In brief

Singapore issued subsidiary legislation under the Income Tax Act (the Act): “Income Tax (Transfer Pricing Documentation) Rules 2018” (2018 Rules), as well as the 5th edition Transfer Pricing Guidelines (5th Edn TPG) on February 23, 2018. The 2018 Rules codify transfer pricing (TP) requirements for the preparation of TP documentation (TPD) from Year of Assessment (YA) 2019 (financial year 2018). The 5th Edn TPG provides practical guidance on how these rules are to be applied. Additionally, new penalties and fines for non-compliance were introduced as part of the legislation package.

The detailed TP rules set out the powers of the Inland Revenue Authority of Singapore (IRAS) to enforce the arm’s-length principle and reinforce the importance of ‘getting one’s TP right’ for Singapore taxpayers.

In detail

2017 amendments

The Income Tax (Amendment) Act 2017 was passed into law in October 2017 (see our October 2017 Tax Insight). To recap, it introduced key TP amendments, including:

- A requirement to prepare contemporaneous TPD from YA 2019 for Singapore taxpayers with annual revenues more than SGD 10 million
- An increase in the penalties for not preparing contemporaneous TPD to SGD 10,000
- A five-percent surcharge on the amount of TP adjustments, which is automatically applicable unless waived by the IRAS
- Codification of the substance-over-form approach, where the IRAS is empowered to re-characterize transactions in certain cases.

TPD requirements under the new 2018 Rules and 5th Edn TPG

The 2018 Rules, which came into force on February 23, 2018, set out details of the contemporaneous TPD requirement from YA 2019 onward and other TP measures introduced as part of the Income Tax (Amendment) Act 2017.

Specifically, the 2018 Rules and the 5th Edn TPG clarify how the SGD 10 million threshold will be applied and how this interacts with the existing exemption criteria established in earlier TPG editions (see paragraph 6.18 of the 5th Edn TPG) in a multi-pronged test. To determine whether the new Singapore TPD legislation applies, taxpayers will have to assess — on an annual basis — a number of factors including:

a. Whether gross revenue exceeds SGD 10 million for the current basis period;

b. Whether qualifying TPD had been prepared for the previous basis period or the period before;

c. Whether gross revenue exceeds SGD 10 million for any of these two basis periods; and
Whether the intercompany transactions are exempted from contemporaneous TPD (these exemptions generally follow the past guidance).

Based on conditions (a) and (c), once contemporaneous TPD is required, taxpayers will be expected to continue to prepare TPD until their gross revenue falls below SGD 10 million for three consecutive periods. Refer to the example below for a company that receives non-routine services from its overseas related parties (see paragraph 6.14 of the 5th Edn TPG):

<table>
<thead>
<tr>
<th>YA</th>
<th>Gross revenue (SGD in millions)</th>
<th>Service fee paid (SGD in millions)</th>
<th>TPD required?</th>
<th>Explanation</th>
</tr>
</thead>
</table>
| 2019 | 12                             | 3                                 | Yes           | Either of the two conditions is met:  
|      |                                 |                                   |               | - Condition (a) is met as current-year gross revenue is more than SGD 10 million  
|      |                                 |                                   |               | - Condition (b) does not apply as section 34F is only effective from YA 2019 onwards |
| 2020 | 9                              | 3                                 | Yes           | Either of the two conditions is met:  
|      |                                 |                                   |               | - Condition (a) is not met as current-year gross revenue is less than SGD 10 million  
|      |                                 |                                   |               | - Condition (b) is met as TPD is required under section 34F for the basis period for YA 2019 |
| 2021 | 9                              | 3                                 | Yes           | Either of the two conditions is met:  
|      |                                 |                                   |               | - Condition (a) is not met as current-year gross revenue is less than SGD 10 million  
|      |                                 |                                   |               | - Condition (b) is met as TPD is required under section 34F for the basis period for YA 2020 |
| 2022 | 9                              | 3                                 | No            | Company is exempt from preparing TPD as its gross revenue is not more than SGD 10 million for the basis period and two immediate preceding basis periods |

Observation: The new rules have introduced additional parameters for assessing whether a taxpayer has contemporaneous TPD requirements and makes this process slightly more complex. The rules also introduce a ‘continuity principle’ to the preparation of TPD. Exemption for preparation of TPD is not available if the company's gross revenues drop temporarily under SGD 10 million.

**Application of the qualifying past TPD rules**

The 2018 Rules also formalized the administrative concession for the preparation of comprehensive TPD through the introduction of 'qualifying past TPD' and set out the conditions for this to apply. In summary, if the relevant facts and circumstances for the taxpayer generally are the same as in the prior basis period, i.e., the bulk of the analysis continues to be relevant (functional analysis, economic analysis), the taxpayer may rely on such 'qualifying past TPD' for up to two basis periods. In such cases, the taxpayer will need to issue a declaration that it is relying on qualifying past TPD for the given tax period, and attach the said TPD to it.

The taxpayer still will be required to prepare a financial analysis, as relevant for the given tax year, to verify the transactional and profit results.

