



Singapore Transfer Pricing developments

Singapore proposes to legislate mandatory TP documentation requirement and penalties

Overview

The Ministry of Finance (MoF) is conducting a public consultation from 19 June to 10 July 2017 on the draft Income Tax (Amendment) Bill 2017, which includes major legislative changes to introduce a mandatory transfer pricing documentation (TPD) requirement as well as penalties for non-compliance.

Key proposed changes

The key proposed legislative changes concerning transfer pricing (TP) are summarised as follows:

Introduction of mandatory TPD requirement and penalties for non-compliance

Current:

The existing Singapore TP Guidelines require taxpayers to “prepare and keep contemporaneous records” and this is to be “part of the record-keeping requirement for tax”, which is

generally taken to refer to Section 65, 65A and 65B of the Singapore Income Tax Act (SITA).

Currently, all taxpayers must prepare TPD unless they meet certain safe-harbour thresholds for exemption from preparing TPD. Generally, under these safe-harbour thresholds, TPD is not required where the value of the transaction does not exceed S\$15 million for intercompany sales/purchases of goods/loans; and S\$1 million for all other categories of related party transactions, such as service income/expense.

There is currently no specific penalty for the failure to prepare TPD. If a taxpayer fails to submit adequate documentation on time upon request by the Inland Revenue Authority of Singapore (IRAS), he may be subject to a general offence penalty under Section 94(2) of the SITA, which may involve a fine not exceeding S\$1,000 or a jail term not exceeding 6 months in default of such payment.

Proposed:

A new Section 34F will be introduced in the SITA to legislate specifically the requirement to maintain contemporaneous and adequate TPD. The requirement to prepare the TPD no later than the filing deadline of the tax return and the submission of the TPD to the IRAS within 30 days of such request are also affirmed and codified in the new legislation. The new legislation also specifically require the TPD to be retained for 5 years.

To reduce the compliance burden for smaller businesses, the requirement to prepare TPD will only apply to businesses with turnover exceeding S\$10 million. This S\$10 million turnover serves as an additional safe-harbour to the existing thresholds. To illustrate, assuming a company has only one related party transaction (service income from a related party), the determination of TPD requirements would be as follows:

	Service income from related party	Gross revenue	TPD required?
Currently	> S\$1 million	< S\$10 million	Yes (as current TPD exemption safe-harbour threshold exceeded)

Proposed	> S\$1 million	< S\$10 million	No
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In addition, the following are now legislated as offences, and a specific fine of up to S\$10,000 may be imposed for each offence:

- Failure to prepare contemporaneous and adequate TPD
- Failure to submit TPD within 30 days of notice
- Failure to retain TPD for 5 years
- Submission of false or misleading TPD

The above amendments will take effect from the Year of Assessment (YA) 2019.

Clarification of existing powers to enforce the arm's length principle

The existing Section 34D of the SITA currently empowers the IRAS to make a tax adjustment if the taxpayer's taxable profit is understated due to non-arm's length related party transactions.

Section 34D will be significantly expanded to clarify the determination of arm's length principle would also consider arm's length "circumstances" i.e., whether third parties would reasonably enter or not enter into similar transactions/arrangements. The new legislation provides power to allow the IRAS to disregard the form of actual commercial or financial relations between related parties where the substance of the transaction is inconsistent with the form of the transaction and for the IRAS to make necessary adjustments.

Interestingly, a specific provision is proposed to treat any income adjustment to be "*accruing in or derived from Singapore or received in Singapore from outside Singapore*", effectively deeming that the income adjustment would be considered Singapore sourced or foreign sourced but received in Singapore.

This specific provision is likely to impact cross-border loans, in the event the Singapore lender does not charge any interest or charges interest at below arm's length rate. Currently, adjustments made on such loans may not result in actual increase in Singapore tax, as the imputed interest is likely to be treated as foreign source income which is not remitted into Singapore (therefore, not subject to tax in Singapore until it is remitted into Singapore). With the change, any such adjustment will be taxable in Singapore.

Introduction of surcharge on TP adjustments

A new Section 34E will be inserted to introduce a surcharge on any TP adjustment made.

Where the IRAS has made TP adjustment under Section 34D to increase the amount of income/reduce the amount of deduction or allowance/reduce the amount of loss, a surcharge equal to 5% of the amount of increase in income or reduction in deduction, allowance or losses will be imposed.

The legislation provides discretion for the IRAS to not impose the surcharge "*for any good cause*". No details have been provided on the circumstances that would merit such exception, but we believe the discretion is likely to be exercised based on whether contemporaneous TPD has been prepared, and the demonstration by the taxpayer of his overall compliance with the various requirements discussed above.

The surcharge will apply from YA 2019.

Lifting of time bar for MAP cases

Section 74 will be amended to lift the statutory time limit of 4 years for the IRAS to raise additional assessments for cases under the Mutual Agreement Procedures (MAP) process to provide taxpayers with certainty that the outcome of the MAP agreed with the relevant foreign competent authority can be given full effect by the IRAS.

TPD required to support claim for error or mistake

Section 93A will be amended to clarify that any claim for error or mistake on TP made in the tax return by the taxpayer must be supported by contemporaneous and adequate TPD.

Deloitte's view

The MoF states that the above proposed amendments seek to "*strengthen the TP regime*" of Singapore.

Together with the numerous changes made by the IRAS in recent years to enhance the Singapore TP Guidelines, the proposed changes are in line and part of the IRAS' overall and continuing effort and focus on TP compliance in Singapore, and to achieve greater alignment with the TP action items under the OECD Base Erosion and Profit Shifting (BEPS) initiative.

With mandatory TPD requirement now legislated and the introduction of significant penalties (fine and surcharges), the IRAS is sending a clear signal that it is moving from a guidance-based approach to a formal TP regime where it will

seek to enforce compliance including the imposition of penalties.

Therefore, companies should ensure that it has proper and contemporaneous TPD. More importantly, with the stakes for non-compliance raised considerably under these proposed changes, companies should also ensure that they devote appropriate attention and processes to address related party transactions and the compliance with the new requirements.

For companies with loans to overseas parties, we would advise re-evaluating these transactions and prepare the necessary documentation, to avoid potential adjustments made by the IRAS which would likely lead to double taxation on a group basis.

Find out more

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Mr See Jee Chang is a Tax Partner at Deloitte Singapore and leads the transfer pricing practice. He was vitally involved in developing the 2006 Transfer Pricing Guidelines in his former role as the Tax Director of the Tax Policy and International Tax Division of the IRAS. During his time at the IRAS, Jee Chang also served as the Competent Authority of Singapore, responsible for transfer pricing and bilateral Advance Pricing Arrangement (APA) negotiations.

Ms Lee Siew Ying is a Senior Manager at Deloitte Singapore's transfer pricing practice. She has extensive experience on projects relating to the preparation of master file documentation for group companies, review of intra-group services, including assisting companies with the implementation of the recommended methodology, as well as advising on transfer pricing policies and planning strategies. Siew Ying has also assisted clients to successfully negotiate for APAs with tax offices, and supported clients in their transfer pricing audit defence.

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