Transfer Pricing Handbook 1.0 Malaysia

November 2022

Audit / Tax / Advisory

Smart decisions. Lasting value.

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Foreword

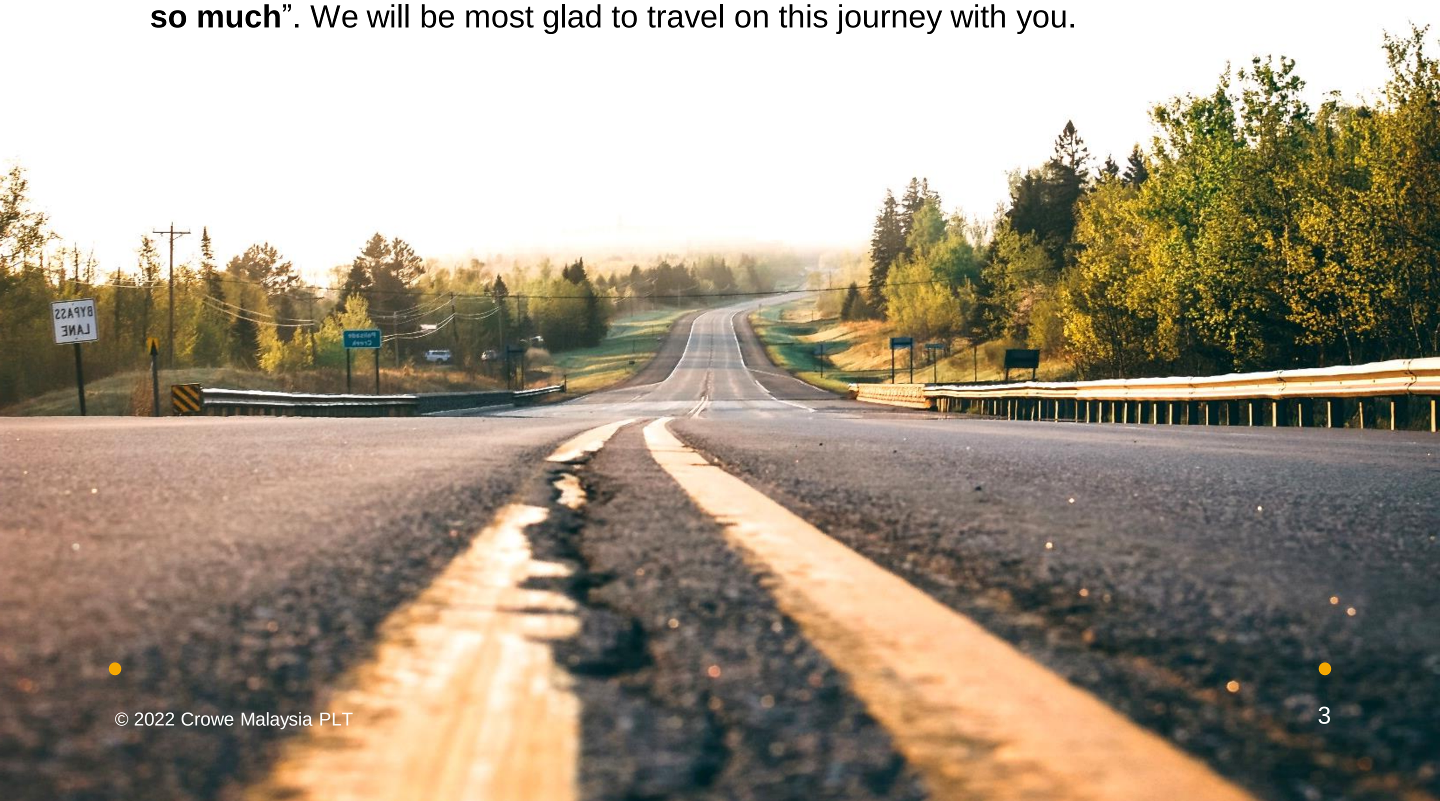
Transfer pricing is and will continue to be a major challenge for all companies doing business domestically or globally. The reason is simple: Transfer pricing is viewed as one of the easiest avenues for companies to shift profits to other countries or shift profits to low tax or no tax entities within a group.

Consequently, governments and multilateral institutions such as the OECD have enacted measures to bring these profits to tax so that every country can have its fair share of taxes. This situation is compounded by the increasing proliferation of digital enterprises which can undertake cross border business without having any business presence in the customer's countries.

Superficially, transfer pricing may appear simple but in practice, it is extremely complex with many variables impacting on prices that are acceptable to the tax authorities. Companies therefore need a measured approach, an approach that mixes practicality so that prices used can be easily implemented, with complexity that is in accord with theory, exactitude that is in conformance with the law and an approach that is acceptable to the tax authorities.

If you wish to consider another perspective of your transfer pricing challenges, please feel free to talk to us.

Like the quote says **"Alone you can do so little. Together we can achieve so much**". We will be most glad to travel on this journey with you.



What is Transfer Pricing?

Transfer pricing (TP) is the term used for the science and art of determining transfer prices. Transfer pricing comes into the picture when two or more parties which are related transact goods or services with one another (these are known as "controlled transactions" in Transfer Pricing). In such cases, the tax authorities would expect taxpayers to follow the arm's length principle and apply an arm's length price.

What is an arm's-length price?

An arm's-length price refers to the price that independent parties will enter into for similar transactions under similar terms, conditions and circumstances. In practice, arm's-length prices are not easy to arrive at because hardly any transactions are identical e.g., export sales terms and conditions are usually different from those for domestic sales. Even if the transactions are identical, prices can fluctuate not only from day-to-day but also throughout the day e.g. commodity prices.

Why apply the arm's length price?

When two parties are not related, they are at liberty to transact at any price (i.e., market price) agreed between the parties without any interference by the tax authorities. These transactions are known as uncontrolled transactions. However, if related parties transact with each other, the tax authorities will expect an arm's-length price to be applied. This is to ensure that the related parties do not shift profits (accidentally or intentionally) to different jurisdictions or domestically to loss-making entities or entities with tax incentives resulting in a loss of tax revenue to the government.

How to determine an arm's length price?

The arm's length price can be determined by using the traditional transactional methods such as the Comparable Uncontrolled Price Method (CUP), Resale Price Method (RPM) or Cost Plus Method (CPM). If the aforesaid methods cannot be used, methods based on profits may instead be applied. The methods used for calculation of arm's-length profits are known as transactional profit methods such as the Profit Split Method (PSM) and the Transactional Net Margin Method (TNMM).

What is Transfer Pricing? (cont.)

