10TH SGATAR JOINT TRAINING PROGRAM
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MUTUAL AGREEMENT PROCEDURE (MAP) AND ADVANCE PRICING ARRANGEMENT (APA)

COUNTRY PAPER

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1. INTRODUCTION

The 2012 Malaysian Transfer Pricing Guidelines (TP Guidelines) replaced the earlier 2003 guidelines and are intended to provide guidance to taxpayers on the application of the law under S 140A of the *Income Tax Act 1967* (ITA) and the *Income Tax (Transfer Pricing) Rules 2012*. The Malaysian TP Guidelines also indicate the type of records and documentation that Inland Revenue Board Of Malaysia (IRBM) expect taxpayers to maintain for transfer pricing purposes.

The Malaysian TP Guidelines are largely based on the governing standard for transfer pricing which is the arm's length standard as set out under the Organisation for Economic Co-operation and Development (OECD) Transfer Pricing Guidelines. These Guidelines provide an in-depth guidance to taxpayers on the following :

I. Steps involved in applying the arm's length principle;

II. Acceptable transfer pricing methodologies;

III. Manner in which a comparability analysis should performed;

IV. The re-characterisation of transactions, loss making enterprises and business restructuring;

V. The application of the arm's length principle to specific transactions.

2. SCOPE OF THE MALAYSIAN TP GUIDELINES

The TP guidelines are applicable to controlled transactions for the acquisition or supply of property or services between associated persons, where at least one person is assessable or chargeable to tax in Malaysia.

The TP Guidelines clarify that this includes taxpayers involved in domestic controlled transactions where at least one party enjoys tax incentives or suffers from continual losses, or is taxed at the different rate, such that effect of that transaction would result in adjustments that alter the total payable.

3. THRESHOLD FOR THE PREPARATION OF CONTEMPORANEOUS TRANSFER PRICING DOCUMENTATION

To ease the compliance burden, the TP Guidelines clarify that the requirement for maintaining contemporaneous transfer pricing documentation under the *Income Tax (Transfer Pricing) Rules 2012* will apply only to the following:

I. For a person carrying on a business, where the gross income exceeds RM 25 million, and the total amount of related party transactions exceeds RM 15 million; and

II. In relation to financial assistance, where such financial assistance exceeds RM 50 million. It should be noted that the Guidelines do not apply to transactions involving financial institutions.

Where taxpayers do not meet the above-mentioned thresholds, S 140A will continue to apply to such taxpayers, but the documentary requirements will not be so onerous as indicated below.

4. PERSONS WHO FALL OUTSIDE THE SCOPE OF THE TP GUIDELINES

Any person who falls outside the scope of the TP guidelines may opt for one of the following:

I. To comply fully with the guidance and documentation requirements in the guidelines; or

II. To maintain an abbreviated set of Transfer Pricing Documentation which covers the organizational structure, controlled transactions and pricing policies.

Additionally, the person is allowed to apply any method and is not confined to the five methods described in the TP Guidelines, provided the method used results in or best approximates an arm's length outcome.

5. SUBMISSION OF TRANSFER PRICING DOCUMENTATION

Transfer pricing documentation does not need to submitted with the annual tax return but should be made available to the IRBM within 30 days upon request.

6. PENALTIES

Penalties are imposed for transfer pricing adjustments under S 113(2) of the ITA at the following rates:

I. No contemporaneous Transfer Pricing Documentation - 35% of tax understated.

II. Transfer Pricing Documentation prepared but not in accordance with requirements set out in the TP Guidelines – 25% of tax understated.

Taxpayers who do not fall within the scope of the Guidelines and hence have not prepared contemporaneous Transfer Pricing Documentation may be subject to a 25% penalty on tax understated in the event that the related party transactions are not at arm's length.

The penalty rate shall be increased by 20% as compared to the last penalty rate imposed for the previous offence but is limited to a sum not exceeding 100% of the amount of tax undercharged, where-

I. The taxpayer obstructs or interferes with a transfer pricing audit; or

II. The taxpayer fails to comply with the arm's length principle after previous transfer pricing audits.

7. MALAYSIAN ADVANCE PRICING ARRANGEMENT GUIDELINES

The 2012 Malaysian Advance Pricing Arrangement Guidelines ("APA GUIDELINES") provide guidance to taxpayers on the procedures to apply for an APA and the manner in which such an application will be processed and administered.

7.1 Threshold For Application For APA

Taxpayers which meet the following criteria are entitled to apply for an APA:

a. A company assessable and chargeable to tax under the ITA;

b. Turnover value exceeding RM 100 million;

c. The value of the proposed transaction (for which an APA is sought) meets a minimum value/ percentages as follows:

- Sale Transaction - 50% of turnover
- Purchase Transaction – 50% of total purchase
- Financial assistance – More than RM 50 million
- Other Transactions – More than RM 25 million

d. The transactions must relate to income that is chargeable and not income which is exempt.

The APA Guidelines provide that a tax compliance audit or an investigation may still be conducted on the taxpayer for transactions that are not covered under the APA. In the event that the APA is cancelled or revoked, a full audit may be conducted.

7.2 Penalties

As long as an APA remains in effect and the taxpayer complies with the terms and conditions of the APA, no penalty under the ITA will be imposed with respect to the covered transactions in the covered period.

However, where as a result of the application for an APA, there is a need to revise the rollback years of assessment, such adjustments may be subject to penalty provisions under the Act.

8. MUTUAL AGREEEMNT PROCEDURE (MAP)

The IRBM will soon release the Mutual Agreement Procedure (MAP) Guidelines which is a set of legally binding framework that elaborates broadly on Mutual Agreement Procedure matters.

