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TAXATION TRANSFER PRICING LAW IN MALAYSIA:SALIENT LEGAL ISSUES

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Abstract

Globalisation and rapid growth of international trade have made intercompany pricing a common consideration for vast majority of businesses. Transfer pricing is not in itself illegal or abusive. What is illegal or abusive is transfer mispricing, also known as transfer pricing manipulation or abusive transfer pricing. Generally, related parties are required to transact on terms which might reasonably be expected to have been made by independent parties engaged in the same or similar transaction at arm's length. The allocation of profits among different parts of the multinational enterprise (MNE) operating in different jurisdictions is dependent on the outcome of its transfer pricing strategy. It can decide how much tax an MNE pays and to which authorities. To curb manipulation and abuse of transfer pricing, the Government of Malaysia like any other tax jurisdictions, introduced transfer pricing guidelines and law.The first guideline on transfer pricing was published in 2003 by the Inland Revenue Board of Malaysia. Consequently, in 2009, specific transfer pricing provisions were inserted into the Income Tax Act 1967 (ITA). Under the new provision, the Director-General of Inland Revenue (DGIR) is empowered to substitute the price of any transactions entered into by related persons to reflect the arm's length price of such transaction. The objective of the research writing is to study the legal issues arising from the transfer pricing law in Malaysia. The authors find that imposition of penalty is one of the most prevalent issue resulting from transfer pricing adjustment. It is an accepted tax principle that a taxpayer is entitled to plan his affairs to pay less amount of tax as it otherwise would be. A taxpayer has always been free to mitigate his tax liability. This research writing usedqualitative case study and legal research methodologies to discuss and analysis the law and the legal issues of the subject matter. For this purpose, the authors focused on two transfer pricing adjustment cases. An examination was also carried out on the notices of appeal filed by the taxpayers to the Special Commissioners of Income Tax.The ultimate goal is to minimise manipulation and abuse of transfer pricing in the related parties transaction. The research aspires to contribute towards the implementation of a comprehensive transfer pricing law in Malaysia.

***Keywords**: Taxation Transfer Pricing Law; Malaysia;Arm's length;Penalty; Legal Issues.*

INTRODUCTION

Globalisation and the rapid growth of international trade has made intercompany pricing a common consideration for the vast majority of businesses. Transfer pricing is not in itself illegal or abusive (Borkowski, 2007). What is illegal or abusive is mispricing resulting in transfer pricing manipulation or abusive transfer pricing (Sebastian & Jan, 2015). Principally related parties are required to transact on terms which might fairly be expected to have been made by independent parties engaged in the same or similar transaction at arm's length (Holtzman& Nagel, 2014).

In Malaysia, the first guidelines on transfer pricing were issued by the Inland Revenue Board of Malaysia (IRBM)in 2003 (Guideline2003). The guidelines were published based on the general anti-avoidance provisionof section 140 of the Income Tax Act 1967 (ITA). Under section 140,the Director-General of Inland Revenue (DGIR) may disregard or vary any transaction between persons,one of whom has control

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over the other,if he has reason to believe that the transaction was not done at arm's length. A number of transfer pricing adjustments were disputed with appeals filed before the Special Commissioners of Income Tax ('SCIT'). Currently, there are three cases decided by the SCIT where the tax adjustment was set aside and ruled to be wrong in law (*MM SdnBhd v KetuaPengarahHasilDalamNegeri*, 2013, *OMSB v KetuaPengarahHasilDalamNegeri*, 2012 and *PGSB v. KetuaPengarahHasilDalamNegeri*, 2013). Though there weresome reasonsstated in the ruling made by the SCIT, the most critical reason is thatthe Revenue is not authorised to make transfer pricing adjustment under the law.The SCIT was of the opinion that the general anti-avoidance provision was not intended to be applied for transfer pricing cases. Therefore,any ambiguity shall be construed in favour of the taxpayer.In addition, Guidelines 2003 has no force of law as there was no enabling provision for the Revenue to issue the Guidelines (*MM SdnBhd v KetuaPengarahHasilDalamNegeri*, 2013).

It is without a doubt that the ruling made by the SCIT hada verysignificant impact on Inland Revenue Board of Malaysia ('IRBM'), in particular, when audit activity involves transfer pricing adjustment.Furthermoreevery year substantial payments are made by a company taxable in Malaysia to its related entities located in other tax jurisdictions. Based onreturn forms furnished to IRBM for the years of assessment 2010 to 2017, the volume of control transactions and amount of paymentsinvolved are very significant. Table 1 provides the data on the number of taxpayers and the amount of payments made for each particular year of assessment.