These five (5) transfer pricing methodologies prescribed in the Malaysian Transfer Pricing Guidelines ("MTPG") are as depicted below:

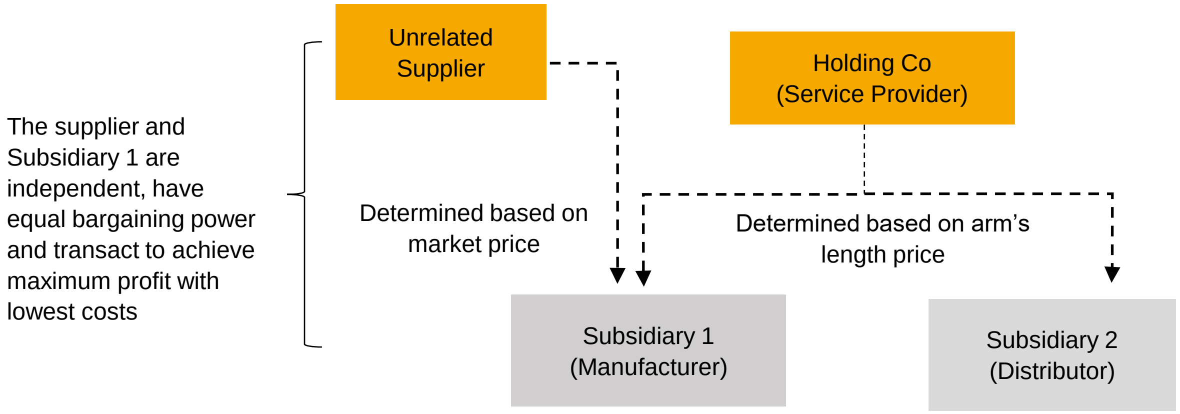
Traditional Transactional Methods

- Comparable Uncontrolled Price Method ("**CUP**")
- Resale Price Method ("**RPM**")
- Cost Plus Method ("**CPM**")

Transactional Profit Methods

- Profit Split Method **("PSM")**
- Transactional Net Margin Method **("TNMM")**

An illustration of the pricing determined for controlled transactions and uncontrolled transactions is shown below:



What is a related party?

"Related" in this context is not confined to those companies with a holding company or subsidiary company relationship. To be precise, the law in Malaysia (under Section 140A(5) of the Income Tax Act 1967 ("ITA")) has defined related (or "associated" as used in the legislation) to mean the following:

a) Persons one of whom has control over the other.
b) Individuals who are relatives of each other. "Relative" means a parent, a child (including a stepchild and a child adopted in accordance with any law), a brother, a sister, an uncle, an aunt, a nephew, a niece, a cousin, an ancestor or a lineal descendant [Section 140(8) of the ITA 1967].
c) Persons both of whom are controlled by some other person (known as "third person").

Section 140A(5A) of the ITA regards "control" to exist in the situations below where persons, one of whom owns shares of the other person, or a third person owns shares of both persons, where the percentage of the share capital held in either situation is 20% or more:

a) the business operations of that person depends on the proprietary rights, such as patents, non-patented technological know-how, trademarks, or copyrights, provided by the other person or a third person;
b) the business activities, such as purchases, sales, receipt of services, provision of services, of that person are specified by the other person, and the prices and other conditions relating to the supply are influenced by such other person or a third person; or
c) where one or more of the directors or members of the board of directors of a person are appointed by the other person or a third person.

What is a related party? (cont.)

The 20% shareholding threshold is calculated based on the effective interest, i.e. both direct and indirect (see below for example). As a result of the low shareholding threshold to establish “control” between companies for the purposes of Section 140A(5A), many companies which are not members within the same group of companies for the purposes of Companies Act 2016 may still be subject to the transfer pricing provisions under Section 140A. This includes licensor and licensee, investor and investee and joint venture parties where there exists shareholding relationships at or above the threshold of 20%.

In addition, under Section 139 of the Income Tax Act, a person shall be taken to have control of a company:-

a) if he exercises or is able to exercise or is entitled to acquire control (whether direct or indirect) over the company’s affairs and in particular, without prejudice to the generality of the preceding words, if he possesses or is entitled to acquire the greater part of the share capital or voting power in the company;

b) if he possesses or is entitled to acquire either—

   i. the greater part of the issued share capital of the company;

   ii. such part of that capital as would, if the whole of the income of the company were in fact distributed to the members, entitle him to receive the greater part of the amount so distributed; or

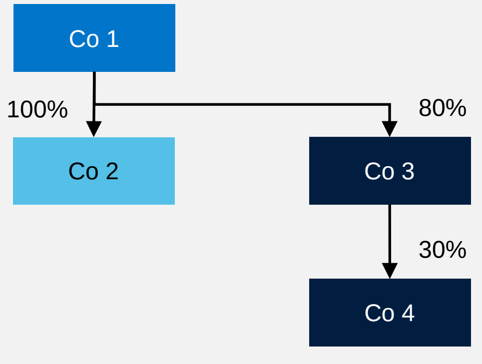
   iii. such redeemable share capital as would entitle him to receive on its redemption the greater part of the assets which, in the event of a winding up, would be available for distribution among members; or

c) if in the event of a winding up, he would be entitled to the greater part of the assets available for distribution among members.

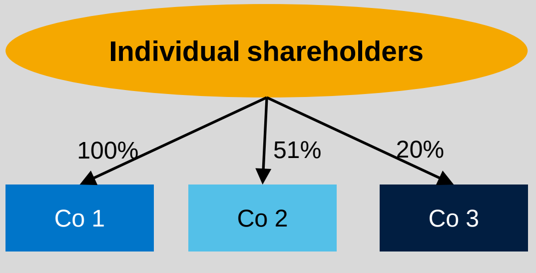
What is a related party? (cont.)

Pursuant to Section 139, a person occupying the position of Director of a company who is not a shareholder, is regarded to have control over the company if the director has management control over the company's affairs (e.g. making crucial business decisions, deciding on key policies, controlling decisions on operational matters, representing the company to enter into key contracts, approving significant payments, etc.). In this case, transactions undertaken between the director (including companies owned by the director) and the company shall be subject to the transfer pricing provisions.

The diagram below illustrates the meaning of related parties for Transfer Pricing purposes:



- Assuming that the conditions relating to control e.g. proprietary rights, are met, Companies 1 to 4 are treated as "associated" parties for Transfer Pricing purposes.*[Section 140A(5A)]*
- Co 4 is associated with Co 1 because the effective interest of Co 1 in Co 4 is 24% which is more than 20%.



- Co 1 and Co 2 are treated as "associated" parties for Transfer Pricing purposes as the companies are controlled by common individual shareholders, i.e. > 50%.
- Co 3 may be regarded to have met the definition of "control" if any of the conditions under Section 140A(5A) is satisfied, and therefore is controlled by the individual shareholders, even though the shareholding is only 20%.

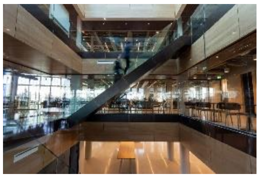
Types of Controlled Transactions

The types of controlled transactions that multinational companies (MNC) or domestic group of companies can enter into are very wide, from the supply of goods and services to leasing of assets. These controlled transactions are listed below:

Sales and purchases of goods / assets
Sales or purchase of goods / assets such as raw materials, intermediate goods, finished goods, fixed assets and Intellectual Property (IP) rights from which sales income is received

Provision of services
Provision of services such as technical services, management services, support services, etc. from which service income is received.