9. CAPACITY BUILDING PROGRAM ON MAP AND APA

9.1 Introduction

In 2003, the Malaysian Tax Academy (MTA) of Inland Revenue Board Malaysia (IRBM) started its training collaboration with OECD with one topic on transfer pricing. Since then, the joint programme has progressed rapidly and by 2011 the MTA successfully conducted 43 bilateral and multilateral, introductory to advanced level technical events for local and international participants in these areas of focus:

a. Transfer Pricing
b. Transfer Pricing Dispute Resolution
c. Tax Treaties
d. Auditing of Multinational Enterprises
e. Auditing of Small Medium Enterprises
f. Taxation of Financial Instruments/Market/Islamic Financial Instruments
g. International Tax Avoidance and Evasion

Enhancing training cooperation with OECD is pivotal to IRBM. OECD training programme enables IRBM officers to build expertise and knowledge particularly in the areas of international taxation and transfer pricing, made possible by knowledge imparted by the experts as well as experience sharing by fellow tax officials from other tax jurisdictions. IRBM expresses its deepest appreciation and gratitude to the OECD for the continuing strong support towards its requests for training and capacity building.

9.2 Training needs

Generally, MTA determines the area of focus of its training programme from various inputs based on current tax issues faced by IRBM with transfer pricing remaining as the main focus of training. As the extent of cross border trade increases and in tandem with IRBM being a Law Enforcement Agency (LEA) in countering money laundering and terrorism, it is pertinent for IRBM to equip its officials with the necessary skills and knowledge in the area of Exchange of Information. This topic is accordingly included in MTA's 2012 training calendar.

9.3 Evaluation and feedbacks

MTA successfully conducted 8 programmes in 2011, involving 196 participants from 27 countries including Malaysia.

Participants concurred and gave positive responses on the overall training experience. They were highly appreciative of the thoroughness applied by resource persons to ensure understanding and encourage their continuity.

Materials and methodology:

a. Case studies were considered the most beneficial and effective by participants hence requests for more case studies were often noted in the evaluation.
b. Country presentations were appreciated as they garnered feedbacks, different point of views and served as a forum of consultation for practical issues faced.
c. Providing materials and pre-reading well in advance was of great help to the participants to come prepared to the events.

Selection of participants. MTA strived to ensure the enrolment of the right participants by highlighting the specific level of programme offered and the desired target audience.

Logistics and social activities. Participants were appreciative of the airport transfer arrangements provided by MTA. They enjoyed social visits and outings planned by the secretariat. Hospitality is indeed a priority to MTA in ensuring the participants feel at home away from home.

MTA is at the planning stage on conducting Level 3 Evaluation (impact study) for its training programmes.

9.4. Suggestions

Suggested areas for improvement are as follows:

Increased number and variety of case studies;

i. Request for experts from specific OECD member country;

ii. Enhancement of course content for example, on auditing of multinational enterprise in-depth discussion and practical study of thin capitalization, hybrid instruments, tax havens, offshore tax evasion, intangibles, global formulary, safe harbour and more computation methods in case-solving

9.5 2011 Programmes

No	Date	Course Title
I.	17 – 21 Jan 2011	Seminar on Audit of Small & Medium Entreprises
II.	7 – 11 March 2011	Tax Treaties – Special Issues
III.	27 June – 1 July 2011	Advanced Seminar on Transfer Pricing
IV.	3 – 14 October 2011	Introduction to the Application and Negotiation of Tax Treaties
V.	14 – 18 November 2011	Workshop on Transfer Pricing Dispute Resolution and Avoidance (Mutual Agreement Procedures and APAs)
VI.	5 – 9 December 2011	International Tax Avoidance

VII.	10 – 14 January 2011	Workshop on Audit of Small & Medium Entreprises (bilateral)
VIII.	21 -23 June 2011	Workshop on Transfer Pricing (bilateral)

9.6 2012 programmes

No	Date	Course Title
1.	5 - 9 March 2012	Advanced Seminar on Tax Treaties
2.	16 - 20 April 2012	Advanced Seminar on Auditing of Multinationals
3.	26-28 June 2012	Workshop on Transfer Pricing (bilateral)
4.	2 – 6 July 2012	Advanced Seminar on Transfer Pricing
5.	1 - 12 October 2012	IRBM-MTCP-OECD: Tax Treaties
6.	5 - 9 November 2012	LHDNM-OECD: Exchange of Information
7.	19 - 23 November 2012	Workshop on Transfer Pricing Dispute Resolution
8.	3 – 7 December 2012	Seminar on Islamic Finance

9.7. Future directions

IRBM sets to create a Focus Group on Transfer Pricing, a brainchild of the Chief Executive Officer of IRBM whereby a group of selected officers will undergo structured training in transfer pricing. The basic and intermediate training modules will be conducted by transfer pricing experienced IRBM officers. IRBM seeks OECD's assistance in providing expertise for the advanced level training.

In furtherance to the above, IRBM is desirous of OECD assistance in producing trainers in transfer pricing via the Training of Trainers program.

Tax offences under sections 112, 113 and 114 of the Income Tax Act 1967 are now predicate offences under the Anti-Money Laundering and Anti-Terrorism Financing Act 2001. Moving towards criminal investigation and being a law enforcement agency under the said Act, IRBM would need to equip the officers with proper knowledge and skills, criminal investigation techniques, addressing tax evasion in illicit activities, bribery awareness etc. OECD's assistance is highly sought to provide such training.