Table 1: The Amount of Payment Made and Received By Related Parties Transaction from 2010 to 2017

Year of Assessment	No.	(N2) Total sales to related parties outside Malaysia	(N4) Total purchase from related parties outside Malaysia	(N6) Other payments to related companies outside Malaysia	(N8) Loan to related company outside Malaysia	(N10) Loan from related company outside Malaysia.
		(RM)	(RM)	(RM)	(RM)	(RM)
2010	**8,223**	256,602,909,286.00	169,806,301,647.00	29,646,908,572.00	105,968,951,495.00	63,738,601,816.00
2011	**8,538**	258,861,293,675.00	203,872,793,740.00	34,469,731,876.00	108,645,940,996.00	83,807,443,824.00
2012	**8,869**	289,154,721,298.00	201,527,258,771.00	30,667,836,009.00	125,464,377,838.00	83,069,868,611.00
2013	**9,047**	262,388,884,199.00	194,035,365,725.00	32,688,047,184.00	164,542,325,776.00	103,166,344,873.00
2014	**9,774**	248,742,787,082.00	217,275,022,651.00	30,418,143,733.00	162,060,587,127.00	100,728,516,610.00
2015	**10,532**	289,010,158,386.00	217,121,283,661.00	38,498,167,691.00	115,071,689,330.00	103,266,167,159.00
2016	**11,049**	318,463,467,459.00	233,769,584,976.00	48,804,225,829.00	195,994,633,507.00	109,952,876,798.00
2017	**11,721**	359,127,287,339.00	241,736,844,812.00	41,055,625,248.00	195,709,401,924.00	163,440,491,482.00

Source: Tax Operations Department, IRBM

In 2009, the IRBM set up a Multinational Tax Department (MTD) to deal with transfer pricing issues.The role of the Department is to determine and implement the policy on transfer pricing. Due to the increase

in the number of transfer pricing cases, a new Multinational Tax Branch (MTB) was set up in place of the Department. Themain task of the department or branch is to auditmultinational companies to ensure that the arm's length principle is observed.The amount of tax and penalty recovered from transfer pricing audit activities between the periods of 2004 – 2018were quite substantial by taking into consideration the strength of the Department. Table 2 details the outcome of the audit for those periods.

Table 2 - Amounts of Tax Payable Arising from Transfer Pricing Audit in 2004 to 2018

Year	Additional tax (RM)	Penalty (RM)	Total Amount (RM)
2004	24,579,529	2,432,370	27,011,899
2005	47,216,212	28,070,656	72,286,868
2006	73,385,623	18,600,308	91,985,931
2007	59,903,353	11,436,656	71,340,009
2008	40,191,247	6,921,183	47,112,430
2009	26,270,487	7,469,424	33,739,911
2010	90,137,793	27,853,992	55,096,075
2011	40,278,097	6,726,005	47,004,102
2012	90,137,793	27,853,992	117,991,785
2013	123,199,748	42,800,629	166,000,377
2014	117,487,828	38,455,479	155,943,307
2015	103,462,733	21,407,454	124,870,186
2016	194,405,673	46,034,914	240,440,586
2017	477,775,200	186,481,024	681,939,667
2018	432,867,821	149,694,311	582,562,134

Source: Multinational Tax Branch, IRBM

MTBwas established as a consequence oftheintroduction ofaspecific transfer pricing provision in the ITA. Malaysiawas one of the last countries in the world to introduce aspecific law to address transfer pricing issues (Lohse, Riede&Spenge, 2012). The United States of America was the pioneer country to develop and adopt regulations on transfer pricing based on the arm's length principle (Koomen, 2015). These footsteps were followed byother countries such as Australia, Japan, Germany, Italy and Indonesia(Theresa et al., 2012). The new section 140A of the ITA requires a taxpayer to determine the arm's length price on its related transaction. Arm's length prices arenot defined under the ITA. However, the manner or method on how the arm's length price should be determined isprovided in the Income Tax (Transfer Pricing) Rules 2012(TP Rules 2012).The IRBM published a new Transfer Pricing Guidelines (Guidelines 2012) to clarify the application of the new law and Rules. The guidelines are largely based on the governing standard for transfer pricing which is the arm's length principle as set out in the Organization for Economic Co-operation and Development (OECD) Transfer Pricing Guidelines (OECD TP Guidelines).

For the purpose of this article, an overview of the objective, literature review, the methodology and the emergence of problems in the implementation of these transfer pricing rules are touchedupon. Emphasis is given on the exploration of the penalty regime in transfer pricing issues and its sufficiency.

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RESEARCH OBJECTIVES

This research writing aims to achieve the following objectives:

1) To study the law of taxation transfer pricing in Malaysia;
2) To study the legal issues of taxation transfer pricing in Malaysia;
3) To recommend some proposal improvements in the law of taxation transfer pricing in Malaysia.

RESEARCH QUESTIONS

The research questions of this research writing are as follows:

1) What are the taxation transfer pricing law in Malaysia?
2) What are the legal issues in the taxation transfer pricing in Malaysia?
3) How and why the legal issues exist?
4) How to deal with the legal issues?
5) What are the recommendations to improve the taxation transfer pricing law in Malaysia?

LITERATURE REVIEW ON TAXATION TRANSFER PRICING

Transfer pricing law and its regulations have been researched extensively concerning this study and appended below are some of the said investigations.