Licensing of IP rights
Licensing of IP rights or marketing intangibles for which royalty income is received. The licensing of IP could be in the form of know-how, trademark, tradename, brand name, etc.



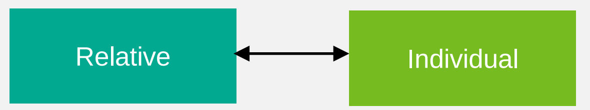
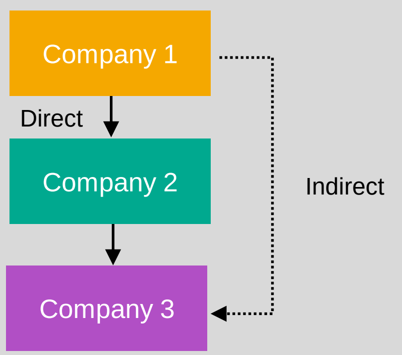
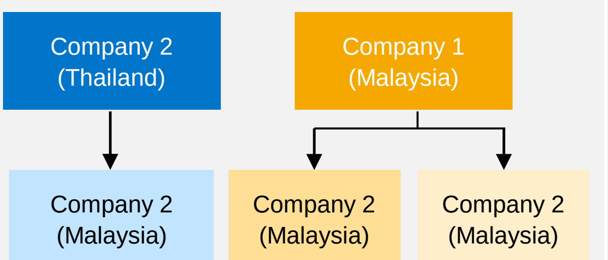
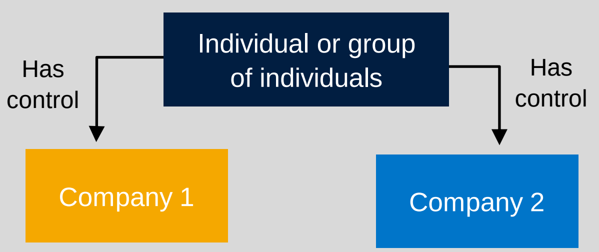
Rental or leasing of assets
Rental or leasing of assets e.g., hire of machinery or premises from which hire income, rental income or leasing income is received.

Provision of financing
Provision of financing in the form of loans for which interest income and guarantee fees are received. Other financing arrangements include treasury services, cash pooling, hedging and captive insurance.

Sharing of costs
Sharing of costs e.g., research & development costs. In Malaysia, taxpayers can opt for the Cost Contribution Agreement (CCA) for cases where taxpayers share the costs and risks of developing, producing or obtaining assets, services or rights.

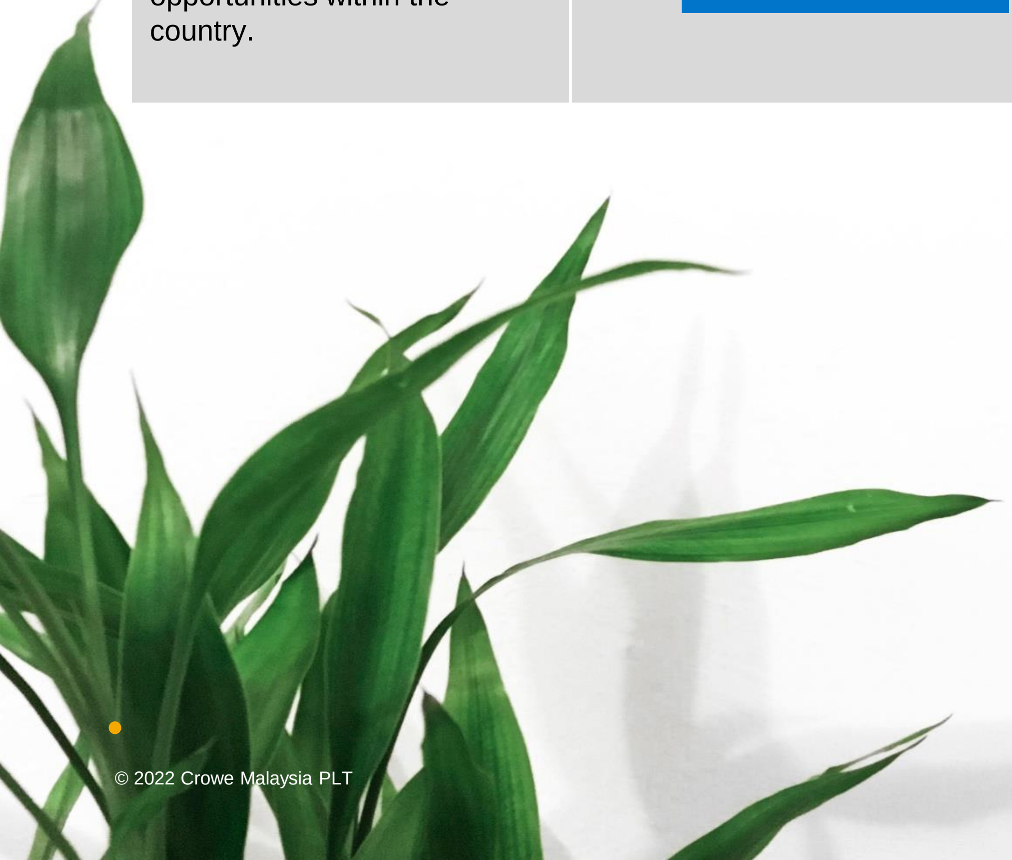
Companies Affected

The parties affected by transfer pricing provisions are those that are in business and who have transactions with related parties. Examples of parties who are affected or not affected by Section 140A of the ITA are illustrated in the following table:

Relationship	Illustration	Affected (Yes/No)
Relatives		Yes, if the individuals are carrying on business transactions.
Companies controlled directly or indirectly via 20% or more shareholding or other means		Yes
MNC groups and Malaysian groups of companies		Yes
Companies which do not have a holding company structure but are commonly controlled by individuals		Yes

Companies Affected (cont.)

Relationship	Illustration	Affected (Yes/No)
Permanent establishments in Malaysia *A permanent establishment is a fixed place of business e.g., a branch, construction site, quarry, etc. as determined by the double tax treaties between Malaysia and the treaty country.	Holding company ↓ Permanent Establishment	Yes
Representative office *A representative office is a non-trading entity that allows foreign-based companies to have a presence in Malaysia together with their expatriates to explore business opportunities within the country.	Holding company ↓ Representative Office	No



Setting of Transfer Prices

Setting transfer prices can be a complicated process and has to go through a few stages before one can determine an acceptable transfer price. The major steps are as follows:

1. Analyse the taxpayer's circumstances and controlled transactions

Background of the taxpayer including business activities, industry performance, controlled transactions, and pricing policies which have to be analyzed and documented.

2. Analyse FAR of each party

Functional analysis is conducted to understand the functions performed, assets employed, and risks assumed ("FAR") by the taxpayer and eventually to characterize the business of the taxpayer.

3. Apply suitable transfer pricing method

Transfer pricing methods such as the CUP, RPM, CPM, PSM and TNMM may be applied. The most suitable method is selected depending on the nature and characterization of the controlled transaction.