Additionally, the IRAS has introduced transitional measures, as it will accept qualifying past TPD for periods before the 2018 Rules came into effect. Specifically, TPD prepared for YA 2017 can be accepted as qualifying past TPD for YA 2018 and YA 2019, provided it meets the requirements for group file/entity file information stipulated by the 2018 Rules and 5th
Edn TPG. Similarly, TPD prepared for YA 2018 can be used for YA 2019 and 2020. No earlier periods would be accepted under this measure.

More details and examples on how to apply the above rules are described in the 5th Edn TPG (see paragraphs 6.27 – 6.39 of the 5th Edn TPG). As there are now multiple parameters to consider, practical application of these rules will require careful case-by-case approach.

**Observation:** If the conditions are met, the positive news for taxpayers is (1) greater clarity that comprehensive TPD is required every three years; and (2) a declaration (with appropriate financial analysis) is sufficient for the intermediate years.

**Other key updates within 5th Edn TPG**

- **TP adjustments:** In alignment with the 2017 amendments to the Act, the 5th Edn TPG also sets out circumstances under which the IRAS will impose TP adjustments (as discussed in the October 2017 Tax Insight). Here, the IRAS provides examples on how it will practically administer such adjustments under the income charging provisions within the Act (e.g., when foreign sourced income is received in Singapore) (see 5th Edn TPG: Section 5.119).

- **Comparability analysis:** In line with the recommendations under the OECD BEPS Action Plans 8 to 10, the IRAS reiterates the importance of comparability analysis in a TP analysis and sets out a framework for such analysis. This framework refers to the importance of reviewing not only the contractual terms of an arrangement, but also the factual substance of the commercial or financial relations between the related parties and a comparison against the functional analysis and characteristics of goods/services/intangible property involved (see 5th Edn TPG: Sections 5.15 – 18).

- **Details on the required form and content of TPD to be prepared in Singapore (Second schedule):** Although Singapore has not formally adopted the OECD master file/local file requirements, the information required under the 2018 Rules is largely consistent with OECD principles. Instead of referring to group level and entity level information, the information required under Singapore’s TPD is focused on describing businesses relevant to the Singapore taxpayer. For Singapore taxpayers adopting the OECD master file/local file approach, the information contained in their TPD must be consistent with the Singapore TP requirements.

- **Date of TPD:** The new rules have clarified that the date when the TP reports were completed will need to be stated in the reports. Consistent with the past, the IRAS has reiterated that the TPD will only be considered contemporaneous if it was prepared before the tax return filing deadline.

- **Financial transactions:** The IRAS also introduced new guidance on refinancing loans, establishing that in such cases each loan will be viewed and analysed as a separate intercompany transaction (see 5th Edn TPG: Section 13.27). If a lender extends the tenure of an existing related-party loan or obtains a related-party loan to repay an existing loan (i.e., refinancing), the IRAS will consider that a new loan has been obtained as at the date of the refinancing or extension of the tenure. Hence, the taxpayer would need to perform a new interest benchmarking to establish the arm’s-length terms and interest for the new loan instead of relying on the transfer pricing analysis carried out for the original loan.

**Observation:** The above measures are a clear signal that the IRAS expects Singapore taxpayers engaging in intercompany transactions take the preparation of TPD seriously, and that it will enforce this requirement. As the consequences for non-compliance have increased significantly, getting this right and ensuring full compliance with the information requirements (including form of the TPD) have become much more critical.

**Further observations and implications to Singapore taxpayers**

By now, many taxpayers are aware that tax authorities globally have committed to share more information (e.g., through Country-by-Country reporting templates), have access to more data (e.g., through enhanced TPD rules, related-party disclosure forms), and have access to more data analytics capabilities. Increased tax transparency is anticipated to result in more cross-border disputes as tax authorities may seek access to the same profits.

The IRAS also has updated its TPG in line with international expectations of TP analysis. Taxpayers should consider the key points of analysis and considerations on which the IRAS (and other tax authorities) will focus in assessing how a group’s intercompany pricing compares to pricing between independent parties. More than before, the focus will be on substance over form. Taxpayers...
therefore should put in place robust tax and TP policies, appropriate TPD, and relevant supporting documentation in seeking to mitigate cross-border tax risks as part of good corporate governance.

Taxpayers also should increasingly consider whether supplementary and corroborative analysis around its value drivers and distribution of overall system profits may be useful as part of its overall tax risk and dispute management strategy.

**The takeaway**

This is the first time Singapore has rewritten its TP provisions since it initially legislated the arm’s-length principle under section 34D of the Act, and it marks a new era for TP enforcement and administration. This clearly signals the seriousness of the government in enforcing the arm’s-length principle in Singapore.

One of the most significant updates is the legislation of TPD requirements and the tenfold increase in penalties. For taxpayers who already have been complying with the TP requirements as stipulated in the earlier IRAS TPGs, this should not result in a significant increase in compliance requirements. Taxpayers also should welcome the added certainty resulting from the various clarifications (e.g., relating to the definition of contemporaneous, application of the various parameters for determining TPD requirements).

Taxpayers that have not followed past TP guidance should now revisit their approach to the robustness and timeliness of their TP compliance. Aside from the legislative requirements and penalties involved, robust TPD is key for articulating a taxpayer’s view on where value is created and how its TP policy is aligned with these principles.

**Let’s talk**

For a deeper discussion of how this issue might affect your business, please contact:

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