Chan'sinvestigation hinges on whether transfer pricing regulation introduced by the governmentleads to the choices of international transfer prices (Chan, 2011). His finding is that companies make decision in the direction of improving overall corporate profits. This finding supportsan earlier study that laws on transfer pricing do affect the making of decisionsin respect of transfer pricing. To curb manipulation, Chan had suggested that government should consider introducing penalties and regulations.

Bhat(2009) reiterated that it is the governments' responsibility to collect taxes, and there is a need to enact legislation to ensure equitable distribution of tax burdens. He depicts that tax-motivated transfer pricing has attracted worldwide attention due to low tax haven jurisdictions and the volume of multinational corporation activities. Multinational corporations can shift profits via transfer pricing through tax haven countries. Governments designed the implementation of arm's length principles and formulation apportionments, in most cases, to regulate transfer pricing manipulations. Bhat'srecommendation is for the establishment of a global institution to calculate the worldwide income of MNEs and provide tax authorities with timely information.

Adams and Drtina's studies (2010) lead to the discovery that in 1994, onlythe United States and Australia enacted transfer pricing legislation. However, the numbers have significantly increased and as a result in 2009, at least 49 countries, including most countries in the Organization for Economic Co-Operation and Development (OECD), have passed transfer-pricing legislation. Adams and Drtina indicated that the increase in the adaptation of transfer pricing legislation could be attributable to multinational corporations' strategies to shift profits to lower tax jurisdictions. Most of the tax authorities of these countries adopted the arm's length standard as a measure to mitigate transfer pricing manipulations. Adams and Drtina also highlighted the need for periodic studies to measure the effectiveness of transfer pricing regulations enacted to regulate transfer-pricing manipulations.

Lohse, Riedel &Spengel(2010) examined 44 countries in the world and studied the development of different aspects of transfer pricing regulations over nine years through comparison between the countries

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in the region. The assumption on the existence of transfer pricing regulation is the adoption of arm's length principles, the consideration of related party or control transaction, methods or documentation are included in the domestic tax law. Their findings as of2009 show that only seven countries do not have transfer pricing regulations introduced in their tax laws. The said countries are Austria, Ireland, Luxemburg, Philippines, Switzerland, Thailand and Malaysia. It was concluded that those countries might, in some way, benefited from the non-arms' length transaction. Lohse, Riedel and Spengelfound that majority of countries apply their transfer pricing regulation to domestic and foreign-related parties. Developed and high tax countries tend to restrict the application of the regulation to foreign-related entities. The study also revealed that not all countries have statutory documentation requirements, and the imposition of penalty varies from country to country. The key elements of transfer pricing that are categorised into six categories become the basis in evaluating transfer pricing regulation in each category strictly. The lowest category is when there is no anti-avoidance rule or no transfer pricing regulation applied or introduced in the country, while the highest category is where a country applies the arm's length principle and has documentation requirement in the law and a long disclosure of documentation. It was discovered that only 32% of countries in Europe fall under the highest category as compared to 80% of countries outside Europe. In Malaysia, with the introduction of specific law and rules on documentation in the year 2009 and 2012 respectively, based on the study, it could be concluded that Malaysia falls into the highest category.

Lohse and Riedel (2013), in another study, examined the impact of transfer pricing documentation laws on international profit shifting behaviour. They collected data on transfer pricing regulations from 26 European countries over the past ten years and linked the data with the panel data on multinational firms in Europe. They found that profit shifting activities have reduced significantly in the countries that have introduced transfer pricing documentation regulation.The result shows around 50% reduction with stricter rules induces stronger declines in shifting behaviour. The imposition of penalties further leads toadecrease in profit shifting activities.

Feleaga&Neacsu(2016) analysed whether the adoption of legislation in particular documentation requirement can reduce the problem of erosion and profit shifting. Their study focused on OECD member countries.They identified the budget revenue obtained from corporate income tax in the sample country and also the share of the budget revenue with the GDP. The result in the year before and after the introduction of transfer pricing documentation regulation have been compared.They found that budget revenue derived from corporate income tax shows positive result during the period between the year before adoption and the year of adoption.They then concluded that regulation indeed discourages multinationals from shifting profit from high to low tax jurisdiction.

Malaysia's transfer pricing law is indeed consistent with the new and rapid development adopted by other countries concerning transfer pricing activities. In Turkey, ZekiGurduz(2009) examined the new transfer pricing legislationthat came into effect in 2007. The new legislation replaces the old provision, which was vague and did not specify testing methodology regarding benchmark; hence, most cases brought to court were rejected due to lack of benchmark. The new legislation follows OECD guidelines strictly, introduces transfer pricing guidelines and documentation requirement.

In Spain, Garrigus'sfinding is that the new changes in transfer pricing rules are in respect of the burden of proof where it is shifted to the taxpayer. The new law provides for new documentation requirement and accepted all OECD valuation methods. The new law also provides penalties provision and highlights the application of specific OECD guidelines (Garrigus, 2005).