4. Perform comparability analysis

A comparability analysis involves comparing conditions in a controlled transaction with those in an uncontrolled transaction.

5. Perform benchmarking study

A benchmarking study is undertaken to support the transfer price. In the study, searches for comparables are performed to obtain reliable financial information as reference for the arm's length prices / profits. The results derived form the range of prices or profits acceptable for transfer pricing purposes. This range is known as "arm's length range".

6. Evaluate results and implement transfer prices and monitor effects

The prices arrived at are subject to regular review to ensure that the transfer prices remain relevant over time. During the review, the company shall continue to perform analysis on the controlled transactions to ensure the transfer prices used are consistent with the arm's length principle.

Setting of Transfer Prices (cont.)

1. **Analyse the taxpayer's circumstances and controlled transactions**

   The following key information are analyzed and documented for transfer pricing purposes:

   - Overview of the business including business model, business line, business strategy and recent history.
   - Details and relationships of all associated persons.
   - Structure, intensity and dynamics of the relevant competitive environment.
   - Nature, terms and conditions with regards to the controlled transactions.
   - Details of pricing policy for each type of controlled transaction.
   - Assumption, strategies and information regarding factors that influence the setting of pricing policies.

2. **Analyse FAR of each party**

   The functional analysis seeks to identify the economically significant activities from the perspectives of functions performed, assets employed, and risks assumed by the parties to the transactions. Accordingly, the party that provides more important functions, deploys significant assets and undertakes higher business risks are expected to earn higher compensation, and vice versa.

   Functions: The exact functions performed by the parties within the business supply chain of the Group must be examined, documented and aligned with the contractual arrangements.

   Assets: The assets employed by a company can be tangible or intangible. Certain intangible assets can be highly valuable to the group and the party owning such intangibles should be compensated accordingly.

   Risks: Evaluating the different business risks assumed by the respective parties is crucial as these risks can potentially translate into costs borne by the parties e.g., legal costs, warranty costs, damages on breach of contractual terms, financial costs, etc.

Setting of Transfer Prices (cont.)

3. Apply suitable transfer pricing method

The five (5) transfer pricing methods are provided below:

- **CUP**: Compares the price charged for property or services transferred in a controlled transaction with the price charged for property or services in a comparable transaction undertaken between independent parties.
- **RPM**: Recognizes gross margin or difference between the price at which a product is purchased and the price at which it is on-sold to a third party.
- **CPM**: Involves identifying the costs incurred by the vendor of the goods or services in a controlled transaction and then adding an arm's-length mark-up to that cost base.
- **PSM**: Evaluates the terms and conditions in the controlled transaction and employs a formula to allocate profits to the parties based on their contributions.
- **TNMM**: Determines the net profit of a controlled transaction undertaken by an associated enterprise by reference to comparable transactions.

4. Perform comparability analysis

A comparability analysis involves comparing conditions in a controlled transaction with those in an uncontrolled transaction. The five factors determining the comparability include:

- Characteristics of the property or services
- Functions performed, assets employed, and risks assumed by the respective persons
- Contractual terms
- Economic circumstances
- Business strategies

5. Perform benchmarking study

When performing a benchmarking study, the following areas are examined and taken into consideration in order to arrive at outcomes that are impartial:

- Tested party
- Comparable period
- Multiple year data
- Separate and combined transactions
- Arm's length range

6. Evaluate results, implement transfer prices and monitor effects

At this stage, an arm's length range is established based on the results of the benchmarking study. Transfer pricing documentations are maintained and kept for the IRB's review during a tax audit.

Post benchmarking study, taxpayers should continue to undertake regular reviews of their controlled transactions to ensure compliance with the arm's length principle.

Compliance Requirements of Transfer Pricing

Transfer Pricing Documentation (TPD) requirements are strict and need to be complied with otherwise, penalties will be imposed for non-compliance. The various requirements are as follows:

1. Documentation

<table>
<tr><td>Who is liable to prepare the TPD?</td><td>Companies that undertake controlled transactions.</td></tr>
<tr><td>When to prepare the TPD?</td><td>Taxpayers are required to prepare contemporaneous TPD:-
• At the time the controlled transactions are entered into.
• Annual review of the TPD prior to the due date for filing of tax return (i.e. Form C) for a year of assessment.</td></tr>
<tr><td>What is the threshold to prepare the TPD?</td><td>A Full TPD is required when a company has:
• Annual gross income <u>exceeding RM25 mil</u> and total related party transactions <u>exceeding RM15 mil per annum</u>; or
• Provision of financial assistance <u>exceeding RM50 mil</u> for non-financial institutions.
Taxpayers that fall below the thresholds may opt to prepare a Limited TPD.</td></tr>
<tr><td>What are the consequences for failure to comply with the Malaysian Transfer Pricing law and regulations?</td><td>1. Penalties for non-preparation of TPD [Section 113B of the ITA 1967]
The penalties range from RM20,000 to RM100,000 and/or imprisonment for up to 6 months or both for each year that the TPD has not been prepared.
2. Prior to 1.1.2021 - Penalty regime under TP audits:
<table>
<tr><th>Situation</th><th>Penalty rate</th></tr>
<tr><td>Taxpayer did not prepare TPD</td><td>50%</td></tr>
<tr><td>Taxpayer prepared TPD but did not comply with the MTPG or taxpayer failed to submit the TPD within 14 days from IRB’s written request</td><td>30%</td></tr>
<tr><td>Voluntary Disclosure cases</td><td>20%</td></tr>
<tr><td>Taxpayer prepared comprehensive and quality TPD according to the MTPG and submitted the TPD to the IRB within 14 days from the IRB’s written request.</td><td>0%</td></tr>
</table>
3. 1.1.2021 and onwards - Surcharge on TP adjustments [Section 140A(3C) of the ITA 1967]
A surcharge of not more than 5% on TP adjustments may be imposed on any TP adjustment arising from a TP audit. As the surcharge is imposed on TP adjustments and not on the additional tax, companies enjoying tax incentives or having tax losses to offset the TP adjustment will be affected.</td></tr>
</table>

Compliance Requirements of Transfer Pricing (cont.)

