

FREQUENTLY ASKED QUESTIONS (FAQ) ON MATTERS PERTAINING TO TRANSFER PRICING (TP) 2.0

(Based on the frequent questions raised by participants at the Multinational Tax Conference 2024)

No.	Topic/Issue	Questions	Answers
1.	Application of arm's length principle	Taxpayers who engage in transactions with related party companies are required to ensure that controlled transactions are priced in accordance with the arm's length principle. What is the arm's length principle?	The arm's length principle is an international standard agreed upon for tax purposes that requires a related party transaction to be conducted under comparable conditions and circumstances as an independent party. This principle advocates that when market forces drive the terms and conditions agreed upon in an independent party transaction, the pricing should accurately reflect the true economic value of the contributions made by each party.
2.	Re-characterisation of transactions	In what situations might the IRBM disregard and re-characterise a controlled transaction when determining an arm's length price?	<p>The IRBM may disregard a transaction if there is evidence indicating its economic substance differs from its form. Even if the form and substance of a transaction are the same, the IRBM may still disregard that transaction if the overall arrangements related to the transaction differ from what independent parties would have adopted in a commercially reasonable manner and these arrangements have impeded the IRBM from determining an appropriate transfer price.</p> <p>The IRBM may recharacterize the aforementioned transactions to reflect an arm's length transaction, and reasonable justification will be provided for this measure.</p>

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3.	Arm's length range (ALR) - Interquartile range (IQR)	Given that IRBM is focusing on the median range, while the OECD continues to accept the interquartile range rather than the median level, will IRBM provide clear guidance on their approach in the IQR?	<p>Through the Income Tax (Transfer Pricing) Rules 2023 (TPR 2023), Malaysia has introduced its own arm's length range (ALR), which applies to controlled transactions entered into from the year of assessment 2023 and subsequent years of assessment. If the transfer price of a transaction falls within the range of 37.5 percentile to 62.5 percentile, that transaction is deemed to be arm's length compliant.</p> <p>However, if the transfer price of a transaction falls below the 37.5 percentile, the arm's length price for that transaction should be the median, which refers to the value at the midpoint of the arm's length range. An adjustment to the median should be made to the transfer price to reflect the arm's length price for this transaction. The application of the arm's length range and median will be detailed out in the revised Malaysia Transfer Pricing Guidelines (MTPGL).</p>
4.	Arm's length range (ALR) – adjustment to median	We request that the IRBM clarify under what circumstances IRBM will make an adjustment to the median or any other point above the median within the range?	<p>The TPR 2023 clearly indicates situations where the IRBM is allowed to make the transfer pricing adjustment. Only in the event that the IRBM has reason to believe that the uncontrolled transaction used in the dataset has a lesser degree of comparability, or if there is evidence of comparability defects that cannot be quantified, identified, or adjusted, the IRBM can make any adjustment, either to the median or to the above median.</p> <p>Rest assured that any adjustment to the median or to the above median will only be undertaken with careful consideration, and reasonable justification will be provided to substantiate IRBM action.</p>
5.	TP Methodologies – most appropriate method	What should I consider when selecting the most appropriate method to ensure it meets the IRBM standards and minimise	IRBM prefers a method that requires the fewest comparability adjustments and provides the most reliable measure of an arm's length result, as this will reduce future disputes. As guidance, taxpayers can consider the following factors to assist them in

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		disputes between taxpayers and auditor?	<p>identifying the most appropriate method for determining arm's length compliance:</p> <ul style="list-style-type: none"> a. The nature of the controlled transaction, determined through particular a functional analysis; b. The availability of reliable information on uncontrolled comparables needed to apply the selected method; and c. The degree of comparability between controlled and uncontrolled transactions, including the reliability of comparability adjustments that may be needed to eliminate such material differences.
6.	TP methodologies – replacement of TP method	Based on the newly gazetted TP Rules 2023, IRBM may make a review and replace for the TP method selected by taxpayer with the other most appropriate method. In this situation, what justification will be used by IRBM?	Sometimes, the business characterisation does not align with the functions and actual conduct of the taxpayers. In this situation, the first step to be taken is to revise the business characterisation to ensure that the characterisation reflects the actual functions and conduct of the taxpayers. Then, a review will be undertaken to ensure that the transfer pricing method used by the taxpayer is still the most appropriate for determining the arm's length price. If the IRBM has reason to believe that the selection is no longer the most appropriate method for determining the arm's length price, the IRBM may replace that method with the other most appropriate method. The IRBM will provide written justification for this replacement.
7.	TP methodologies – separate and combined transactions	Are taxpayers allowed to apply one method for conducting benchmarking analysis for all transactions?	To accurately approximate arm's length conditions, the arm's length principle should be applied on a transaction-by-transaction basis. However, if an adequate evaluation cannot be made on a separate basis, it is acceptable to evaluate a combination of transactions. For example, transactions that are so closely linked or continuous may be evaluated together using one most appropriate transfer pricing method if it is a normal industry practice to set one price for a combination of transactions (e.g., goods and the associated