In Russia, it wasobserved that the transfer pricing legislation which was introduced in 1999 is not an efficient tool to deal with transfer pricing issues. The proposed amendments focus on the area of safe harbour, imposition of penalties, documentation requirement and burden of proof

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(PricewaterhouseCoopers, 2007).Nicolas Jacquotreported that France would introduce new legislation on the requirement of submitting transfer pricing documentation and imposition of penalty (Nicolas, 2009).

The obvious characteristic of the studies reviewed acknowledges that transferpricing manipulations are indeed a serious problem to all governments in the world. The studies by Lohse and Riedel (2013), and Feleaga and Neacsu (2016) confirmed the effectiveness of transfer pricing documentation and penalty to curb transfer pricing manipulations.

RESEARCH METHODOLOGY

The authorsexaminedtwotransfer pricing audit cases where the adjustments and the assessmentsmade by the IRBM were disputed and appealed to the Special Commissioners of Income Tax. The legal scope involvesprinciples ofrevenue law, the Federal Constitution and administrative law. Besides, the legal framework and legal approaches in the UK and Australia are also considered in the context of transfer pricing cases. The purpose of this comparative study is to learn and adopt an appropriate approach to formulating a comprehensive legal provision to deal with transfer pricing issues.

The qualitative case study and legal research methodologies in carrying out the purported research have been adopted by the researcher. Qualitative case study isused toanalyse data and information acquired from two transfer pricing audit cases carried out by the IRBM. The reason as to why qualitative is chosen rather than quantitative research methodology is because qualitative allows more access to details, getting a more intensive andin-depth study, problems, issues, legal phenomena and legal problems of transfer pricing in the two cases (Silverman, 2000).

This writing is also an outcome of finding done through a legal doctrinal research. This type of research concerns the discovery and development of legal doctrines. Legal doctrine is a hermeneutic discipline. In hermeneutic discipline, texts and document are the main research objects and their interpretation, according to standard methods, is the main activity of the researchers. It is research writing about law rather than research writing in law. The aim, in each case, is to answer the question “What is the law?’ in a particular situation (McConville& Wing 2007).This research also states the rules, principles of the law and decided cases involving transfer pricing. The possible outcome is the determination of the clarity and unambiguity of the existing legislation beingsection 140A of the ITA.

The research activities include the discovery of the principles, rules and case law to explain and resolve the issues, objectives and research questions. The sources are from the traditional legal authorities on revenue/taxation lawand other branches of the law that have central and peripheral relevance to the topic under study like parliamentary debates, guidelines, practice notes, internal ruling etc.

FINDINGS AND DISCUSSIONS

This research paper examines issues arising from the implementation of taxation transfer pricing provisions in Malaysia. The issues were identified from the two case studies involving two companies that have been audited by IRBM.Also, grounds of appeal filed by the taxpayer who is aggrieved by the assessments raised by the DGIR as a result of a transfer pricing adjustment is also examined. The summaryof the facts and issues found in respect of the twocase studies and the finding on the grounds of appeal from 40 notices of appeal filed against transfer pricing adjustments are as follow:

Case study 1

Case Study 1 examines a company selected for audit by the IRBM prior to the year 2009. It is pertinent to note that prior to 2009, there was no specific provision in the ITAfor transfer pricing issues. As

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such,IRBM relied on section 140 of ITA, beingthe general anti-avoidance provision. Due to the confidentiality provision (Section 138, ITA), the taxpayer who was audited will be referred to as'Company One'. Company Oneis an international strategy and general management consulting firm advising clients in most global markets and industries.

IRBM selected Company One for transfer pricing audit due to two crucial reasons. Upon an examination of the initial risk of Company One,IRBM discovered that Company One was in a continuous loss position from 2003 to 2006 as gathered from aninitial examination of the profit and loss account of Company One. The second reason for the commencement of audit on Company One is the fact that the company had a significant related party transaction (IRBM Audit Report 2012).

From the IRBM Audit Report (2012) Company One had filed a transfer pricing documentation where the result of the analysis showed that arm's length related parties transaction. To benchmark the arm's-length rate for its related party services, Company One had applied the Transaction Net Margin Method (TNMM). The related party services are corporate labour, worldwide IT projects and regional administration.Using the similar method of TNMM, the IRBM has taken the median of the benchmarking result. The approach of the IRBM has resulted in additional assessments for the year assessment 2003 to 2007.

Disagreeing with the assessment, Company One filed an appeal on the ground that the full deduction on all expenses incurred are revenue expenditure and form an integral part of the company's profit-making process. Besides, Company One submitted that the assessment for the years of assessment 2003 to 2005 is time-barred, fatally flawed and defective. As the assessment raised was based on TP Guidelines, 2003which do not have legal effect; thus, the imposition of tax based on the TP Guidelines 2003 is unlawful. Additionally, the assessment is not valid because the IRBM has raised the assessment under section 140 of ITA but has not furnished particulars of the adjustment as required under subsection (5) of the said section. The IRBM has failed to prove that Company One was involved in any tax evasion;thus IRBM cannot raise the assessment under section 140 of the ITA.