1. Documentation (cont.)

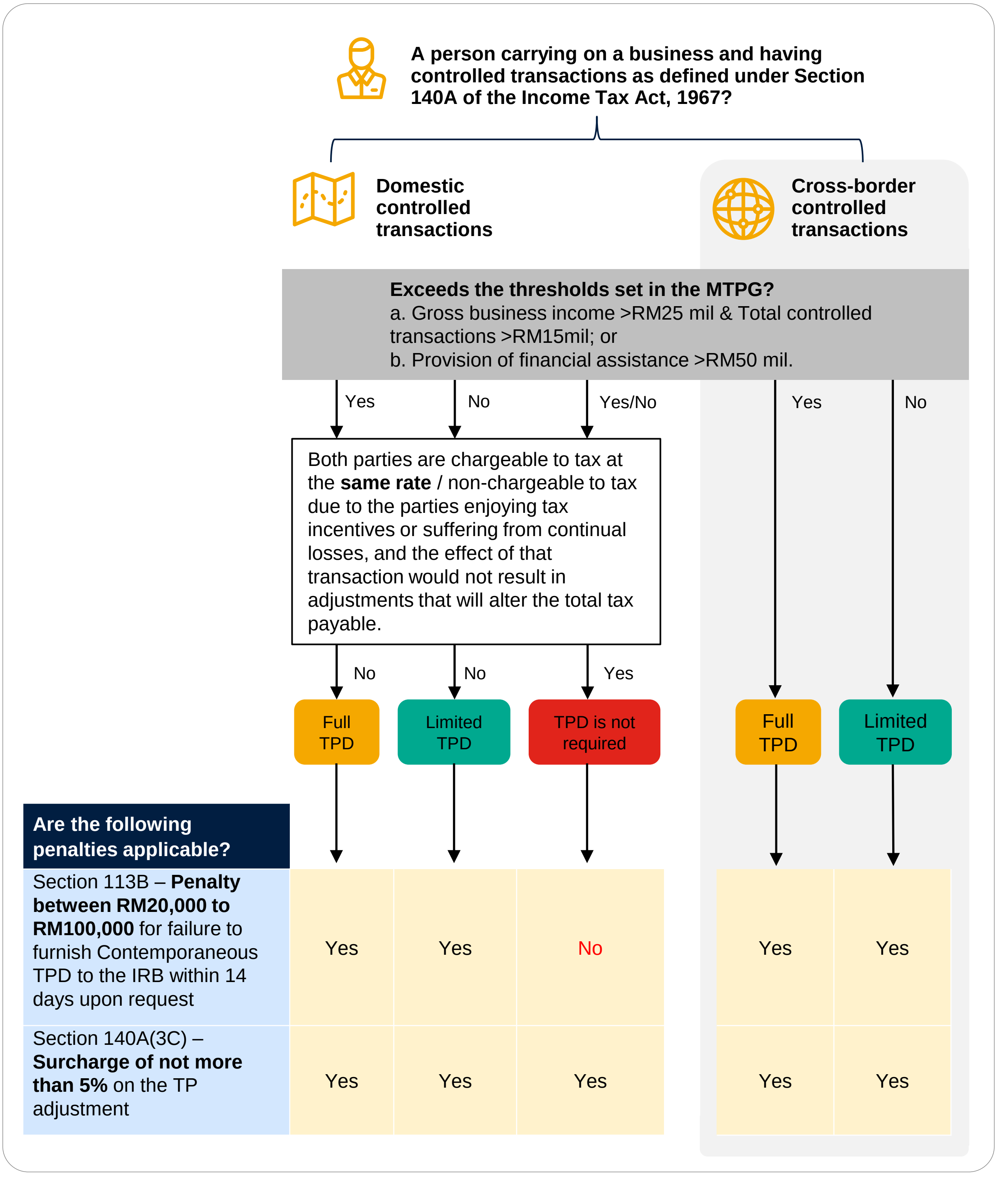
What is the period covered for the TPD?	The IRB is empowered to make TP adjustments for a period of 7 years. Taxpayers need to keep sufficient records for a period of 7 years from the end of the year to which income from the business relates.
How often should the TPD be updated?	Financial data of comparable companies selected from the search process during the benchmarking study should be **reviewed and updated every year.** The benchmarking study on comparable searches in databases should be updated **every three years**.

2. Exemption from preparation of Transfer Pricing Documentation

Who can be exempted from preparation of TPD?	Domestic groups of companies which undertake controlled transactions within Malaysia can be exempted from preparation of TPD, provided the transacting parties fulfill the following conditions: i. Both parties are chargeable to tax at the same rate; or ii. Both parties are non-chargeable to tax due to the parties enjoying tax incentives or suffering from continual losses; AND iii. The effect of any TP adjustments (if any) will not alter the total tax payable by both parties, i.e. no loss of tax revenue to the Government.

Compliance Requirements of Transfer Pricing (cont.)

Transfer Pricing Documentation Flowchart



Compliance Requirements of Transfer Pricing (cont.)

We set out below some of the examples of companies engaged in domestic controlled transactions and our comments on whether these companies should consider preparing TPDs in view that the tax payable positions of the parties may not be certain at the time of filing of the tax returns:

Company A	Company B	TP adjustment	Recommend-ation
Non-chargeable to tax (Loss making)	Non-chargeable to tax (Loss making)	If the tax losses are not sufficient, any TP adjustment made by the IRB will not be fully offset by the tax losses, and hence, may result in additional taxes payable by Co. A or Co. B.	Yes – To prepare TPD
Taxable	Non-chargeable to tax (Loss making / enjoying tax incentive)	Any TP adjustment made by the IRB on Co. A will likely result in additional tax payable by Co. A.	Yes – To prepare TPD
Taxable*	Taxable*	Any TP adjustment on either Co. A or Co. B will result in one company paying additional tax and the other company receiving a corresponding tax reduction i.e. overall tax neutral position - no difference in the net tax payable position / no loss of tax revenue to the government.	No TPD is required to be prepared.
Taxable*	Taxable*	If the controlled transaction involves financial assistance arrangements between the parties, any TP adjustment on the interest expenses / interest income may not result in a tax neutral position if the borrower party is subject to the interest restriction rule under Section 33(2) of the ITA where the interest expense of the borrower is not fully deductible.	Yes – If the controlled transaction involves a financing arrangement that is subject to the interest restriction rule.

**Note: Assuming Company A and B are subject to the same corporate tax rate.*

Compliance Requirements of Transfer Pricing (cont.)

3. Submission of Transfer Pricing Documentation

When to submit the TPD?	The TPD has to be submitted to the IRB upon request.
What is the deadline for the submission of the TPD?	TPD has to be submitted within 14 days upon request by the IRB.
What is the impact to the taxpayer indicating "Yes" or "No" to having a TPD prepared in the Corporate Tax Return Form (Form C)?	Taxpayers which undertake significant controlled transactions but did not prepare TPD at the time of submission of Form C will have to check "No" in the Form C disclosure on TPD compliance. Taxpayers who checked "Yes" in the Form C for having a TPD prepared must ensure the TPD is ready to be submitted within 14 days upon request by the IRB. Penalties ranging from RM20,000 to RM100,000 for each year of assessment may be imposed for failure to furnish TPD to the IRB in a timely manner.

4. Setting of proper transfer prices

Will a company that is below or above the TP thresholds be penalized if the transfer prices are incorrect?	Yes, failure to set proper transfer prices will result in Transfer Pricing adjustments being made by the IRB during a tax audit.
What is the penalty for failure in setting proper transfer prices?	Any TP adjustments made by the IRB shall give rise to a "surcharge" of not more than 5% on the TP adjustment. The surcharge is imposed regardless whether the taxpayers are in tax payable position or otherwise.

Compliance Requirements of Transfer Pricing (cont.)

