Malaysia introduces new transfer pricing guidelines and transfer pricing audit framework

January 28, 2025

In brief

What happened?

Malaysia introduced the Malaysian Transfer Pricing Guidelines 2024 (TP Guidelines 2024) on December 30, 2024, which apply from year of assessment (YA) 2023 onwards. The TP Guidelines 2024 are meant to be read in conjunction with the Income Tax Act 1967 (ITA) and the Income Tax (Transfer Pricing) Rules 2023 [P.U.(A) 165/2023] (TP Rules), and expand significantly on the previous version updated in 2017 to provide further details and clarifications, as well as new guidance on contemporaneous transfer pricing documentation (CTPD) requirements in Malaysia.

The Inland Revenue Board (IRB) also published the updated Transfer Pricing Audit Framework (TPTAF 2024), which came into effect on December 24, 2024, replacing the version published on December 15, 2019. The TPTAF 2024, to be read in conjunction with the 2022 Tax Audit Framework (TAF), provides new details and clarifications to the TP audit procedures currently in place.

Why is it relevant?

The TP Guidelines 2024 introduced revised compliance requirements, exemptions for certain taxpayers from comprehensive documentation, and adjustments in documentation thresholds, emphasizing the importance of verifiable data and a tighter arm's length range. The TPTAF provides an enhanced audit process by specifying penalties for non-compliance and voluntary disclosure options, aligning Malaysia with international standards for transparent tax practices.

Penalties for non-compliance with the TP Guidelines 2024 range from RM20,000 to RM100,000 (USD4,200 to USD20,850) per YA, in addition to applicable surcharges of up to 5% on the transfer pricing adjustment made, if any.

Action to consider

Given the changes in requirements to prepare transfer pricing documentation and additional clarification as to how the arm's-length principle should apply, taxpayers should review their existing positions on (1) whether CTPD requirements apply, and (2) whether the approach taken in defending the arm's length principle would be aligned with requirements under the TP Guidelines 2024.

The key takeaways from the TP Guidelines 2024 and TPTAF 2024 are discussed below.

In detail

TP Guidelines 2024

Scope and exemptions for CTPD

To ease the compliance burden for taxpayers, the TP Guidelines 2024 include the following persons (which include a company, a body of persons, and a corporate sole):

- Individuals not carrying on a business,
- Individuals carrying on a business (including partnerships) who only engage in domestic controlled transactions,
- Person who entered into controlled transactions with a total amounting to not more than RM1 million, or
- Person who entered solely into domestic controlled transactions with another person where both parties:
    - Do not enjoy tax incentives,
    - Are taxed at the same headline tax rate, or
    - Do not suffer losses for two consecutive years prior to the controlled transactions.

Observation: While the above exemptions are provided, the TP Guidelines 2024 still require exempted persons to comply with the arm's length principle and retain relevant documents relating to the controlled transactions, including documentation to support and prove the determination of the arm's length price (Paragraph 1.6 of Chapter 1 of the TP Guidelines 2024). Despite this exemption, in the event of a transfer pricing audit, the onus would be on taxpayers to produce the required information and analysis to support the arm's length position of their controlled transactions.

For taxpayers with exclusively domestic transactions, tracking performances in prior years for both parties to the transaction will be important in the above exemption.

Scope for preparation of full CTPD

The TP Guidelines 2024 also revise thresholds for persons required to prepare full CTPD to include taxpayers who:

- Generate gross business income of more than RM30 million (USD6.25 million) in total and engage in cross-border controlled transactions totaling RM10 million (USD2.08 million) or more annually, or
- Receive or provide controlled financial assistance of more than RM50 million annually.

Taxpayers that fall below these thresholds are eligible to prepare a minimum CTPD as defined in Chapter 11.12 of the TP Guidelines 2024.

Observation: Given the change in thresholds and the specification of 'cross-border' controlled transactions, taxpayers should reassess their compliance requirements to determine whether they now qualify to opt for a 'minimum' CTPD going forward, instead of 'full' CTPD.

Full and Minimum CTPD

All CTPD needs to be prepared before the due date for furnishing a tax return for the YA in which a controlled transaction is entered into.

The contents of a 'full' CTPD are set out under Paragraph 11.7 of Chapter 11 of the TP Guidelines 2024 and remain consistent with that set out in the TP Rules. Taxpayers who qualify to prepare a minimum CTPD would have reduced requirements, and only need to provide details on:

- Worldwide group structure,
- Organizational structure,
- Controlled transactions, and
- Pricing policy.

Controlled transactions and pricing policy are confined only to "key controlled transactions," which are defined as (1) controlled transactions that are related to the taxpayer's principal activity, and (2) other than controlled transactions, constitute 20% or more of the operating revenue of each YA.

***Observation*:** While there are no explicit requirements to prepare a comparability analysis under the minimum CTPD, Paragraph 11.15 of Chapter 11 of the TP Guidelines 2024 states that the IRB may subsequently request taxpayers to prepare a comparability analysis to justify the transfer price. As such, taxpayers should consider preparing a comparability analysis upfront in the event of a later transfer pricing audit.

Comparability analysis

To reinforce the IRB's position with respect to local vs foreign comparables, the TP Guidelines 2024 state that priority would be given:

> *"… to the availability of sufficient and verifiable information on both the tested party and comparables… therefore, any selection of foreign tested parties and comparables that do not have sufficient and verifiable information would not be accepted."*

Chapter 4 of the TP Guidelines 2024 also expanded on the technical approaches to comparability analyses, including when to use multiple year data, and introduced new quantitative criteria for Malaysian comparables to ideally have turnovers 10% or less of the tested party's revenue.