On the imposition of penalty, it was argued that subsection 113(2) of ITA is not a strict liability provision, and the DGIR cannot impose penalty on Company One as the DGIR has failed to prove that Company One has acted in bad faith and that it is unreasonable for the imposition of such penalty based on the facts of the case.The audit adjustment was due toa different interpretation of the arm's length principle between IRBM and Company One, and it cannot be assumed that the taxpayer has filed an incorrect return or given incorrect information. As such, there is no basis for the imposition of penalty. Therefore, the DGIR does not have the power to raise any assessment in this case, and such assessment is void and invalid.

(b) Case Study2

Case study two focuses on the transfer pricing audit case conducted by the IRBM post-2009. It is pertinent to note that the first new and specific transfer pricing provision was introduced in that year. The new section 140A of ITAenacted by Parliament took effect from year of assessment 2009 and subsequent years of assessment. Subsequent to the introduction of the new provision, a transfer pricing rules were issued by the Minister of Finance in 2012 (Section 154 of ITA). It was followed with a new transfer pricing guidelines (Guidelines 2012) to substitute the earlier Guidelines 2003. Due to the confidentiality provision (Section 138 of ITA), the audited taxpayer will be referred to as Company Two. From the TP Document of Company two, at page 24, Company Two's business in Malaysia began in 1989 in the capacity as a representative office. Company Two is principally engaged in the trading of plastic resins, semiconductor and electronic components.The company procures trading merchandise from both related and

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third parties. The Company then sells the merchandise to third parties as well as affiliates.These constitute approximately 97 percent of the total revenue of the Company.

Company Two was selected for transfer pricing audit due to the downtrend ofthe gross profit margin of the company for the period of 2006 to 2010. The company's net profit margin was also very low in the year 2009 and 2010 as opposedto prior years of 2006 and 2010.Observation from the IRBM audit shows that Company Two purchases approximately half of its total trading merchandise from companies within the Group for the financial year (FY) 2009. Majority of the trading merchandise purchased relates to industrial materials.During FY 2006-2009, Company Two's related party purchases are mainly from companies within the Group based in Japan, Singapore and Hong Kong.

Initially, Company Two applieda cost plus method in ascertaining its arm's length transaction since the method can be reliably performed to demonstrate the arm's length nature of its related purchases and sales transaction. The alternatives method presented to the IRBM is TNMM where 6 companies were chosen as comparables. Based on the benchmarking result for 2009 to 2011, the operating profit margin of Company Two lies above the median of the interquartile range for each of the three years under study. IRBM's audit team had in the course of the audit applied TNMM, however,in doing so,IRBM hadrejected two comparable companies that were used by Company Two andhad added three new companies as comparable. The approach taken by IRBM had resulted in an additional assessment and penalty to be paid by Company Two as the operating profit margin of Company Two is lower than the median of the benchmarking result.

Aggrievedwith the assessment raised, Company Two filed an appeal on the ground that IRBM's selective selection of "comparable" and adjustments are without legal basis and contrary to proper transfer pricing principles. It was contended that IRBM has erred in not applying the Cost Plus Method submitted by Company Two as the method provides the most reliable measures of arm's length result. Company Two further argued that IRBM's had failed to apply the arm's length inter-quartile range in its proper context. Thedecision to make adjustments to the median are unreasonable, incorrect and without legal justification.

The penalty imposed by IRBM is also subject to an appeal. Company Two alleged that IRBM has wrongly imposed the penalty and does not have absolute discretion in law but must have due consideration of all relevant facts and circumstances. Subsection 113(2) of ITA is not a strict liability provision and IRBM failed to show that Company Two had acted in bad faith. It was contended thatthe transfer pricing adjustments essentially arose due to the difference between Company Two and the IRBM'sinterpretation as to what constitutes "arm's length" and thus cannot be regarded as resulting in an incorrect return being filed or incorrect information given by Company Two to IRBM.

Grounds of appeal (Form Q)

The authorshaveexamined 40 notices of appeal filed against additional assessments or penalties imposed as a result of transfer pricing audits. Among the common issues are failure on the part of IRBM to understand or consider the prevailing commercial and economic condition of the taxpayer, arbitrary application of median range, rejection of comparable, failure to apply the right profit level indicator, failure to observe natural justice, time-barred assessment and failure to provide reasons or analysis for the adjustment. The grounds of appeal as stated in the Form Q filed by 40 companies can be summarised below –

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Table 5- Grounds of Appeal in Respect of Assessments Raised from 2009 to 2018

No	Grounds of Appeals	Number of Appeals
1	Disregard prevailing commercial reason	21
2	Failure to make appropriate adjustment	9
3	Arbitrarily apply median	21
4	Wrongly apply the profit level indicator	7
5	Inappropriately imposing penalty	37
6	Rejection of comparable	16
7	Failure to adopt a weighted average	14
8	Disagreement on method	6
9	Failure to provide particulars and wrongly apply the guidelines.	9

Source: Tax Litigation Division, Legal Department, IRBM.