5. Information required in a Transfer Pricing Documentation

No	Information	Details	Full TPD	Limited TPD
1	**Organizational structure**	▪ Group background, ownership structure and business ▪ Organization chart	✓	✓
2	**Nature of the business or industry and market conditions**	▪ Overview of Company's business profile and recent history. ▪ Analysis of the general economic and legal issues affecting the business and industry. ▪ Description of the structure, intensity and dynamics of the relevant competitive environment(s).	✓	✗
3	**Controlled transactions**	▪ Nature, terms (including prices) and conditions of controlled transactions. ▪ Intercompany agreements setting forth the terms and conditions of the transactions. ▪ Record of any forecasts, budgets or any other financial estimates	✓	✓
4	**Pricing policies**	▪ Details of pricing policy for each type of controlled transactions. ▪ Sample of documents to support the pricing policy. ▪ Comparability study to ensure the accuracy of the arm's length price.	✓	✓
5	**Assumptions, strategies and information regarding factors that influence the setting of pricing policies**	▪ Assumptions and information regarding business strategies and factors that influenced the setting of prices. ▪ Documentation to support material factors that could affect prices or profits.	✓	✗

Compliance Requirements of Transfer Pricing (cont.)

5. Information required in a Transfer Pricing Documentation (cont.)

No	Information	Details	Full TPD	Limited TPD
6	**Comparability, functional and risk analyses**	▪ Description of the characteristics of the controlled transactions, functions performed, assets employed, risks assumed, terms and conditions of the contract, business strategies pursued and economic circumstances. ▪ Analysis to evaluate comparability of uncontrolled transactions with the relevant controlled transactions. ▪ Criteria used in the selection of comparables including database screens and economic considerations.	✓	✗
7	**Selection of the transfer pricing method**	▪ Analysis to determine the arm's length price and the rationale for the selection of this methodology including reasons for its use in preference to other transfer pricing methodologies.	✓	✗
8	**Application of the transfer pricing method**	▪ Documentation of all calculations made in applying the selected method, and of any adjustment factors. ▪ Appropriate updates of prior year documentation relied upon in the current year to reflect adjustments for any material changes	✓	✗
9	**Financial information and relevant documents**	▪ Annual audited accounts for the fiscal year concerned. ▪ Analyse the financial results and provide justifications for loss making position. ▪ Financial data of comparables used in the comparability analysis (if applicable).	✓	✓

The Law and Relevant Guidelines

The TP landscape in Malaysia (for domestic and cross-border transactions) is shaped by the following legislation and guidelines:

Transfer Pricing Documentation

- Income Tax Act ("ITA") 1967
  - *Section 140A*
- Income Tax (Transfer Pricing) Rules 2012
- Malaysian Transfer Pricing Guidelines 2012 (updated in July 2017)

Country-by-Country Reporting

- Country-by-Country Reporting Guidelines
- Section 21 of Labuan Business Tax Act 1990
- Income Tax (Country-by-Country Reporting) Rules 2016
- Income Tax (Country-by-Country Reporting (Amendment) Rules 2017
- Labuan Business Activity Tax (Country-by-Country Reporting) Regulations 2017

Advance Pricing Arrangement

- Income Tax (Advance Pricing Arrangement) Rules 2012
- Income Tax (Advance Pricing Arrangement) (Amendment) Rules 2012

Mutual Agreement Procedure

- Mutual Agreement Procedure ("MAP") Guidelines

Transfer Pricing Audit

- Transfer Pricing Audit Framework 2019

OECD Guidance

- OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.
- Base Erosion and Profit Shifting ("BEPS") Actions 8 -10

The Law and Relevant Guidelines (cont.)

No	Law or Guidelines	Details
Transfer Pricing Related Legislations, Rules and Guidelines		
1	Section 140A of the ITA 1967	• The IRB is empowered to substitute the prices on transactions between related parties to reflect the arm's length prices if the Director General has reason to believe such related party prices do not meet the arm's length requirements. • The IRB is also empowered to disregard any structure set up by related parties in a controlled transaction if the economic substance differs from the form, or that the structure does not observe commercial practices.
2	Transfer Pricing Rules 2012	• Subsidiary legislation issued by the Government to govern the implementation of the transfer pricing provisions in Malaysia. • The Rules cover several topics on the Government's expectations from taxpayers with regard to preparation of TP documentation, application of TP methods, etc.
3	Malaysian Transfer Pricing Guidelines 2012 (updated in July 2017)	• Set out in detail the administrative requirements and various procedures to be adhered to pertaining to compliance with the provisions under Section 140A of the ITA 1967 and the Transfer Pricing Rules 2012. • Largely follow the guidelines issued by the OECD. • Give illustrations of different scenarios on specific transfer pricing issues for better understanding, elaborate on different categories of controlled transactions and the specific transfer pricing analysis for each of these types of transactions, e.g. provision of intra-group services, provision of intra-group financial assistance, transfer of intangible assets, etc. • Prescribe thresholds for taxpayers to determine the extensiveness of the TP documentation required from them based on a combination of the size of the taxpayers' business and the size of the controlled transactions.

The Law and Relevant Guidelines (cont.)

No	Law or Guidelines	Details
Country-by-Country Reporting (“CbCR”)		
4	Income Tax (Country-by-Country Reporting) Rules 2016 Income Tax (Country-by-Country Reporting) (Amendment) Rules 2017 Labuan Business Activity Tax (Country-by-Country Reporting) Regulations 2017	• Statutory orders issued by the government that prescribe the rules to be applied relating to the compliance of CbCR requirements in Malaysia / Labuan.
5	Country-by-Country Reporting Guidelines	• Provide guidance and clarification on reporting obligations, and explain on reporting requirements, filing procedures, submission requirements and other administrative procedures including penalties for non-compliance.
Advance Pricing Arrangement (“APA”)		
6	Income Tax (Advance Pricing Arrangement) Rules 2012 and Income Tax (Advance Pricing Arrangement) (Amendment) Rules 2012	• A taxpayer who carries on a cross-border controlled transaction may apply to the Director General for an APA that is agreeable between the taxpayer and the IRB under specified terms and conditions. • The advance pricing application is subject to a fee.
7	Advance Pricing Arrangement Guidelines 2012	• Explain the manner in which a taxpayer may apply for an APA from the Director General of Inland Revenue (DGIR) / Competent Authority (CA), and the manner in which such an application will be processed and administered.

The Law and Relevant Guidelines (cont.)