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			<p>intangible property) or where it may not be reasonable to expect to find quality data available to set the price for separate transactions.</p> <p>Nevertheless, if the nature of the transactions differs significantly, combining them to determine the arm's length price may not provide a fair and accurate assessment of the arm's length nature of those transactions.</p>
8.	Pass-through costs	<p>Pass-through costs are external expenses incurred by a taxpayer on behalf of a related party or, in some instances, on behalf of a third-party customer in relation to the taxpayer's business. Will IRBM accept if the pass-through costs will be excluded when computing the cost-based profit level indicator (PLI)?</p>	<p>IRBM may consider allowing the costs of services obtained from third parties on behalf of group members to be treated as pass-through costs. These pass-through costs can be excluded in computing the cost-based PLI only if taxpayers are able to demonstrate that reliable adjustments can be made to eliminate such costs from the denominator of the comparables. If taxpayers are using commercial or publicly available data, the operating margins of the comparables should have excluded similar pass-through costs.</p>
9.	TP methodologies & TP documentation (TPD)	<p>In order to prove that the taxpayers have chosen the most appropriate method, do they need to include all supporting documents (such as invoices, bills, etc.) in appendices of the TPD?</p>	<p>Taxpayers are not required to include supporting documents as appendices in the TPD. The supporting documents should be retained within the record-keeping timeframe, i.e., seven years from the end of the basis period in which the transaction took place and be readily available when requested to be submitted to the IRBM.</p>

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10.	Comparability analysis - Selection of tested party	<p>If a taxpayer is using foreign tested parties, what criteria must be met to ensure that the transfer pricing method is applied reliably, and how does the availability of sufficient and verifiable information affect the acceptance of these foreign tested parties and comparables in Malaysia?</p> <p>For instance, if a loan is provided by a Malaysian company to a related party company in Vietnam, will the IRBM accept the benchmarking analysis prepared by the related party company in Vietnam to determine the arm's length interest rate?</p>	<p>A tested party should be the one where a transfer pricing method can be applied in the most reliable manner and most reliable comparables can be found. As such, a party with less complex functional activities should be more appropriate to be selected as a tested party, irrespective of its local or foreign status. However, in Malaysia, the IRBM prioritises the availability of sufficient and verifiable information on both the tested party and comparables. Thus, a foreign-tested party or foreign comparables may only be accepted if the taxpayers can provide sufficient and verifiable information on that foreign party. In the event the taxpayers fail to submit sufficient and verifiable information on the foreign tested party or foreign comparables selected, the selection of these entities will be deemed unacceptable.</p> <p>With regards to the example given, the IRBM will review the benchmarking analysis prepared by the Vietnamese company and request necessary supporting documents to ensure sufficiency and verifiability of the foreign tested party or foreign comparables used to prepare that benchmarking. If the IRBM satisfies that the benchmarking can accurately reflect the arm's length of interest rate for the said loan, the benchmarking analysis is acceptable and can be inserted in the taxpayer's annual contemporaneous TPD (if any).</p>

