



## A Tale of Two Transfer Pricing Regimes *Grasping The Essentials Of Singapore's And Malaysia's TP Regime*

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*Facilitated by:*  
Mr See Jee Chang and Ms Theresa Goh

**S**ince the OECD's base erosion and profit shifting (BEPS) project, transfer pricing (TP) rules and regulations worldwide have continued to grow in number and complexity. At the same time, TP audits are intensifying as tax authorities step up scrutiny of intercompany transactions and adopt increasingly assertive stances to protect their respective tax bases. Companies are left to navigate the evolving TP landscape, and failure to comply with their TP obligations can lead to double taxation and hefty penalties.

In this article, we focus on Singapore's and Malaysia's TP regimes and compliance requirements. Sharing their professional insights were Accredited Tax Advisor (Income Tax) See Jee Chang, Senior Transfer Pricing Leader, Deloitte Singapore, and Theresa Goh, Senior Transfer Pricing Partner, Deloitte Kuala Lumpur, Malaysia, at a recent webinar organised by the [Singapore Chartered Tax Professionals](#).

### **BACKGROUND OF SINGAPORE'S AND MALAYSIA'S TP REGIMES**

#### **SINGAPORE**

Inland Revenue Authority of Singapore (IRAS) issued its first set of TP guidelines in 2006, and has continued to regularly update its TP guidelines to clarify IRAS' positions amid ongoing international developments. However, it was not until February 2018, when the Income Tax (Transfer Pricing Documentation) Rules 2018 were gazetted, that the country's TP documentation (TPD) requirements were codified into the Income Tax Act.

#### **MALAYSIA**

TP requirements were first introduced in Malaysia in 2003. Since then, there have been numerous developments in Malaysia's TP regime, including the introduction of Income Tax (TP) Rules 2012 and Income Tax (Advance Pricing Arrangement) Rules 2012 in May 2012, the new disclosure requirement in the tax return in YA 2014, the release of Income Tax (Advance Pricing Arrangement) (Amendment) Rules 2017 and the corresponding update of TP Guidelines in 2017, as well as the recent introduction of new provisions in the Finance Act 2020 that aim to strengthen the enforcement for TP compliance in Malaysia.

## TPD REQUIREMENT

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### SINGAPORE

From YA 2019, companies must prepare TPD under Section 34F of the Singapore Income Tax Act if the gross revenue derived from their trade or business for the basis period exceeds S\$10 million, or if they were required to prepare TP documentation in the previous basis period, unless exemption applies.

Taxpayers are required to prepare TPD on a contemporaneous basis. IRAS generally accepts TPD as contemporaneous when it has been prepared no later than the filing due date for the YA corresponding to the financial year in which the transaction takes place. Taxpayers are not required to submit their TPD to IRAS when filing their tax returns, but need to do so within 30 days upon IRAS' request. In practice, it is noted that IRAS has been strict in enforcing the 30-day timeline.

### MALAYSIA

Under the Malaysian TP guidelines, taxpayers that enter into domestic and international controlled transactions (that is, related party transactions) are required to prepare contemporaneous TPD. TPD is regarded as contemporaneous in Malaysia if it is prepared at the time a person is developing or implementing any controlled transaction, or prior to the due date for filing of tax return for a particular YA.

In Malaysia, a company is required to prepare a full TPD if its annual gross income exceeds RM25 million and total related party transactions exceed RM15 million per annum, or if the provision of financial assistance exceeds RM50 million for non-financial institutions.

It is important to note that companies falling below the thresholds are still required to prepare a limited TPD to comply with their Malaysian TP requirements.

Local TPD must be updated whenever there are material changes (such as changes in shareholding, business model and structure, or TP policies) that would impact the functional analysis or TP analysis of tested party. Financial data and suitability of existing comparables are expected to be reviewed and updated annually, while comparable searches should be conducted every three years to update the local file (assuming the operating conditions remain unchanged).

Similar to Singapore, taxpayers in Malaysia are not required to submit TPD at the time of submission of their tax returns. Instead, they are required to disclose in their tax returns whether TPD had been prepared for the relevant YA, and to furnish to Inland Revenue Board of Malaysia (IRB) their TPD within the stipulated period upon request.

It is critical to note that the period to furnish TPD to IRB has been drastically reduced (from 30 days to 14 days) for TP audit cases commencing on or after 1 January 2021. With the reduced timeframe, it is more important than ever for taxpayers to stay disciplined and ensure the timely preparation of contemporaneous TPD.

## **PENALTIES FOR NON-COMPLIANCE WITH TPD REQUIREMENTS**

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### **SINGAPORE**

Prior to YA 2019, there was no specific penalty for non-compliance with TPD requirement in Singapore. However, from YA 2019, a fine not exceeding S\$10,000 shall be imposed on conviction for offences relating to non-compliance with TPD requirement (such as the failure to prepare TPD by the time for the making of the tax return, or the failure to submit TPD within 30 days upon request by IRAS).