No	Law or Guidelines	Details
Mutual Agreement Procedure ("MAP")		
8	Mutual Agreement Procedure Guidelines 2017	• Set out the detailed mechanism for resolving tax disputes between taxpayers from different countries with the IRB.
Transfer Pricing Audit		
9	TP Audit Framework 2019 ("TPAF")	• Issued by the IRB to ensure that transfer pricing audits are carried out in a fair, transparent and impartial manner. • Outlines the IRB's approach in conducting TP Audits to ensure audits are carried out in a fair, transparent and impartial manner. • Spells out the respective rights and responsibilities of audit officers, taxpayers and tax agents engaged in a transfer pricing audit.
Organisation for Economic Co-operation and Development Guidance ("OECD Guidelines")		
10	Base Erosion and Profit Shifting (BEPS) Actions 8 -10	• Actions 8 – 10 relate to proposed new approaches to tackle more challenging transfer pricing issues, such as hard-to-value intangible assets, low value-adding services, alignment of value creation with returns, etc. • BEPS project is an initiative by the OECD to confront tax planning strategies used by MNCs that exploit gaps and mismatches in tax rules by engaging in tax avoidance schemes. All in all, the BEPS framework has 15 action items to tackle tax avoidance, improve the coherence of international tax rules and ensure a more transparent tax environment.
11	OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (2022 Edition)	• The OECD Transfer Pricing Guidelines provide guidance on the application of the "arm's length principle", which is the international consensus on the valuation of cross-border transactions between associated enterprises. • Guidance by OECD on the application of the transactional profit method and the guidance for tax administrations on the application of the approach to hard-to-value intangibles, financial transactions, etc.

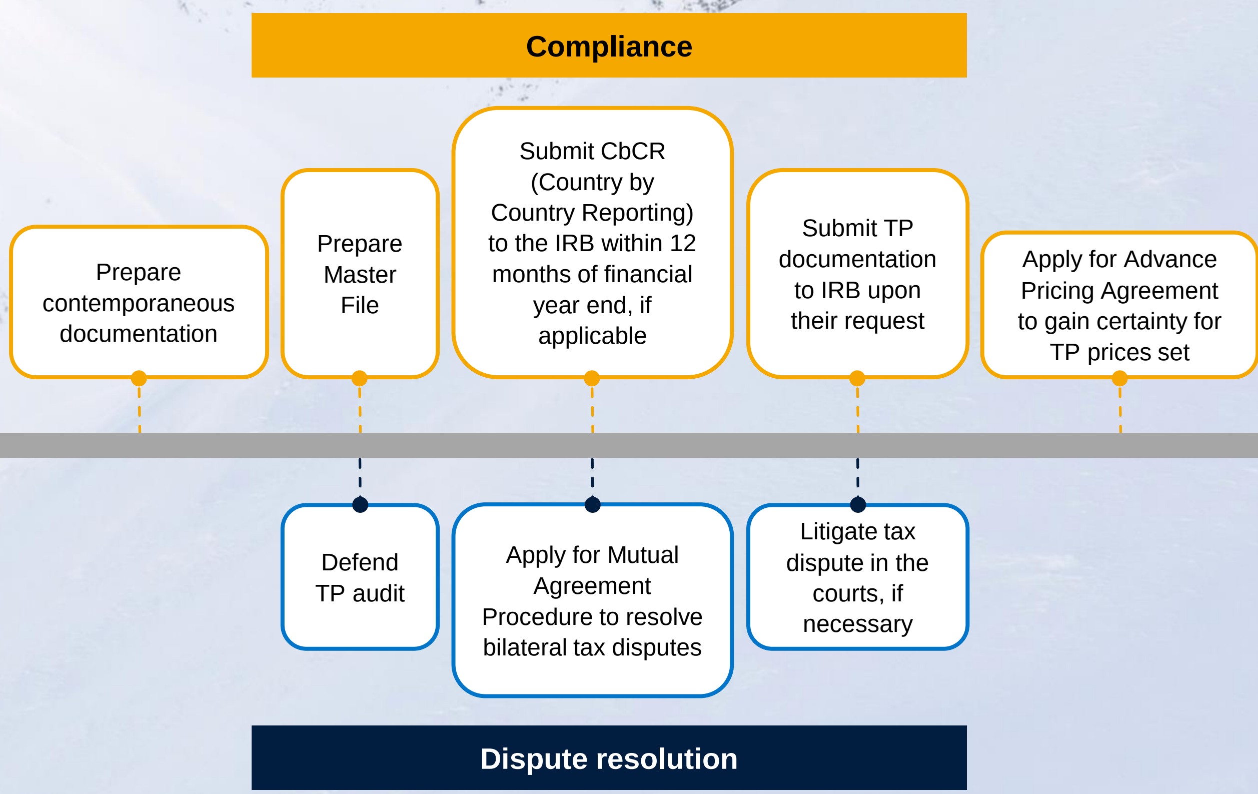
International TP Tax Issues

MNC groups which operate across the world have to cope with the Transfer Pricing laws and rules in all the relevant countries.

Specifically in Malaysia, TP compliance is key to mitigate exposure to TP risks. Other than complying with TP Documentation requirements in terms of preparing a local file and a master file, a MNC Group is required to observe the CbCR rules if the Group meets the minimum threshold set for preparing CbCR. Despite having put in place the TP Documentation, the IRB may still challenge the taxpayer on various TP issues during a TP audit.

Hence, another important area of TP relates to handling and resolving disputes with the view to manage the final tax outcome more effectively.

The compliance as well as dispute resolution options are illustrated in the chart as follows:



International TP Tax Issues (cont.)

The documents that are relevant for cross-border compliance are outlined below:

Country-Country Reporting (CbCR)	Advance Pricing Arrangement (APA)	Mutual Agreement Procedure (MAP)
Malaysia has introduced the OECD three-tiered approach on transfer pricing documentation. ***CbCR****:* Provides aggregate tax jurisdiction-wide information. ***Master File****:* Provides an overview of the MNC group's business, value drivers, intangibles, financing arrangements and supply chain. ***Local File****:* There is no requirement to prepare a Local File in addition to the general transfer pricing documentation requirements. The CbCR Rules/ Labuan CbCR Regulations apply to the following MNC Groups with total consolidated annual group revenue of at least RM 3 billion: • MNCs headquartered in Malaysia and surrogates. • MNC groups where the ultimate holding entity or any of its constituent entities is a Labuan entity carrying on a Labuan business activity. Failure to furnish CbCR return is an offence and if convicted, the taxpayer would be liable to a fine of not less than RM20,000 and not more than RM100,000 or to imprisonment for a term not exceeding 6 months or to both.	A taxpayer who carries on a cross-border controlled transaction may apply to the DGIR for an APA in relation to the transaction, subject to meeting certain terms and conditions. There are three types of APA: • Unilateral APA • Bilateral APA (BAPA) • Multilateral APA (MAPA) The scope of an APA covers the following: a) taxpayer and the foreign related parties b) cross-border transactions to be covered c) agreed TP method to be employed including arm's length outcomes from applying the said TP method d) duration of the APA e) critical assumptions f) other agreed terms and conditions	The MAP Guidelines are intended to provide guidance to taxpayers on the process and procedures to initiate an MAP request with the Malaysian Competent Authority to resolve treaty-related disputes. The MAP mechanism is independent from the legal remedies available under domestic law.

Transfer Pricing Audit FAQs

With the recent developments in the sophistication of transfer pricing audits in Malaysia, Malaysian companies engaged in controlled transactions must keep up with the practices of the IRB to ensure that their TP practices remain relevant at all times. Some of the questions relating to TP audits are listed below, together with the corresponding answers in short-form format:

Q: What is a Transfer Pricing audit?

A: An examination performed by the IRB on the taxpayers' business records and financial affairs to ascertain the arm's length nature of their controlled transactions.