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11.	Comparability analysis - Selection of comparable company	Please clarify whether a benchmarking analysis must be conducted with Malaysian local companies, or can the taxpayer use data from the Asia Pacific region (APAC)?	IRBM prefers Malaysian local comparables for benchmarking analysis in order to accurately reflect the economic and commercial realities of market conditions in Malaysia. Nevertheless, as previously mentioned, foreign comparables, including comparable companies from the APAC region, may be used, provided that the information on the foreign comparables submitted to the IRBM is accurate, sufficient, and verifiable. Reasonable justification on the use of the foreign comparables should be included in the Contemporaneous Transfer Pricing Documentation (CTPD) to ensure compliance with Malaysia transfer pricing regulations.
12.	Comparability analysis - Comparable period	To what extent can the financial year-end results of a tested party be compared with those of comparable companies whose financial year-ends are before or after the tested party's financial year-end?	<p>An uncontrolled transaction conducted within the same basis period serves as the most reliable comparable, as it can accurately reflect the market conditions and economic environments of the taxpayer's controlled transactions. However, to minimise the impact of some practical issues, it is acceptable to compare a test party's financial year-end (FYE) results with comparable companies' FYEs prior to or after the test party's FYE, as long as it can be proven that the overlapping period had similar market conditions and economic environments as the taxpayer's controlled transactions.</p> <p>For instance, comparable companies with a FYE six months before or after the tested party's FYE can be used to determine the arm's length price, provided that no significant changes occurred during those periods that could significantly affect the economic or commercial realities. A longer overlapping period may be allowed if it can be proven that it better reflects the market condition or the economic environment.</p>

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13.	Benchmarking analysis – multiple year data	To complete the TPD by the filing deadline, can taxpayers use a weighted average data rather than single-year data for benchmarking purposes, given that the financial statement may not be available? For example, the December 2023 Financial Statement may only be available in quarter 4, 2024.	IRBM would advise taxpayers to avoid using a multiple-year average since it is not allowed under paragraph 7(6)(b) of the Rules. Taxpayers should use the most current reliable financial data of comparable companies that is readily available during the preparation of TPD. Therefore, if during the preparation of TPD only prior data is available, taxpayers are allowed to use the prior year's financial data. However, once the current year financial data is readily available, taxpayers should revisit and update the benchmarking analysis and evaluate whether any adjustments are needed to reflect the appropriate arm's length pricing for the controlled transactions. The process of updating the benchmarking analysis will not impact the contemporaneous status of the original TPD.
14.	Benchmarking analysis – updated the data	<p>In accordance with the response to question 13, if taxpayers have to update their benchmarking analysis on the current financial data is available, will there be a waiver of the surcharge imposed on the TP adjustments resulting from the subsequent review?</p> <p>Are taxpayers allowed to request an amendment if the updated benchmarking analysis results in a downward adjustment?</p>	<p>In situations where the updated benchmarking leads to an upward TP adjustment, taxpayers have the option to make voluntary disclosure. In voluntary disclosure cases, the surcharge rate that may be imposed is between 0% and 4%. The IRBM is of the opinion that the reduction of the surcharge rate under voluntary disclosure provides great benefit to taxpayers since the surcharge rate is imposed on the amount of TP adjustment under subsection 140A(3C) will be reduced from the general rate of 5% to a rate between 0% and 4%.</p> <p>The imposition of surcharge rates is determined on a case-by-case basis and subject to the discretion of the IRBM State Director/Special Branch Director. However, any request for downward TP adjustment based on the updated benchmarking analysis will not be entertained since the TP Rules 2023 do not provide for such measures.</p>

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15.	Benchmarking analysis – Adjustment to median	Comparability differences may exist in any benchmarking analysis due to differences in business strategies. Thus, how did the IRBM ensure that the adjustment to or above the median would be fair to the taxpayers?	<p>IRBM is aware that finding identical companies with the taxpayer's profile for comparability purposes is challenging. Therefore, any benchmarking dataset may have some differences that could not be quantified, identified or adjusted. Any adjustment to median or to any point above median is exercised only in the event that the IRBM has reason to believe the benchmarking dataset has a lesser degree of comparability or there is evidence of comparability defects due to those differences.</p> <p>Rest assured that the adjustment to the median or above-median will only be undertaken with strict discretion and careful consideration. Written justification will be provided if the IRBM decides to make the adjustment.</p>
16.	Penalty -Section 113B Income Tax Act 1967	What is the impact if taxpayers are unable to furnish contemporaneous TPD upon IRBM request?	<p>Effective from the year of assessment 2023, a taxpayer who fails to submit a contemporaneous TPD within 14 days from the date of service of a written notice has committed a criminal offence under subsection 113B (1) of the ITA, for which, if convicted, the taxpayer may be fined not less than RM20,000.00 and not more than RM100,000.00 or imprisonment for not more than 6 months or both. If no prosecution action is taken, a penalty of not less than RM20,000 and not more than RM100,000 can be imposed for each year of assessment in which the taxpayer fails to produce and submit contemporaneous TPD.</p> <p>The details of the penalty imposition under Section 113B will be made available in the revised Transfer Pricing Tax Audit Framework.</p>