Observation: In the event of a transfer pricing audit, it is important that verifiable data on foreign tested parties and comparables is readily available for submission. Where the tested party (or comparable information) cannot be verified (e.g., against audited financial statements), the selected tested party may be challenged by the IRB.

Arm's length range

In line with the updated 2023 TP Rules, the TP Guidelines 2024 elaborate on the application of the adoption of a range of figures (or single figure) falling between the 37.5th to the 62.5th percentile of the data set that is acceptable to the Director General of Inland Revenue (DGIR) as the arm's length range.

Observation: Since Malaysia has adopted a tighter arm's length range than the interquartile range adopted in many jurisdictions, taxpayers should analyze whether global transfer pricing policies take into account Malaysian requirements.

Business restructuring

The TP Guidelines 2024 significantly expanded on Chapter 5 (Business Restructuring) to be more closely aligned with the OECD Transfer Pricing Guidelines (OECD TP Guidelines), and includes considerations to changes to a business' characterization, other options realistically available, and the application of the arm's length principle in a business restructuring.

Observation: Given the focus on business restructuring exercises in a Malaysian context, taxpayers should consider if the options realistically available and the application of the arm's length principle are fully assessed and documented.

Intragroup services

The chapter on intra-group services in the TP Guidelines 2024 includes the introduction of a simplified approach for low value adding intra-group services (LVAS), in line with the OECD TP Guidelines. (See chapter 6 of the TP Guidelines 2024 for definitions and examples of LVAS).

This approach, applicable only to Malaysian service providers or foreign service providers who have similarly adopted the OECD simplified approach in their jurisdictions, allows taxpayers providing LVAS within their group to apply a 5% mark-up on all relevant costs incurred in the provision of those services, without the need for a comparability analysis. Paragraph 6.26 of Chapter 6 of the TP Guidelines 2024 provides a list of examples of typical services that would fall under the LVAS service categories.

TPTAF 2024

'Comprehensive' audit

The TPTAF 2024 now refers to audits as 'comprehensive' and does not distinguish 'field' from 'desk' audits. Comprehensive audits will:

- Be carried out at the taxpayer's premises, the IRB's office, or any places agreed by both parties, and
- Apply the TAF comprehensive audit examination procedures that involve examination of the taxpayer's business records. Additional procedures such as submission of business information slides and CTPD before the audit visit also are stipulated with specific timeframes mentioned.

Years of assessment

The IRBM may carry out a comprehensive audit for up to six YAs. However, depending on the audit findings, the comprehensive audit may be extended to cover seven prior YAs.

Basis for selection of cases

The TPTAF 2024 has elaborated on the IRB's basis for selecting audit cases, which is based on:

- Risk assessment criteria for controlled transactions,
- Restructuring of the company group, and
- Information received from third parties, including foreign tax authorities.

Audit visits

The IRB may conduct an audit visit to any of the taxpayer's premises, or those related to the taxpayer by informing the taxpayer in advance. If necessary, the audit visit may be extended to the related company.

Audit settlement

If TP adjustments are made by the IRB that only involve related companies in Malaysia, the offsetting adjustment for the same amount would not automatically be given to other related parties.

The application for an offsetting adjustment must be made by the other related parties, and audits will be carried out to ensure that the application may be considered under the provisions of the ITA.

Observation: This emphasizes the importance of conducting domestic transactions at arm's length, even if there is no perceived tax leakage in Malaysia, as the taxpayer may face double taxation if the IRB makes an adjustment, and a corresponding adjustment is not secured by the counterparty.

Voluntary disclosure

The TPTAF 2024 clarified that voluntary disclosures may be made after the deadline for submission of the Return Form but before the audit commences.

The information and documentation required, along with the Voluntary Disclosure Form to be submitted is set out and included in the TPTAF 2024. However, if the documents submitted are considered incomplete, the IRBM may perform a further review via an audit visit and/or letter of enquiry.

Penalty for late submissions

In line with the TP Guidelines 2024, the TPTAF 2024 has been updated to state that failure to submit CTPD within 14 calendar days from the date of the request by the IRBM may be subject to penalty ranging from RM20,000 to RM100,000 (USD4,200 to USD20,850) or to imprisonment for a term not exceeding six months, or to both, for each year of assessment to the offence.

The TPTAF 2024 also provided further clarity on the application of the penalty range, to be imposed based on the number of days the TPD is outstanding. The penalty amounts to be applied are as follows:

Days outstanding	Penalty Amount
Up to 7 days	RM20,000
More than 7 days, up to 14 days	RM40,000
More than 14 days, up to 21 days	RM60,000
More than 21 days, up to 28 days	RM80,000
More than 28 days	RM100,000

Application of penalties and surcharge

The TPTAF 2024 clarified that the penalty regime is applicable for audit cases commencing prior to January 1, 2021, whereby in the event of an understatement or omission of income as a result of the audit finding, a penalty ranging from 15% to 45% may be imposed to the amount of tax that has been undercharged.

For audit cases commencing on or after January 1, 2021, a surcharge at a rate of up to 5% on the amount of the transfer pricing adjustment may be imposed instead (0% to 4% for voluntary disclosures). ***Note:*** A surcharge still may be imposed even if no additional assessment is raised, as the surcharge is imposed on the amount of the adjustment itself.

Let's talk

For a deeper discussion of how the TP Guidelines 2024 and the TPTAF 2024 might impact your business, please contact:

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