Malaysia – TP updates

New TP and APA rules

June 2023

Summary of the new developments

Malaysia has replaced its existing Transfer Pricing rules i.e. the Income Tax (TP) Rules 2012 with the Income Tax (TP) Rules 2023, and this would be effective for the YA 2023 onwards. Additionally, a minimum TP documentation ('TPD') template with explanatory notes has been published in connection with persons who do not meet the thresholds prescribed[1] under the Malaysia TP guidelines 2017 (paragraph 1.3.1) for maintaining detailed TPD.

The Income Tax (Advance Pricing Arrangement) Rules 2023 have also been issued which replace Malaysia's Income Tax (Advance Pricing Arrangement) Rules 2012.

In our alert we have summarized the key aspects in relation to the new TP and Advance Pricing Arrangement ('APA') Rules.

Transfer Pricing Rules 2023 – Key updates

1. **Arm's length range ('ALR')** - The ALR has been defined as the 37.5^{th} percentile to 62.5^{th} percentile of the comparable dataset, with the median being the mid-point of the ALR. The range is derived from applying the same transfer pricing method to multiple comparable data or by applying any other method allowed by the Director General ('DG').

2. **Usage of data points** – Earlier, the use of multiple year averages (weighted average) for the comparable companies was common. In the new rules and in line with the existing TP guidelines, it

[1] Detailed TPD is required to be maintained where:
- for a person carrying on a business, gross income > RM25 mn, and the total amount of related party transactions > RM15 mn.
- for a person providing financial assistance, the financial assistance > RM50 mn. Transactions involving financial institutions are excluded.

The above thresholds are not applicable in case of a PE.

has been stressed that the usage of multiple year data is permitted only to assist in the selection of comparables and not for computation of the ALR.

3. **Adjustments by the Director General** – If the controlled transaction's price is not within the ALR, the DG may adjust the price to the median. Even if the controlled transaction's price is within the ALR, the DG can adjust the price to the median or a higher point within the ALR under specific circumstances (where the uncontrolled transaction has lesser comparability, or any comparability defects cannot be quantified, identified or adjusted).

4. **TP documentation** – The TPD is quite extensive and must be prepared on a contemporaneous basis prior to the due date of filing tax return, and furnished within 14 days of request. Further guidelines may also be issued by the DG to facilitate the implementation of the TPD rules. The contents prescribed for the TPD are as follows:

   a) **Schedule 1 (MNE Group information)** – Most of the contents in relation to Master file from the existing TP guidelines have been incorporated in the Rules with certain additions (MNE's key competitors, business models and strategies, industry and economic conditions in which it operates etc.). So, this looks like a laborious process for taxpayers who don't have a global Master file to collate this data.

   b) **Schedule 2 (Business information)** – Covers most of the contents prescribed in the existing TP guidelines. Further, comprehensive details such as information on the heads of local departments (including whether they are expatriates or local citizens) and number of employees in each department are required.

   c) **Schedule 3 (Cost Contribution Agreement or 'CCA')** – Contents from the TP guidelines have been incorporated with certain additions (policies and procedures for adjusting the terms of the CCA, mechanisms for managing and controlling the responsibilities in relation to DEMPE of assets used in the CCA etc.).

   d) The date of completion of the TPD is to be mentioned to ensure it is contemporaneous.

5. **Selection of TP method** – Reference to Most Appropriate Method (out of CUP, RPM, CPM, PSM, TNMM, any other method allowed by the DG) has been made for determining the Arm's Length Price unlike the old rules where there was a preference to the Traditional Transactional methods over the other methods. Taxpayers have to document the reasons for choosing any method over the others, and the DG can replace the selected TP method if not satisfied.

6. **Intangibles** – In line with the OECD guidelines, it has been emphasized that the owner of IP is not entitled to any income arising from the IP if he neither performs the functions nor controls the functions or risks related to DEMPE of the IP.

7. **Offsetting adjustment provision removed** – As per the old Rules, any adjustment made by the DG to one party in a controlled transaction could be reflected by an offsetting adjustment on the assessment of the other party upon request. This provision has been removed in the new Rules and this could affect domestic related party transactions.

It is interesting to note few similarities between the new Malaysian Rules and the Indian TP legislation especially the adoption of a unique arm's length range (37.5th percentile to 62.5th percentile as against 35th-65th percentile in the case of India) and a short time period for TPD submission upon request (14 days as against 10 days in the case of India).

Considering the emphasis on contemporaneous documentation in the Rules, it is essential taxpayers are well prepared to maintain TPD within the prescribed timeline. Even in cases of taxpayers who do not meet the thresholds for maintaining detailed TPD, the new minimum TPD template would call for aligning the documentation requirements to ensure compliance.

APA Rules 2023 – Key updates

- Taxpayers can opt only for a Bilateral or Multilateral APA if the covered transaction is with a country where a DTAA exists (even in case of a PE where the head office will make an application). In other cases, only a Unilateral APA is possible. Malaysia has DTAAs in place with more than 70 countries[2], including most of its major trading partners, and hence looks like only a Bilateral or Multilateral APA may be a viable option for most of the Tax payers
- Along with a pre-filing request, additional documents would need to be submitted including the contemporaneous TP documentation as per the Income Tax (TP) Rules 2023; financial statements and tax computations for the latest 3 years etc.
- Once the DG accepts a pre-filing request, the APA application must be submitted within 6 months of the notification, as against 2 months in the earlier Rules. In case of renewal requests, the application must be submitted within 2 months. If not submitted within the timeline, the applications will be deemed to be withdrawn.
- An APA application can be declined where the proposed transaction involves improper use or abuse of the application of the DTAA.
- If the request of the DG or Competent Authority ('CA') for further information during the APA process is not fulfilled within 30 days, the APA application shall be deemed to be withdrawn. This would enable them to expedite the conclusion of cases.
- Rollback of only Bilateral or Multilateral APA is permitted and under certain prescribed situations, rollback option will not be available. Rollback will be available for the immediately 3 preceding years.
- Certain additional information has also been prescribed to be included in the APA compliance report.
- The DG or CA may cancel/revoke an APA in case the Bilateral or Multilateral APA entered into with the participating CA has been cancelled/revoked.
- An APA can also be revoked if any of the parties fails to disclose any occurrence of voluntary disclosure, investigation, audit or incentive approval.
- Fees have been prescribed in connection with application for APA and renewal of APA, and these are non-refundable if the taxpayer withdraws the application.

[2] https://www.hasil.gov.my/en/international/double-taxation-agreement/

The APA rules have been streamlined with clear timelines and taxpayers can consider this option to achieve tax certainty. Allowing for only Bilateral or Multilateral APAs where DTAAs exist will also ensure avoidance of double taxation.

About us

VSTN Consultancy Private Ltd is a boutique Transfer pricing firm with extensive expertise in the field of international taxation and transfer pricing.

Our offering spans the end-to-end Transfer Pricing value chain, including design of intercompany policy and drafting of Interco agreement, ensuring effective implementation of the Transfer Pricing policy, year-end documentation and certification, BEPS related compliances (including advisory, Masterfile, Country by Country report), Global Transfer Pricing Documentation, safe harbour filing, audit defense before all forums and dispute prevention mechanisms such as Advance Pricing agreement.

We are structured as an inverse pyramid where leadership get involved in all client matters, enabling clients to receive the highest quality of service. Being a specialized firm, we offer advice that is independent of an audit practice and deliver it with an uncompromising integrity.

Our expert team bring in cumulative experience of over four decades in the transfer pricing space with Big4s spanning clients, industries and have cutting edge knowledge and capabilities in handling complex TP engagements.