



MALAYSIA TRANSFER PRICING GUIDELINES

The Ministry of Finance Malaysia published the **Income Tax (Transfer Pricing) Rules 2023** (“Rules 2023”) on 29 May 2023, in the Federal Gazette. The Rules 2023 replace the Income Tax (Transfer Pricing) Rules 2012 (“Rules 2012”) issued in May 2012. This signifies a major development in Malaysia’s transfer pricing (“TP”) landscape.

The new Rules 2023 lay down a stricter TP compliance regime for taxpayers and **are effective for YA 2023 and onwards (i.e., financial year ending on or after 1 January 2023).**

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SUMMARY OF THE KEY PROVISIONS

When does the Malaysian taxpayer need to prepare TP documentation?

Malaysian taxpayers that enter into related party transactions are required to prepare contemporaneous TP documentation to support the arm's length nature of the related party transactions. Such documentation must be prepared before the tax return filing deadline, prior to the due date of furnishing a return. This provision was also part of Rules 2012. However, Rules 2023, requires the date of completion to be mentioned in the report.

For FY 2023, the due date for furnishing corporate tax returns is 7 months after the FY end plus a one-month grace period, based on the Tax Filing Program for the Year 2023 issued by the IRB on 31 May 2023.

What to include in the TP documentation?

Rules 2023 specify the information that is mandatorily required to be contained within such documentation. A summary of the information that is required is detailed below.

MULTINATIONAL ENTERPRISE ("MNE") GROUP INFORMATION (under Schedule 1)

1

MNE Group's worldwide organizational structure that shows the location and ownership linkages among the Group entities transacting with the taxpayer.

SUMMARY OF THE KEY PROVISIONS

What to include in the TP documentation?

- 2 Description of the MNE Group's business, including products and services, geographic markets, key competitors, supply chain, business models and strategies, business drivers, industry analysis, the business activities of each entity in the MNE Group and the functional analysis.
- 3 Description of the MNE Group's intangible property.
- 4 MNE Group's financial activities, including identification of the central financing entity and a description of the related transfer pricing policy.
- 5 Financial and tax position of the MNE Group.

BUSINESS INFORMATION (under Schedule 2)

- 1 Taxpayers' worldwide organisational and ownership structure, a description of the management structure of the taxpayer, including the reporting lines, and a local organization chart showing the number of employees in each department.
- 2 Nature of the business, industry, and market conditions.
- 3 Details of the related party transactions.
- 4 Pricing policies for each type of related party transaction.
- 5 Assumptions, strategies, and information regarding factors that influence the setting of pricing policies.
- 6 Functional, asset, and risk analysis including the risk analysis framework.
- 7 Comparability analysis.

SUMMARY OF THE KEY PROVISIONS

- 8 Selection of the transfer pricing methodologies.
- 9 Application of the transfer pricing methodologies.
- 10 Financial information.

COST CONTRIBUTION ARRANGEMENT INFORMATION AND DOCUMENTS (under Schedule 3)

- 1 A copy of the cost contribution arrangement ("CCA").
- 2 A list and identity of participants in the CCA.
- 3 The scope of the activities and specific projects covered by the CCA, and how the activities are managed and controlled.
- 4 The duration of the arrangement.
- 5 The total amount of contributions incurred pursuant to the arrangement.
- 6 The allocation of tasks and responsibilities.

What to include in the TP documentation?

Rules 2012 allowed taxpayers some flexibility to decide the level of information to be included in the TP documentation. However, Rules 2023 mandates inclusion of specific information, thereby increasing the compliance requirements for taxpayers entering into related party transactions.

SUMMARY OF THE KEY PROVISIONS

What to include in the TP documentation?

Moreover, where any of the information, data or other related documents required to be furnished does not apply to the taxpayer, the taxpayer shall indicate the non-applicability in the TP documentation.

Failure to comply with the above provisions may lead to the imposition of penalties.

When to submit the TP documentation?

The Director General (“**DG**”) may, by notice, require the taxpayer to furnish the contemporaneous TP documentation in writing within fourteen days from the date of service.