Q: What are the key targets for Transfer Pricing audits?

A: Companies indicating "No" TPD in their Form C tax return despite having controlled transactions, having low profit or are loss making, having fluctuating financial results, enjoying tax incentives, entered into business restructuring, used tax haven countries, etc.

Q: How will the taxpayer be notified for the audit?

A: The taxpayer will receive a letter/email requesting for documents and information from the IRB.

Q: What is the timeline for submission of the TPD upon the IRB's request?

A: Taxpayers are required to submit the TPD and other information within 14 days from the date of written request.

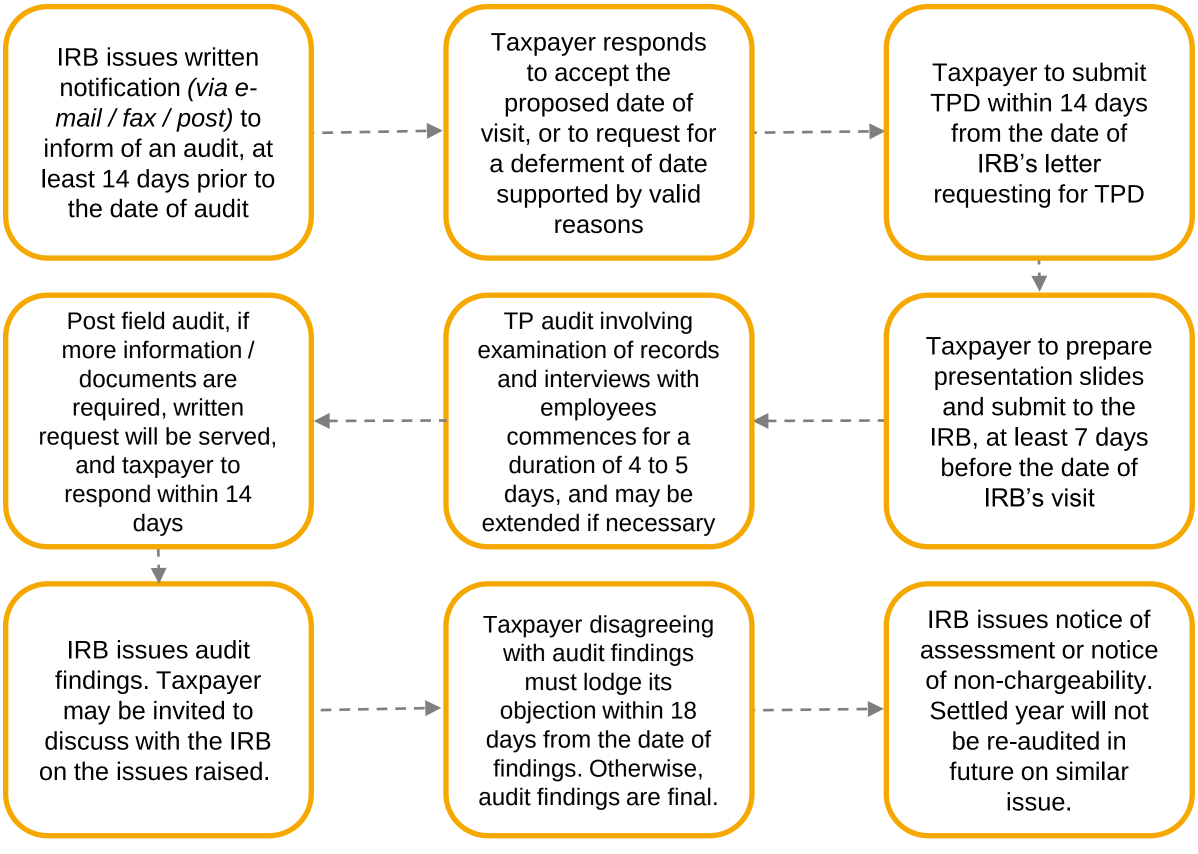
Q: How many years of assessment are covered under the transfer pricing audit?

A: The transfer pricing audit will usually cover between three (3) to six (6) years of assessment depending on the transfer pricing issues which have been determined. However, the IRB may raise an assessment on the TP adjustments up to seven (7) years.

Q: What happens if the TPD is not furnished in time / poorly prepared / the controlled transactions are not at arm's length prices?

A: The taxpayers will be subject to penalties, surcharges and / or additional tax assessments depending on the offence. Please refer to Section 6 of this handbook for details on the different rates of penalties.

Transfer Pricing Audit Process Flowchart



No	Notable Event	Timeline
1	Prior to commencement of TP audit: - Notification to taxpayer of an audit	At least 14 calendar days prior to the date of the IRB's visit.
2	Prior to commencement of TP audit: - Submission of TPD	Within 14 calendar days from the date of the IRB's letter requesting for TPD.
3	Prior to commencement of TP audit: - Submission of presentation slides on required information	At least 7 calendar days prior to the date of the IRB's visit.
4	During the audit: - Furnishing of additional information / documents	Within 14 calendar days from the date of the IRB's letter requesting for such information / documents.
5	During the audit: - Scope of audit	Generally, covers 3 to 6 years of assessment, but can be up to 7 years. May be extended where fraud, willful default or negligence is detected.
6	During the audit: - Objection to audit findings	Objection to be lodged within 18 calendar days from the date of audit findings.
7	Post audit: - Appeal on notice of assessment	Form Q to be filed to the IRB within 30 days from the notice of assessment.

How Crowe Can Help

Crowe can help in many ways ranging from documentation to dispute resolution. We have the experts with the in-depth knowledge and experience to cater to your requirements. Please feel free to contact us for a discussion.

Transfer Pricing Documentation

- Local file
- Master file
- Country-by-Country report
- Regional transfer pricing documentation
- Intra-group financing comparability analysis
- Intangible property comparability analysis and DEMPE analysis

Transfer Pricing Advisory

- High-level transfer pricing review
- Transfer pricing due diligence
- Transfer pricing planning
- Transfer pricing strategy setting
- Value chain analysis

Transfer Pricing Dispute Mitigation

- Advance pricing agreement
- Mutual agreement procedures
- Transfer pricing health-check
- Transfer pricing strategy setting
- Value chain analysis

Transfer Pricing Dispute Resolution

- Transfer pricing audit defense
- Litigation and appeal

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About Crowe Malaysia
Crowe Malaysia is the 5th largest accounting firm in Malaysia and an independent member of Crowe Global. The firm in Malaysia has 14 offices, employs over 1,200 staff, serves mid-to-large companies that are privately-owned, publicly-listed and multinational entities, and is registered with the Audit Oversight Board in Malaysia and the Public Company Accounting Oversight Board in the US.

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Crowe Global is one of the top 10 accounting networks with over 200 independent accounting and advisory firms in more than 145 countries. For almost 100 years, Crowe has made smart decisions for multinational clients working across borders. Our leaders work with governments, regulatory bodies and industry groups to shape the future of the profession worldwide. Their exceptional knowledge of business, local laws and customs provide lasting value to clients undertaking international projects.

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