A majority of the grounds of appeal,i.e. 37 out of 40 appealcases,were disagreements or grievances on the imposition of penalties pursuant to transfer pricing adjustments. Another noticeable ground of appeal involving 21 cases, is the failure of the IRBM to regard the prevailing commercial and economic condition of the taxpayer while making a transfer pricing adjustment.The same number of appeals were in respect of arbitrary application of median range by the IRBM in ascertaining whether or not the tax payer's transaction is at arm's length. Based on the finding it is clear that the issue of imposition of penalty requires a detailed examination as to why it becomes the most pertinent ground of appeal and how the implementation of penalties in transfer pricing case could be done in a clear, consistent and fair manner.

Imposition Of Penalty In Transfer Pricing Cases

Impositions of penalties due to audit adjustment in tax cases are indeed common in all tax jurisdictions. In Malaysia, the penalty rate for transfer pricing adjustment is 35% where there is no contemporaneous transfer pricing documentation and 25% in the case where the document is prepared not according to the requirements of the guidelines (Guidelines, 2012). Presently, there is no special penalty provision which is applicable for transfer pricing adjustments. To date, a penalty is imposed under subsection 113(2) of ITA on the basis that the taxpayer has provided incorrect information or return that leads to an understatement of income. It is a general penalty provision applicable to all other audit finding cases. The rate of penalty shall not be more than double the amount of the tax or additional tax to be paid (Subsection 113(2) of ITA).

Where pursuant to an audit, the IRBM has reason to believe that the taxpayer has paid no tax or sufficient tax, an assessment or additional assessment will be issued against the taxpayer (subsection 91(1) of ITA). A notice of assessment will be served (Section 145 of ITA) on the taxpayer and upon service of the said notice, the taxamount becomes due and payable (Subsection 103(1) of ITA). The taxpayer has 30 days to pay the amount payable failing which an increase of 10 per cent of the amount unpaid will be imposed (Subsection 103(2) of ITA). If there is no payment after 60 days following the end of the 30 days period, a further increase of 5 per cent of the unpaid amount will be collected from the taxpayer (Subsection103(5) of ITA). Notwithstanding that the taxpayer is appealing against the assessment, the tax has to be paid (*Sun Man Tobacco Co Ltd v. Government of Malaysia,* 1973).

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In addition to the additional tax, IRBM may also impose a penalty if there is a failure to furnish a return within the stipulated period (Subsection 112(2) of ITA) or an incorrect return is furnished by the taxpayer or the taxpayer has given an incorrect information to the IRBM (Subsection 113(2) of ITA). Based on an interview conducted by the author with the IRBM's auditor, an audit finding may attract a penalty on the basis that the amount of tax payable as stated in the return furnished is lower than the amount of tax ascertained as a result of the audit. Thus, the return furnished is incorrect due to a difference in the amount of tax to be paid. For example, if in the original return furnished, the taxpayer self-assessed its liability at MYR 10 million(USD 2,392,716.93) and subsequent to an audit certain expenses are disallowed leading up to an additional tax of MYR 2 million (USD 477,725.23), the actual liability of the taxpayer is no longer MYR 10 million(USD 2,392,716.93) as declared in the return but has increased to MYR 12 million (USD 2,871,260.31). IRBM is of the view that the MYR 10 million (USD 2,392,716.93) disclosure originally made by the taxpayer in the return is incorrect thus warrants an imposition of penalties.

OECD acknowledges the use of penalties to ensure compliance but emphasises the need for a fair and not burdensome regime. It is argued that a penalty regime that is too hard on taxpayers may distort the determination of taxable income between two jurisdictions. Therefore, OECD member states have agreed not to impose substantial penalties on taxpayers who have acted in good faith (OECD Model Tax Convention, 2012). Most countries apply general tax penalties to transfer pricing cases, but some countries have introduced specific transfer pricing penalties, especially in respect of documentation (Lohse&Spengel, 2012).

LEGAL ANALYSIS

The relevant provision on the imposition of penalty in consequence of an audit adjustment, including transfer pricing audit, is subsection 113(2) of ITA. As such, the analysis that has been developed focuses primarily on the application of the said section. The landmark case on subsection 113(2) of ITAis the decision of the Supreme Court in*KetuaPengarahHasilDalamNegeri v Kim Thye& Co* [1992] 2 MLJ 708.The Supreme Court held that subsection 113(2) is not a mandatory provision. The court ruled that subsection 113(2) clearly confers a discretion on the Director-General of Inland Revenue (DGIR) as to whether a penalty should be imposed or not. In exercising its discretion, the DGIR must take into account all factors and circumstances of the case and should not act mechanically.

In the case of *BR Sdn. Bhd. v. KetuaPengarahHasilDalamNegeri*[2008] MSTC 3, 655,the DGIR had reduced the rate of the penalty of 60% from the additional tax payable, which is normally imposed on audit cases, to only 25%. The Special Commissioners of Income Tax (SCIT)was of the view that the DGIR has exercised its discretion correctly by reducing the penalty rate. The SCIT was satisfied that the Director-General had applied his mind to the facts and circumstances of the case in using his discretionary power, and there is no reason for them to interfere with the imposition of penalty.

