

Transfer Pricing Documentation - submission within 14 days upon request!

In the 2021 Budget proposals, there were some changes made to the Income Tax Act 1967 (“ITA”) and one of the more notable ones was the introduction of new provisions over transfer pricing (“TP”) penalties. The Malaysian TP Guidelines were also updated to stipulate that TP documentation must be submitted within 14 days instead of the 30 days that were given previously.

TP is set to be one of the avenues that the Malaysian tax authorities will be zooming into in 2021. As such, much needed attention must be given to TP to ensure that our clients and taxpayers at large are managing their tax risk well.

TP basically affects companies with related party transaction(s) (“RPT”) in which prices transacted must be ‘arm’s length’ in nature, i.e. the transacted price(s) must be similar to how independent companies transact with one another.

The Inland Revenue Board Malaysia (“IRB”) has issued TP Guidelines which can be used as a reference point by taxpayers when preparing the TP documentation.

In the abovementioned TP Guidelines, the IRB has recently made two (2) important amendments as follows –

With effect from 1 January 2021	
14-days	With the introduction of (new) Section 113B in the ITA, TP documentation should be made available within 14 days upon request from the IRB
Penalty	Penalty will not be imposed if TP documentation is submitted within 14 days upon request from the IRB in respect of TP audit cases which have commenced on or after 1 January 2021

Please note that in Malaysia, there is no requirement in the law for TP documentation to be submitted on any predetermined or annual/regular basis. It is submitted or made available upon request by the IRB, normally when the companies are selected for TP audits. Probably, due to this, there tends to be a relaxed approach taken by many taxpayers that the TP documentation can be prepared as and when the need arises. It is important to note that it is not possible to prepare TP documentation in 14 days or even 30 days for that matter!

The timeline needed to prepare the TP documentation depends on the complexity and volume of RPT transactions. It is also important to take note that unlike other countries, TP in Malaysia also includes “domestic” transaction(s) as well as “cross-border” transactions. As such, companies must place importance to prepare TP documentation pro-actively to avoid getting things wrong and then scrambling for solutions after the inquest begins!

Please take note that there were no specific TP penalties in place prior to the 2021 Budget proposals. The following “NEW” penalty section 113B in the ITA was introduced obviously with strict TP compliance for taxpayers in mind and we provide this below –

With effect from 1 January 2021	
Failure to furnish contemporaneous TP documentation	
Section 113B(1), if prosecution and upon conviction – <ul style="list-style-type: none"> • Penalty of RM20,000 to RM100,000 or imprisonment of up to 6 months or to both; and • To furnish the TP documentation within 30 days or such other period as the Court deems fit 	Section 113B(4), if no prosecution is instituted – <ul style="list-style-type: none"> • Penalty of RM20,000 to RM100,000
Prior to 1 January 2021	
There was no specific TP penalty provision in the ITA for the non-submission of contemporaneous TP documentation	

In addition to the above penalty under section 113B, new subsections 140A(3A), (3B) and (3C) were also introduced in the ITA. A new concept of imposing a “**5% surcharge**” is introduced as follows –

With effect from 1 January 2021	
Subsections 140A(3A) & (3B), where an adjustment is made to bring transactions to what is perceived by IRB to be ‘at arm’s length’ – <ul style="list-style-type: none"> • The Director General of Inland Revenue (“DGIR”) may disregard the structure adopted by a person in entering into a transaction • The DGIR shall make adjustments to the structure or transaction as he thinks fit to reflect the structure that would have been adopted by an independent person dealing at arm’s length 	Subsection 140A(3C), DGIR may impose surcharge – <ul style="list-style-type: none"> • The DGIR may require that person to pay a surcharge” of not more than 5% of the amount of increase of any income or reduction of any deduction/loss due to “TP adjustment”
Prior to 1 January 2021	
There was no such TP surcharge in the ITA.	

The surcharge may make companies which are in a loss-making position or in a non-tax payable position due to tax holidays/incentives to take seriously the need to prepare TP documentation that meets the expected standards under the laws and guidelines.

With the shorter 14-day timeframe, it is important for taxpayers to ensure that contemporaneous TP documentation is in place and up to date. ‘Contemporaneous’ refers to ensuring that all data in the TP documentation is valid and updated in the relevant financial period under review. The preparing of contemporaneous TP documentation requires specific expertise and technical knowledge. Baker Tilly Malaysia urges their clients and taxpayers at large to consult advisers on what needs to be the minimum to be put in place to avoid undue problems with the tax authorities. The TP documentation will be subject to scrutiny by the IRB during the course of an audit, and there tends to be greater reliance placed on work of external consultants when assessing the sufficiency and compliance of the documentation with the Rules and Guidelines.

With such severe TP penalties being imposed with effect from 1 January 2021, it is time for companies with RPT to pay careful attention to ensuring, without delay, the preparation of robust TP documentation, if they have not already paid heed.

For any enquiries or assistance, please contact any of the following in this office:

Kuala Lumpur Office

Mr Anand Chelliah
Managing Partner, Tax Services
Asia Pacific Tax Co-Leader
DL: +6 (0)3 2297 1093
anand.chelliah@bakertilly.my

Mr Yohan Francis
Executive Director, Tax Services
(International Tax & Transfer Pricing)
DL: +6 (0)3 2297 1096
yohan.xavier@bakertilly.my

Mr Marcus Tan
Executive Director, Tax Services
(Corporate Tax & Tax Incentive)
DL: +6 (0)3 2297 1521
marcus.tan@bakertilly.my

Mr Murugan Anbanantham
Director (Technical), Tax Services
DL: +6 (0)3 2297 1004
murugan.anbanantham@bakertilly.my

Ms Sandra Saw
Associate Director, Tax Services,
(Corporate Tax & Indirect Tax)
DL: +6 (0)3 2297 1146
sandra.saw@bakertilly.my

Ms Tay Siew Chu
Associate Director, Tax Services
(Corporate Tax & Personal Tax)
DL: +6 (0)3 2297 1139
siewchu.tay@bakertilly.my

Regional Offices

Mr Huang Shze Jiun
Managing Partner, Johor Bahru
DL: +6 (0)7 332 6926
sj.huang@bakertilly.my

Ms Joanne Khor
Tax Director, Penang
DL: +6 (0)4 227 9258 Ext: 102
joanne.khor@bakertilly.my

Ms Khoo Shaw Cbyn
Senior Managing Consultant, Tax Services,
Batu Pahat
DL: +6 (0)7 431 5403
shawcbyn.khoo@bakertilly.my

Ms Wong Poh Ling
Senior Managing Consultant, Tax Services,
Seremban
DL: +60 (6) 6762 2518 / 763 8936
pohling.wong@bakertilly.my