

Transfer Pricing



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Key Message

“With the proposed introduction of new provisions in the ITA relating to transfer pricing, the IRB is sending a strong message to taxpayers that transfer pricing compliance is not an option anymore. Comply with the requirements of Section 140A or face the possibility of severe penalties.”

1 Failure to furnish contemporaneous transfer pricing documentation

Currently, there is no specific provision in the ITA that penalises a taxpayer who fails to furnish contemporaneous transfer pricing documentation on time, typically within 30 days of a written notice of request from the IRB.

A new section is proposed to impose the following penalties for failure to furnish transfer pricing documentation on time:

	Proposed Penalty
Section 113B(1) <i>On conviction</i>	<ul style="list-style-type: none"> Penalty of RM 20,000 to RM 100,000 or prison term of up to 6 months or both; and Furnish transfer pricing documentation within 30 days or any other period decided by the Court
Section 113B(4) <i>If no prosecution</i>	<ul style="list-style-type: none"> Penalty of RM 20,000 to RM 100,000
Section 113B(5)	<ul style="list-style-type: none"> Taxpayer may appeal to the SCIT if served with a notice in writing under subsection (4)

The proposed new section re-emphasises the importance of transfer pricing compliance. If it wasn't clear before, it is now clear that transfer pricing documentation is a mandatory document and taxpayers need to put greater effort to ensure that it is prepared on time to avoid the imposition of penalties.

The above proposal comes into operation on 1 January 2021.

2 Power to disregard structure in a controlled transaction

Rule 8 of the Income Tax (Transfer Pricing) Rules 2012 is now proposed to be inserted in the ITA under new subsections which empower the DGIR to disregard and recharacterise any structure adopted by a person in a controlled transaction if:

- a) the economic substance of the transaction differs from its form; or
- b) the form and substance are the same but the arrangement when 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.

Where the DGIR disregards any structure, the DGIR shall make adjustments to the structure to reflect the structure that would have been adopted by an independent person dealing at arm's length having regard to the economic and commercial reality.

The inclusion of the new subsections is to ensure consistency between the Income Tax (Transfer Pricing) Rules 2012 and the ITA. This will avoid potential disputes on whether the ITA empowers the DGIR to disregard and recharacterise structures adopted in controlled transactions.

The above proposal comes into operation on 1 January 2021.

3 Surcharge on transfer pricing adjustment

Currently, a penalty is imposed where a transfer pricing adjustment made during a tax audit results in additional tax payable. The penalty will be applied on the amount of additional tax payable. However, in cases where a transfer pricing adjustment does not result in additional tax payable, penalties could not be imposed. It is now proposed that new subsections be inserted in the ITA to allow the IRB to impose a surcharge of not more than 5% on any transfer pricing adjustment made on all tax audit and investigation cases, whether taxable or not.



The introduction of this surcharge is yet another strong message from the IRB on the importance of ensuring that controlled transactions are carried out on an arm's length basis. Up until now, taxpayers who are enjoying tax incentives or have significant amounts of unutilised allowances or business losses may not have paid serious attention to whether their controlled transactions are at arm's length as any transfer pricing adjustment is sheltered by the incentive, allowances or losses.

The above proposal comes into operation on 1 January 2021.