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New Rules on Transfer Pricing and Advance Pricing Arrangements

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The [Income Tax \(Transfer Pricing\) Rules 2023](#) (“TP Rules 2023”) and [Income Tax \(Advance Pricing Arrangement\) Rules 2023](#) (“APA Rules 2023”) were gazetted on 29 May 2023.



Income Tax (Transfer Pricing) Rules 2023

The TP Rules 2023 take effect from year of assessment (“YA”) 2023 and subsequent YAs. The Income Tax (Transfer Pricing) Rules 2012 will continue to apply for prior YAs.

The key changes introduced under the TP Rules 2023 are outlined below:

Key changes	Elaboration
<i>Definition of contemporaneous transfer pricing documentation</i>	<p>Transfer pricing documentation which is brought into existence prior to the due date for furnishing a return in the basis period for a YA in which a controlled transaction is entered into.</p> <div><p>PwC comments:</p><p><i>The revised definition removes the prior definition which includes documentation that is brought into existence at the point the transaction is developed or implemented. This provides clarity that documentation should be prepared and updated on an annual basis prior to the filing of the tax return.</i></p></div>
<i>Content of transfer pricing documentation</i>	<p>The TP Rules 2023 incorporate the detailed documentation requirements previously outlined under the Malaysian Transfer Pricing Guidelines, with the following key additions:</p> <ol style="list-style-type: none">Information on the Multinational Enterprise (“MNE”) Group for the relevant basis period<ol style="list-style-type: none">The MNE Group’s worldwide organisational structure that shows the location and ownership linkages among all entities in the MNE Group transacting with the Malaysian taxpayer.

Key changes	Elaboration
<i>Content of transfer pricing documentation (con't)</i>	<p>1. Information on the MNE Group for the relevant basis period (cont'd)</p> <p>b) a description of the MNE Group's businesses that are relevant to the business of the Malaysian taxpayer, including:</p> <ul style="list-style-type: none"> i. the MNE Group's businesses, products and services, geographic markets and key competitors; ii. the supply chains of those businesses, products and services; iii. the MNE Group's business models and strategies; iv. the business drivers of the MNE Group's business profit; v. the industry, market, regulatory and economic conditions in which the MNE Group operates in; vi. the business activities of each entity in the MNE Group and the functional analysis describing their contributions, including functions performed, assets used and risks assumed; and vii. changes to the MNE Group's structure through restructuring, acquisition or divestiture. <p>c) a description of the MNE Group's intangible property that are used in or applied to the Malaysian taxpayer including:</p> <ul style="list-style-type: none"> i. the strategy for the development, ownership and exploitation of intangible property in that basis period, including the location of research and development facilities and the location from which the research and development is managed; ii. a list of the intangible property and the names of the entities in the MNE Group that have legal ownership of those intangible property; iii. a list of agreements among the entities concerning the intangible property, including cost contribution arrangements, cost sharing agreements, research service agreements and licence agreements; iv. the MNE Group's transfer pricing policies relating to research and development and the intangible property; and v. any transfer of interests in the intangible property among the entities in that basis period, including the names of the entities and the countries they carry on businesses in, and the amount of compensation involved. <p>d) the MNE Group's financial activities that are connected to the business of the person in Malaysia, including:</p> <ul style="list-style-type: none"> i. the MNE Group's financial activities, including the MNE Group's inter-entity financial activities and financing arrangements with lenders who are not associated persons; ii. identification of any entity of the MNE Group that provides a central financing function for the MNE Group; and iii. a description of the MNE Group's transfer pricing policies relating to financing arrangements between associated persons.