Under the current IRBM Audit Framework (2013), the penalty rate for audit cases is 45% of the tax or additional tax payable, while for transfer pricing audit cases the rate of penalty is only 25% of tax or additional tax payable (Transfer Pricing Audit Farmework 2013, para 26). Applying the reasoning in the *BR SdnBhd's* case, it may be argued by the DGIR that he has applied his mindin exercising his discretion to impose penalty by not imposing the maximum penalty rate of 100% as provided under the ITA, but instead applying a lower rate of 45% or 25% respectively. However, the opposing argument on the application of the framework by the IRBM's auditor is that the auditor has acted mechanically by following the framework blatantly without considering other relevant facts of the case (*ToxicolSdnBhd Appeal v. KPHDN,*).

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There are numerous recent cases where the courts were urged to decide on the issue of penalty. For instance, the High Court, in the case of *Office Park Development SdnBhd v KetuaPengarahHasilDalamNegeri*[2011] 9 MLJ 479, has set aside the penalty imposed by the DGIR. The High Court affirmed the SCIT's decision to set aside the penalty under subsection 113(2) of the ITA on the basis that the taxpayer at all material times had acted in good faith, took professional advice, made full disclosure and that the matter in dispute arose as a result of a technical adjustment. It must be noted that the IRBM had withdrawn its appeal at the Court of Appeal against the decision of the High Court.Therefore, the principal of the case can be referred to by the tax payer to challenge any penalty imposed by IRBM.

The consideration on whether a penalty should be imposed on technical adjustment was further confirmed in another High Court case of *PiramidIntanSdnBhd v KetuaPengarahHasilDalamNegeri*[2014] 1 LNS 1468.In this case, it washeld that where the deduction made by the taxpayer was merely as a result of a technical adjustment made by the Respondent (DGIR), i.e., it is due to a differing interpretation of the tax legislation by the parties, the Court opined that penalty should not be imposed.

In a nutshell, *Office Park* and *PiramidIntan's* caseshaveput a burden for the DGIR to adduce evidence that the error made in return was not done in good faith or DGIR need to show a bad intention on the part of the taxpayer in preparing and submitting the return. Section 77 of ITA requires company to submit return of income to the DGIR seven months after the close of the accounting period. DGIR will also face difficulties in maintaininga penalty imposed if a taxpayer is represented by a tax agent or tax professionalsas these are facts that support the element of good faith. There is a significant number of tax agents beingappointed under Section 153 of ITA (List of Tax Agent as at July 2019) andmost companies or wealthy taxpayers are represented by tax advisers. Therefore, following the reasoning of the two cases above imposition of penalty by IRBM may not be sustained.The taxpayer may also be able to avoid paying penalty if, during the audit process, full cooperation is given, such as providing particulars or documents and answering all questions asked by the auditors (*Kyros International SdnBhd v KetuaPengarahHasilDalamNegeri*, 2013).

In contrast to the above principles, there are decisions of the SCIT and courts that have taken a different approach in deciding on similar contentions or instances. For example, on the issue of technical adjustment, the SCIT in *UCM S&S SdnBhd v KPHDN*[2006] (Appeal No. PKCP(R) 37/2006),decided that technical adjustment argument is immaterial inimposition of penalty. The SCIT had adopted a strict approach and taken a stand that penalty is entirely the discretion of the DGIR.The SCIT took a similar stand in *KT & Co v. KetuaPengarahHasilDalamNegeri*(1996) MSTC 2594. The SCIT emphasised the importance of imposing penalty if there is an error made in the return. The imposition of penalty was held to be an essential part of assessment.A strict approach was preferred by the SCIT.

A strict approach may be considered as consistent with the implementation of the self-assessment system where a taxpayer is required by law to determine his taxable income, compute his tax liability and submit his tax return. The tax computed is due to be paid on the due date and in the case of company seven months after the close of the accounting period (Section 77of ITA). Therefore, it is the duty of the taxpayer to ensure that they file a correct return or furnish the right information to the IRBM as the duty to ascertain and pay the tax is placed fully on the taxpayer. The validity of penalty imposed under the self-assessment system was deliberated by the Court of Appeal in *Syarikat PukinLadangKelapaSawitSdnBhd v KPHDN*[2012] 6 MLJ 411, (Civil Appeal No. W-01-712-12/2011(COA), where High Court's decision on penalty is maintained having regard to the current self-assessment system and audit that has been carried out. The High Court agreed that in the self-assessment system, the duty is on the taxpayer to submit a correct return, and any error can only be discovered upon audit by the IRBM. The activity of audit by the IRBM was accepted as a basis to justify the imposition of penalty.The learned judge in the

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above case has also considered the issue of "good faith" as a defence to the taxpayer. It was decided that good faith is only applicable if the taxpayer is being prosecuted for making an incorrect return.

