

eNewsletter 03/2021

Latest Transfer Pricing Updates (Effective 1 January 2021)

Introduction of new Sections in the Malaysian Income Tax Act, 1967:

- Section 113(B)
- Section 140A(3A), (3B), (3C), and (3D)



It is no more a 'sit & wait' approach when it comes to Transfer Pricing arrangement considering many taxpayers involved in intercompany/controlled transactions are still reluctant to fully comply with the Transfer Pricing regulations. With the new additions to the Malaysian Income Tax Act, 1967 (ITA), it is high time for local conglomerates and multinational companies who participate in intercompany transactions to tighten their seat belt.

An overview of the latest provisions is summarised below:

1. Penalty on failure to furnish Contemporaneous Transfer Pricing (TP) documentation

Effective 1 January 2021, the Inland Revenue Board of Malaysia (IRBM) intend to impose a penalty on the taxpayer who fails to submit contemporaneous TP documentation within a stipulated time. A new Section 113B has been introduced in the Malaysian Income Tax Act, 1967 (ITA) to govern this rule.

The penalty rates are shown below:

Effective 1 January 2021	Prior to 1 January 2021
<p><u>New Section 113B</u></p> <p>113B(1) – On conviction:</p> <ul style="list-style-type: none">• Fine between RM20,000 to RM100,000 or prison term up to 6 months or both; and• Furnish TP Documentation within 30 days or period decided by the Court <p>113B(4)– if no prosecution:</p> <ul style="list-style-type: none">• Penalty between RM20,000 to RM100,000 <p>113B(5)</p> <ul style="list-style-type: none">• may appeal to Special Commissioners of the Income Tax to reduce/ waive the penalties	<p>No specific penalty imposed on taxpayers who fail to furnish TP Documentation on time</p>



2. Power to disregard structure in a controlled transaction and impose a surcharge

Prior to 1 January 2021, the Director General of Inland Revenue (DGIR) was not empowered to disregard any structure undertaken in a controlled transaction. Besides, a penalty will not be imposed on the transfer pricing adjustments if there are no additional taxes payable by the taxpayers.

A new sub-Section 140A(3A) of the ITA has been introduced **effective 1 January 2021** to empower the DGIR to disregard any structure adopted by a person entering into a controlled transaction if:

- the economic substance of that transaction differs from its form; or
- the form and substance of that transaction are the same but the arrangement made in relation to the transaction, viewed in totality, differs from those which would have been adopted by independent persons behaving in a commercially rational manner and the actual structure impedes the DGIR from determining an appropriate transfer price.

The DGIR is now allowed to make adjustments to the structure of that transaction as he thinks fit to reflect the structure that would have been adopted by the independent party dealing at arm's length. This is governed under the new sub-Section 140A(3B) of the ITA.

Additionally, under the new sub-Section 140A(3C), the DGIR may impose a surcharge of not more than 5% of the total transfer pricing adjustments whether or not the adjustment results in additional tax payable. The surcharge imposed shall be treated as a tax payable for the purposes of tax payment and recovery of tax payment under Sections 103 to 106 of the ITA. It would not be treated as a tax payable under any other provision within the ITA.

Moving Forward

The recent updates and changes made to the Malaysian Transfer Pricing Regulations clearly indicate that the transfer pricing issues are under the spotlight of the Malaysian tax authority. Hence, taxpayers are advised to be more vigilant when it comes to the intercompany arrangements.

What should taxpayers (including companies enjoying tax holidays or suffering losses) do to avoid being challenged or penalised by the IRBM?

- Review the existing controlled transaction to ensure that the transaction has an economic substance that aligns to the form.
- Ensure that the controlled transaction is carried out in an arm's length manner, i.e., comparable to a third-party transaction.
- Verify the above by carrying out transfer pricing analyses and prepare contemporaneous transfer pricing documentation.
- Prepare transfer pricing documentation before submitting the tax return for the respective Year of Assessment.

COMMUNICATION

If you need any assistance pertaining to Transfer Pricing, kindly contact us for assistance.



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COMPLIMENTARY WEBINAR

Welcome to RSM Tax Webinar

Transfer Pricing Updates 2021



WEBINAR
RSM Tax Updates

Friday, 19 February 2021

10:00 am – 11:30 am (GMT +8:00) Kuala Lumpur

REGISTRATION

Registration Link: <http://bit.ly/3i9mnRf> (latest by 18 February 2021)

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