Key changes	Elaboration
<p><i>Content of transfer pricing documentation (con't)</i></p>	<p>1. Information on the MNE Group for the relevant basis period (cont'd)</p> <p>e) Financial and tax position of the MNE Group:</p> <ul style="list-style-type: none"> i. the MNE Group's annual consolidated financial statements relating to the business of that person in Malaysia; and ii. a list and brief description of the MNE Group's existing unilateral advance pricing agreements ("APA") and other tax rulings relating to the allocation of income among countries. <div data-bbox="621 479 2456 788" style="background-color: #f9cb9c; padding: 10px; margin-top: 10px;"> <p>PwC comments: <i>The revised documentation requirements introduce content which was broadly covered under the master file only. This is a significant increase in documentation requirements for Malaysian taxpayers, as 1. Master file requirements which historically applied only to MNE Groups with consolidated revenues of EUR750 million / RM3 billion (whichever threshold is applicable) now applies to all taxpayers which cross the thresholds for full scope documentation; 2. Information which may not be readily accessible by the Malaysian taxpayer now has to be obtained and documented prior to filing the tax return for the relevant basis period.</i></p> </div>
<p><i>Requirement to date the transfer pricing documentation</i></p>	<p>2. Business information</p> <p>Information on the local taxpayer broadly replicates primary documentation and Cost Contribution Arrangement documentation requirements outlined under the Malaysian Transfer Pricing Guidelines.</p> <div data-bbox="621 1082 2456 1270" style="background-color: #f9cb9c; padding: 10px; margin-top: 10px;"> <p>PwC comments: <i>The Inland Revenue Board (IRB) currently accepts documentation which is submitted within 14 days of written request as 'contemporaneous'. This additional requirement further enforces the requirement to ensure contemporaneous documentation is prepared at the point of filing the tax return, failing which penalties ranging from RM20,000 to RM100,000 per YA may apply.</i></p> </div>

Key changes	Elaboration
<i>Indication of non-applicability</i>	<p>Taxpayers are now required to indicate if any of the prescribed information under the documentation requirements is non-applicable.</p> <p>PwC comments: <i>A ‘check-the-box’ approach is now required to ensure documentation requirements are fulfilled. What remains to be seen is the extent of penalty protection (in the form of a reduction / waiver of the surcharge applicable on transfer pricing adjustments) accorded to taxpayers who fulfil all requirements.</i></p>
<i>Data available at the point of preparation</i>	<p>Taxpayers shall determine an arm’s length price based on the most current information that is reasonably available at the point of determining the arm’s length price.</p> <p>PwC comments: <i>Additional clarification will need to be sought on the application of three-year weighted averages / latest year data to assess current year results, as comparable data would not be available at the point the documentation is prepared. Generally, there should be no expectation from the tax authorities that taxpayers revise documentation or transfer prices once finalised.</i></p>
<i>Selection of best method</i>	<p>The TP Rules 2023 effectively replace the hierarchy of methods with the best method approach outlined under the OECD Guidelines.</p> <p>The TP Rules 2023 also require taxpayers to provide an explanation and reasons as to why the method (and profit level indicator, if the TNMM [Transactional Net Margin Method] is applied) selected is considered to provide the best approximation of the arm’s length price.</p> <p>The Director General (“DG”) may replace the selected method with the most appropriate method if there is reason to believe that the selected method is not the most appropriate method.</p>
<i>Use of multi-year averages</i>	<p>The TP Rules 2023 allow reference to prior year data for the purposes of reviewing the impact of business cycles / life cycles to select comparables, but still require comparison of the taxpayers’ results against the comparables’ results for the same basis year.</p>

Key changes	Elaboration
Adjustment to an arm's length price	<p>The arm's length range is defined as a range of figures or a single figure falling between the value of 37.5 percentile to 62.5 percentile of the data set.</p> <p>PwC comments: <i>The TP Rules 2023 now provide clarity on the definition of the 'arm's length range' in a Malaysian context. Taxpayers should review their existing transfer pricing policies to ensure that transfer prices are at arm's length from a Malaysian perspective, as the range applied is a narrower range than the interquartile range adopted in many other jurisdictions.</i></p> <p>Where the transfer price:</p> <ul style="list-style-type: none">Falls within the arm's length range, such price shall be considered to be at arm's length;Falls out of the arm's length range, an adjustment shall be made to the median. <p>This is qualified by allowing to DG to adjust the transfer price to a median (or any point above the median and within the arm's length range) where there are comparability defects between the uncontrolled transaction(s) and tested transaction.</p> <p>PwC comments: <i>In addition to reviewing the transfer prices adopted based on the definition of the arm's length range as per the TP Rules 2023, it is also necessary to review the comparability of selected comparables, to ensure that a reliable arm's length range is arrived at; failing which, the DG still reserves the right to apply an arm's length price which is at least at the median of the range of comparable results.</i></p>



Income Tax (Advance Pricing Arrangement) Rules 2023

The APA Rules 2023 take immediate effect. The key changes introduced by the Rules are outlined below:

