process, the duration of the visit and the documents that need to be made available for their review. Generally, field audit visits are carried out by four to six tax officers within a one-week period. The officers examine any financial documents, supporting documents and agreements that are linked to a taxpayer's business operations. As part of the field visit, the officers also conduct interviews with the key personnel of the taxpayer's business to have a better understanding of the functional and risk profile of the company and the pricing basis adopted. At the end of the field audit, the MIRB summarises its initial findings and arranges for a follow-up meeting at its office to discuss the case.

The MIRB is cognisant of taxpayers' concurrent business obligations; therefore, the process is fairly structured, with a reasonable timeframe provided for the submission of documents and information.

Revised assessments and the appeals procedure

If a taxpayer is not satisfied with a transfer pricing adjustment or assessment, the available avenues of appeal mirror the normal tax appeal procedures. To appeal, the taxpayer must file an appeal with the MIRB within 30 days of receiving the Notice of Assessment. This culminates in the MIRB agreeing to the appeal or routing the matter to the Special Commissioners. Failing at that level, the ultimate decision resides in the High Court (or Court of Appeal) if the taxpayer or the MIRB so desire to proceed to such authority.

Before proceeding with the appeals process, the taxpayer is required to pay the assessed tax and penalties within 30 days of receiving the Notice of Assessment.

An alternative avenue available to taxpayers via the double-taxation treaties is the MAP which is a mechanism that caters to equitable tax treatment on transactions that involve multiple tax administrations. In some instances, MNCs recognise the need for the use of this type of dispute-resolution procedures to ensure the elimination of double taxation. Currently, Malaysia has concluded 70 double-tax agreements globally.

Additional tax and penalties

There are no specific provisions for non-compliance with Section 140A or the TP Rules 2012. The Guidelines, however, specify the penalty rates applicable on additional tax payable resulting from transfer pricing adjustments under different circumstances. The penalty rates are summarised below:

Penalty structure

	Penalty rate
If there is no contemporaneous transfer pricing documentation	35%
If transfer pricing documentation is prepared, but not according to requirements in the Guidelines	25%
If taxpayer does not fall under the scope of the Guidelines, and has not prepared contemporaneous transfer pricing documentation	25%

Resources available to the tax authorities

The MIRB has a dedicated department, i.e. the Multinational Tax department that specialises in transfer pricing audits. This has been further enhanced with the setting up of separate transfer pricing teams in the various tax audit assessment branches of the MIRB across the country.

With the additional disclosure information requested in Parts N and P of the Form C, and the MNE and JCK Forms, the MIRB has the information to make a reasonable selection of companies for a tax or transfer pricing audit. Additionally, the MIRB digitises the information disclosed by companies in their tax returns. This electronic database of information allows the MIRB to effectively identify companies for audit, conduct trend analyses of a company’s results as well as benchmark the company’s performance against its industry.

The majority of the tax officers are experienced in handling tax investigations and tax audits. The officers are continually updating their knowledge through dialogues with other tax administrations in the region, in addition to attending and participating in training sessions conducted by foreign and international tax authorities/bodies, such as the OECD.

Use and availability of comparable information

Tax authorities

The MIRB generally obtains comparable information from their internal database. Each year, companies are required to submit their tax returns and other associated work papers to the MIRB. This forms part of the comparable information available to the tax authorities, in addition to information obtained from other tax audits performed in the taxpayer's industry and via the information disclosed in the MNE and JCK forms.

Taxpayers

As a starting point, the taxpayer should determine whether internal comparable information can be found within the company. In the event internal comparable information is unavailable, the MIRB expects companies to carry out an external comparable study using local comparables. Foreign comparables will be considered by the MIRB only if the taxpayer is able to provide persuasive evidence as to the unavailability of local comparables.

The search for potential local comparables can be carried out using public directories and databases. Most Malaysian companies (private and public), except for exempt private companies, are required to lodge their statutory financial statements at the Companies' Commission of Malaysia (CCM). Information at CCM is available to the public. The process of retrieval of such information is done manually and is therefore time consuming.

Risk transactions or industries

No particular industry is more at risk to being tax audited than another. Past experiences indicate that the MIRB generally targets a particular industry or industries for a certain period of time, due to the similarities in issues generally faced by companies in a specific industry.

The tax authorities are beginning to focus on the following related-party transactions as part of their audit selection:

- Sales and purchases of goods, assets and services.
- Transfer and use of know-how, copyrights and trademarks.
- Advertising and marketing activities which indicates development of marketing intangibles locally.
- Financial assistance.
- Cost-sharing arrangements.
- Intra-group management and administrative services.
- Unusual economic transactions and arrangements.
- Research and development expense allocation.
- Sale, purchase and other commission payments.

Other issues that may alert the tax authorities include:

- Reduction of profits in a post-tax holiday period.
- Losses made on the sale of products or assets to related companies.

- Physical delivery of goods and invoicing to customers that are performed by different group companies located in different tax jurisdictions.
- Consistent losses or very low profits compared with other independent comparables.
- Constantly fluctuating profit margins.
- Significant differences in sales or purchase prices on transactions between related companies and independent third parties, frequent changes in prices on transactions between related companies.

Limitation of double taxation and competent authority proceedings

In addition to the limited agreements dealing with the taxation of international traffic of ships and aircraft, Malaysia has a fairly extensive network of comprehensive double tax agreements modelled on the OECD convention.

Most Malaysian treaties have the automatic relief, and this is a standard article – not a limitation issue. Malaysia's treaties generally contain an 'Associated Enterprise' article and a MAP article.

Advance pricing arrangements

The APA process in Malaysia needs to be initiated by a request from a taxpayer for a unilateral, bilateral or multilateral APA.