### **MALAYSIA**

Taxpayers that failed to furnish TPD were not subjected to any specific penalty in Malaysia before the introduction of the new Section 113B to the Malaysian Income Tax Act. Starting from 1 January 2021, however, taxpayers who fail to prepare contemporaneous TPD and furnish it upon request by IRB within the given timeframe will be liable, upon conviction, to a fine of RM20,000 to RM100,000 or to imprisonment for a term not exceeding six months, or both.

## **SURCHARGE FOR NON-COMPLIANCE WITH ARM'S LENGTH PRINCIPLE**

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### **SINGAPORE**

In the course of TP audit or review by IRAS, IRAS may make TP adjustments to increase a taxpayer's income or reduce its deduction or loss if the taxpayer has understated its profits due to non-arm's length related party transactions. From YA 2019 onwards, where a TP adjustment is made by IRAS, a surcharge of 5% on the amount of TP adjustment will also be imposed, regardless of whether the taxpayer is in a tax-paying position.

### **MALAYSIA**

Effective 1 January 2021, a surcharge of not more than 5% will be imposed on TP adjustment arising from substitution of a transaction price to reflect an arm's length price, or to disregard any structure adopted in entering into a transaction.

The surcharge applies to all taxpayers with controlled transactions, irrespective of whether or not they have any tax attributes (for example, incentives, capital allowances, or business losses). This means that non-taxable companies (such as companies on a 100% tax holiday) would also be subject to the surcharge and accordingly, would need to prepare TP documentation to defend their TP positions.

## **POWER TO RECHARACTERISE CONTROLLED TRANSACTIONS**

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### **SINGAPORE**

Section 34D of the Singapore Income Tax Act provides the Comptroller of Income Tax with the power to recharacterise controlled transactions to those consistent with arm's length transactions, if it is found that unrelated parties would have entered into substantially different arrangements or would not have entered into similar arrangements.

### **MALAYSIA**

The insertions of Sections 140A(3A) and 140A(3B) into the Malaysian Income Tax Act fortifies the power of the Director General of Inland Revenue to disregard the structure in a controlled transaction, as well as make adjustments to the structure as he deems fit. This is provided that the economic substance of the controlled transaction differs from its form, or the controlled transaction differs from commercially acceptable transactions undertaken by independent parties.

The new sections may lead to increased scrutiny of controlled transactions involving, among others, intragroup interest-free financial assistance arrangements and aggressive tax planning structures. Accordingly, to mitigate the risk of recharacterisation, companies should ensure that their controlled transactions are accurately delineated through contemporaneous TPD and the actual conduct is aligned with intercompany agreements.

## COMPARABLES IN BENCHMARKING ANALYSES

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### SINGAPORE

In practice, both local and regional comparables are generally accepted by IRAS. External comparables are typically obtained through commercial databases and other publicly available information.

The use of three- or five-year weighted average comparable data is generally acceptable for Singapore TP purposes.

### MALAYSIA

Unlike IRAS, it is noted that IRB has a preference for local comparables. The use of foreign comparables is generally avoided unless the taxpayer is able to provide persuasive evidence to demonstrate the lack of relevant local comparables to IRB.

External comparables are typically obtained through local trade directories or Companies' Commission of Malaysia (CCM)'s database. Separately, it is noted that year-on-year data of comparable companies are generally preferred by IRB during TP audit.

## ACCEPTABLE ARM'S LENGTH PRICE/ RANGE

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### SINGAPORE

In a comparative analysis, taxpayers could apply the interquartile range to determine the arm's length remuneration. In the case of Comparable Uncontrolled Price (CUP) analysis, the taxpayer may even apply the full range if it is able to demonstrate that all observations in the full range are equally reliable.

### MALAYSIA

In Malaysia, there is a preference to use median instead of range for comparative analysis.

With the evolving TP landscape, companies with cross-border related party arrangements should keep abreast of global TP developments to determine their TP exposures, if any, in each country. Failure to address TP exposures may result in unwarranted penalties and negative financial impact on the group.

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## Facilitators

### **Mr See Jee Chang**

Senior Transfer Pricing Leader  
*Accredited Tax Advisor (Income Tax)*  
Deloitte Singapore

### **Ms Theresa Goh**

Senior Transfer Pricing Partner  
Deloitte Kuala Lumpur, Malaysia

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Felix Wong is Head of Tax, and Angelina Tan is Technical Specialist, Singapore Chartered Tax Professionals (formerly Singapore Institute of Accredited Tax Professionals).

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