Key changes	Elaboration
Application	<p>Taxpayers who carry on cross-border transactions may apply for an APA, subject to the following:</p> <ul style="list-style-type: none">Where the counterparty is from a country which has a double tax agreement with Malaysia under section 132 of the Income Tax Act 1967 (“the Act”), the taxpayer may only apply for a bilateral APA or multilateral APA; orWhere the counterparty is from a country which does not have a double tax agreement with Malaysia, the taxpayer may only apply for a unilateral APA;For an arrangement under section 132 of the Act, a permanent establishment may apply for a bilateral APA or multilateral APA where such application shall be made on its behalf by its head office.
	<p>PwC comments:</p> <p><i>Taxpayers who wish to apply for an APA involving a counterparty in a jurisdiction which has a double tax agreement with Malaysia may now only consider a bilateral APA or multilateral APA. This may be a decision taken by the tax authorities in light of administrative considerations relating to potential Mutual Agreement Procedure (“MAP”) applications, in the event the tax authority in the counterparty’s jurisdiction disagrees with the findings of the APA.</i></p>



Key changes	Elaboration
<i>Request for pre-filing meeting</i>	<p>Taxpayers are now required to provide the following documentation and information in their request for a pre-filing meeting:</p> <ul style="list-style-type: none">• Transfer pricing documentation prepared in accordance with the TP Rules 2023;• Name, addresses and tax file references of the taxpayer and other persons involved in the proposed APA whether in Malaysia or outside Malaysia;• Proposed covered transaction;• Proposed period covered by the APA;• Description of the critical assumptions under which the proposed transfer pricing methodology will operate and the events that should be taken into account when considering the said assumption;• Financial statements and tax computations that are available at least for the latest three years prior to the application; and• A written indication whether the income in relation to the covered transactions is tax exempted by the other competent authority. <div data-bbox="621 746 2453 978"><p>PwC comments:</p><p><i>The extent of documentation required for the pre-filing meeting is now substantial and mirrors documentation typically requested for by the tax authorities after the pre-filing meeting and for the formal application. For newly established taxpayers with less than three years of operations, discussions may be held as to the stability of the taxpayer's business and proposed covered transaction, for the proposed period covered by the APA.</i></p></div>
<i>Timeline for submission of APA application</i>	<p>Taxpayers are now given 6 months (instead of 2 months) after receiving positive notification from the DG to submit the formal application.</p>

Key changes	Elaboration
<i>Application for rollback</i>	<p>A rollback may be allowed for not more than three YAs immediately preceding the covered period. If a rollback is granted, taxpayers are required to submit the revised tax computations for the relevant YAs within 30 days of the signing of the APA.</p> <div data-bbox="621 361 2453 515"><p>PwC comments: <i>The period of rollback was not specified in the Income Tax (Advance Pricing Arrangement) Rules 2012. In practice, the IRB has typically considered rollbacks for up to a period of three years.</i></p></div>
<i>Revocation of APA</i>	<p>The DG may now revoke the APA if the taxpayer fails to disclose any occurrence of voluntary disclosure, investigation, audit or incentive approval.</p>
<i>Fees</i>	<p>The fees payable for an APA application is now dependent on the speed in which the application is made.</p> <p>In respect of an application for a fresh advance pricing arrangement, a non-refundable application fee:</p> <ul style="list-style-type: none">A. of RM5,000 if the application is made within two months after receipt of the notification from the DG to proceed; orB. of RM10,000 if the application is made after two months but within six months after receipt of the notification from the DG <p>In respect of an application for a renewal, a non-refundable application fee of RM5,000.</p>

Connect with us

Jagdev Singh

Partner

jagdev.singh@pwc.com

+60(3) 2173 1469

Anushia Soosaipillai

Partner

anushia.joan.soosaipillai@pwc.com

+60(3) 2173 1419

Desmond Goh

Partner

desmond.goh.keng.hong@pwc.com

+60(3) 2173 1439

Lim Ying Tian

Director

ying.tian.lim@pwc.com

+60(3) 2173 1188

Lilia Edlina Azmi

Director

lilia.edlina.azmi@pwc.com

+60(3) 2173 1498

Ong Ai Ling

Director

ai.ling.ong@pwc.com

+60(3) 2173 0711



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