The MIRB is now encouraging taxpayers to apply for an APA. The APA Rules 2012 were introduced on 11 May 2012, and the APA Guidelines were issued by the MIRB on 20 July 2012 to provide further guidance to taxpayers on the APA process in Malaysia.

There are a few APAs currently in negotiation with the tax authorities. APAs in Malaysia are currently largely focused on unilateral APAs, but the MIRB highly encourages applications for bilateral/multilateral APAs.

Applicants and scope

A taxpayer with cross-border related party transactions may apply to the MIRB for an APA under Section 138C of the MITA. This includes companies, partnerships, individuals, corporation soles and permanent establishments.

Thresholds

The MIRB will consider an application for an APA only if:

- the taxpayer is assessable to tax under the MITA
- the taxpayer has a turnover exceeding MYR 100 million
- the value of the proposed covered transaction is i) for sales, exceeding 50% of turnover, ii) for purchases, exceeding 50% of total purchases, or iii) for other transactions, if total value exceeds MYR 25 million
- all covered transactions must relate to chargeable income, and
- for financial assistance, the value of financial assistance must exceed MYR 50 million.

Process

The APA application process in Malaysia consists of five stages: pre-filing meeting(s), formal submission, processing of the APA, signing of the APA, and filing of annual compliance reports.

Pre-filling meeting

A written request for a pre-filing meeting must be made to the MIRB 12 months prior to the commencement of the proposed period of the APA via Form APA 1 (Pin 1/2011) for a unilateral APA application or Form 2 (2011) for a bilateral APA application. Pre-filing meetings are held between the tax authorities and the taxpayer to discuss the feasibility of an APA. Issues that are discussed include:

- Nature of APA (unilateral, bilateral or multilateral).
- Nature and scope of proposed covered transaction(s).
- Proposed transfer pricing methodology and critical assumptions.
- Description of the proposed comparables and expected range of results.
- Period of the APA.
- Documentary requirements.
- Extent of information required.
- Possible need for an independent expert.
- Roll-back.
- Possible costs involved.
- Taxpayer's obligations as a result of the APA.
- Other relevant issues.

The written request for a pre-filing meeting must include submission of the taxpayer's contemporaneous transfer pricing documentation covering the following:

- Names, addresses and tax file references of the taxpayer and other parties to the proposed APA.
- Proposed covered transaction.
- Period covered by the APA.
- Details of the taxpayer (ownership structure, organisation chart and operational aspects of the business).
- Nature of the taxpayer's business, industry environment and worldwide organisational structure.
- Functional analysis of each party to the covered transaction, details and analysis of the proposed transfer pricing methodology and its rationale.
- Information and analysis required to produce the arm's-length result for the covered transaction.
- Description of the critical assumptions, and the events taken into account when considering the said assumptions.
- Any other necessary information including proof of similar applications/ notifications by the taxpayer's related party for the application of a bilateral or multilateral APA.

The MIRB will notify the taxpayer of the outcome of the pre-filing meetings within 14 days from the last pre-filing meeting for a unilateral APA, and 30 days for a bilateral/ multilateral APA.

Formal submission
A formal submission must be lodged with the MIRB via Form APA 1 (Pin 1/2011) for a unilateral APA application or Form 2 (2011) for a bilateral APA application within two months of receiving the notification.

Processing and signing of the APA
Generally, the MIRB will conduct site visits in its process of analysing and evaluating an APA application. The MIRB will also request for meetings with all the parties involved to understand the facts and circumstances underlying the application, and to agree on the transfer pricing methodology to be applied. The taxpayer will be notified by the MIRB upon conclusion of the review process.

The time required to process an APA application varies from case-to-case. Unilateral APAs generally require six to 12 months to conclude, while bilateral/multilateral APAs may require one to two years.

Filing of annual compliance reports
The taxpayer is required to file annual compliance reports subsequent to the conclusion of an APA with the MIRB. The report should contain the following:

- Copy of the taxpayer's audited financials (and its related party for a bilateral/multilateral APA).
- Detailed report and analysis of the covered transactions.
- Description of any material changes in financial or tax accounting methods/principles employed for that year of assessment in respect of the covered transactions, or an affirmative statement to the contrary.
- Description of any failure and reasons for failure to meet a critical assumption, or a statement to the contrary and a statement as to the continued relevance of the critical assumptions.
- All relevant information and computations necessary to support the application of the transfer pricing methodology.
- Analysis of any compensating adjustments required and the relevant tax computations.
- Other items as may be appropriate to the particular circumstances of the taxpayer and the foreign entity (for a bilateral/multilateral APA).

The APA may be revised in the event that the taxpayer fails to meet any critical assumptions in the APA with both parties' consent. An APA may also be revoked in cases of non-compliance by the taxpayer, or if the taxpayer makes any misrepresentations, fraud, omissions or misleading or false statements.

Liaison with customs authorities
Information obtained by the income tax authorities is confidential and may not be exchanged with the customs authorities. However, copies of import/export documents on the taxpayer's business premises can be requested by the MIRB in the course of a tax audit.

OECD issues
Malaysia is not a member of the OECD. However, Malaysia has adopted the arm's-length principle and the transfer pricing methodologies endorsed by the OECD Guidelines.

Joint investigations

Malaysia would partake in a joint investigation of a multinational group with another country if both countries would benefit from the investigation. Joint investigations involving the Malaysian authorities have taken place in the past.

Thin capitalisation

Thin capitalisation was introduced via Section 140A(4), with effect from 1 January 2009. This provision allows the Director General to disallow any interest, finance charge, other consideration payable for or losses suffered in respect of all excessive related party financial assistance in relation to fixed capital. However, the MIRB has deferred the implementation of thin capitalisation rules until 31 December 2012.