How do you determine the Arm’s Length Price (“ALP”)?

Rules 2023 provide that the ALP is to be determined based on the most current reliable data that is reasonably available at the time of determination.

Method to determine ALP

Rules 2023 provide that the selection of method, as well as the profit level indicator, must be based on the facts and circumstances, including the economically relevant characteristics of the accurately delineated related party transactions. The DG has been provided with the power to replace the selected method with the other most appropriate method if they have reasons to believe that the selected method is not the most appropriate in determining the ALP.

The hierarchy of methods has now been removed. Moreover, Rules 2012 did not give any powers to DG to review or replace the selected method. This change in Rules 2023 implies that the taxpayers must include a robust justification of the selection of the most appropriate method as well as the profit level indicator that is used to justify the arm’s length nature of the related party transactions.

SUMMARY OF THE KEY PROVISIONS

How to determine the comparability of transactions?

The application of data for prior years shall only be used to assist in the selection of the comparable and not for the use of multiple year averages.

This implies that multiple year averages (weighted averages) are no longer applicable.

Arm's Length Range ("ALR")

Rules 2023 have redefined the ALR to mean a range of figures or a single figure falling between the 37.5th percentile to 62.5th percentile of the data set.

This essentially puts the taxpayers in a high-risk situation, as what was considered arm's length in the prior year's (based on the 25th percentile to 75th percentile rule) may now not be considered to be arm's length given this new constricted range concept. Taxpayers should take note of this and plan accordingly.

Transfer pricing adjustments by DG

If the price or interest rate used in related party transactions is outside this ALR, the ALP will be considered to be the median of ALR.

Margins that fall within the ALR would generally be acceptable. However, in such a case, if the DG has reasons to believe that the comparable set has a lesser degree of comparability or in case some comparability defects remain that are not quantifiable and, therefore, not adjusted, the DG has powers to adjust the price to the median or to any other point above the median but within the ALR.

Offsetting adjustments

Removal of rule allowing offsetting adjustments: Rules 2012 recognized the concept of an offsetting adjustment, which is not included in Rules 2023.

SUMMARY OF THE KEY PROVISIONS

Offsetting adjustments

This is relevant to domestic related-party transactions since a transfer pricing adjustment made in relation to a taxpayer may not make the counterparty taxpayer eligible for corresponding relief.

Penalty Provisions

New penalty provisions under **Section 113B** of the Income Tax Act have also been introduced, wherein any person who fails to furnish a contemporaneous TP documentation shall be liable to:

- A fine of not less than RM 20,000 and not more than RM 100,000; or
- Imprisonment for a term not exceeding six (6) months; or
- Both.

This also applies to cases where the TP documentation is not in compliance with the Rules 2023.

The introduction of a penalty statute means added accountability is to be adhered to by the tax payers.

CONCLUDING COMMENTS

Malaysian taxpayers who do not prepare annual comprehensive TP documentation or are unable to support the arm's length nature of the related party transactions, are likely to be severely impacted with the introduction of the new Rules 2023. Rules 2023 have introduced changes which have far-reaching implications for Malaysian taxpayers. Although Rules 2023 align with the OECD Transfer Pricing Guidelines 2022 on certain important aspects such as the accurate delineation of related party transactions, cost contribution arrangements, etc., it has also introduced certain other provisions which lead to increased compliance for the taxpayers.

CONCLUDING COMMENTS (CONT.)

Moreover, under Rules 2023, the DG has been conferred with additional powers not only to replace the most appropriate methodology that is selected by the taxpayers but also to make adjustments to the transfer prices to the median or to any other point above the median. Thus, taxpayers need to ensure that they have a robust transfer pricing analysis and documentation to support not only the selection of the methodology and profit levels indicators but also the arm's length nature of their related party transactions.

The Rules 2023 also have new provisions on Intangible properties and Advance Pricing Arrangements, which the taxpayers might want to take note of.

If you have any questions on these developments or require assistance with your annual transfer pricing compliance requirements, please get in touch with us.

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