A similar decision was taken by another Court of Appeal in *Syarikat Ibraco-PerembaSdnBhd v KetuaPengarahHasilDalamNegeri*(Civil Appeal No. : W-01-177-04/2013)(COA)**.** In this case, the assessment was raised under section 140 of ITA where the DGIR had disregarded the transaction entered into by the taxpayer on the basis that it was part of a tax avoidance scheme. The learned Court of Appeal judge agreed that the avoidance scheme had been proven before the SCIT and on the issue of penalties the court held that the defence of good faith is only available to the taxpayer if the DGIR invokes or commences prosecution under subsection 113(1) of ITA. As such, the contention of good faith by the taxpayer with regards to imposition of penalty under subsection 113(2) of ITA was rejected.

Finally, on the issue of good faith, the High Court in the case of *KPHDN v NV Alliance*[2009] (Civil Appeal No. R1-14-04-2009 (HC) and Court Appeal in *Sri BinarayaSdnBhd v KPHDN*[2016] MSTC 30-130, (Civil Appeal No: W-01-448-10/2012 (COA)confirmed the High Court's decision leading to good faith not being a shield against subsection 113(2) of the ITA.AbangIskandar Bin AbangHashim J, in the case of *Sri BinarayaSdnBhd v KPHDN*(2016)(Reported Judgment of the High Court) states as follows -

> *"**This Court is of the view that good faith is not an element that ought to feature and be considered**, in cases of imposition of penalty by the KPHDN under Section 113(2) of the ITA, that could provide the taxpayer with the semblance of a shield of immunity against the imposition of such penalty. The language, as was employed in that subsection, as compared to the one immediately preceding it, would strongly convey the message that such has not been the intention of Parliament, **namely that good faith is not a defence in a section 113(2) of the ITA**."*(Emphasis added).

For IRBM, the arguments of good faith as a defence for the taxpayer to set aside the penalty under subsection 113(2) of the ITA should no longer arise as recent decisions have decided otherwise. Nevertheless, since there is no clear higher court's decision that has deliberated and held that *Office Park's* case is wrongly decided, it is still open for the taxpayer to rely on or quote the grounds of judgement of the learned High Court judge in that case. Furthermore, except for *Syarikat IbracoParemba*'s case that involved a tax avoidance scheme, there are no grounds of judgement by the Court of Appeal in other cases. Without grounds of judgement of higher courts, it is not clear what are the basis or reasons for confirming or setting aside the imposition of penalty. Therefore, there is a need to provide a clear law on whether good faith can be a defence under subsection 113(2) of ITA or penalty maybe imposed on a strict liability basis.

The imposition of penalty in a transfer pricing case was raised and decided in three SCIT rulings. The first reported case is the case of *MM SdnBhd v KPHDN* (2009)where the taxpayer argued that IRBM had conducted a transfer pricing audit on an arm's length transaction based on the Transfer Pricing Guidelines 2003 wherein it has no legal effect and IRBM argued that the said guidelines take its cloth from the OECD model tax convention. The Court came to a conclusion among other issues that although IRBM had rejected the taxpayers comparable, the adjustment was done based on taxpayers comparable instead of IRBM's own comparable. There is no appeal on this case. Because of the decision, the penalty was discharged by the SCIT.

In another transfer pricing case of *PGSB v DGIR* [2013] (PKCP (R) 189-193/2013), IRBM's conclusion that the dealings by the Company were not at arm's length was argued as unreasonable and contrary to the functions, assets and risks and the accepted transfer pricing methodologies. The taxpayer objected to the imposition of penalty at 25%. The taxpayer had argued that the transfer pricing documents comply with the Malaysian transfer pricing requirements in effect at that time.The taxpayer contended that, IRBM

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failed to adhere to its own TP Guidelines 2003 and the OECD Guidelines 2010 by not producing a transfer pricing report to justify its characterization of normal distributor that is actually a full-fledged distributor under OECD Guidelines 2010. Further, IRBMfailed to consider the complexity of the marketing function of the Company and rejected the 22 comparables put forward by the taxpayer. The taxpayer also argued that notwithstanding the incorrect comparable selected, IRBM had misapplied the OECD Guidelines and should have made capital adjustments and not adjusted to the median and failed to take into account the other functions carried out by the 5 comparable companies. IRBM argued that the TP Guidelines 2003 is premised on the OECD TP Guidelines 2010 (OECD TP Guidelines 2010, para 3.4) thus in absence of any guidelines on a specific area, the OECD TP Guidelines will be utilised. IRBM had reviewed all TP documents filed by the taxpayer and provided explanations on the adjustment made and OECD TP Guidelines enable adjustment of price in controlled transaction to median range due to defective comparability (OECD TP Guidelines 2010, para 3.57). IRBM had chosen the 5 comparables after making an analysis of 22 comparable companies chosen by the taxpayer, and each activity of each comparable companies had been considered. The taxpayer argued that they did not submit incorrect return nor gave incorrect information and had also sought professional advice. The Court found that IRBM's conclusion that the controlled transactions are not at arm's length was wrong and as such the penalty was set aside.

The most recent decision of the SCIT is the case of *OM (M) SdnBhd*[2012] (PKCP (R) 189-192/2012) that hinges on section 140 of the ITA, the general anti-avoidance provision. The Court concluded that based on subsection 140(6) of the ITA, IRBM is responsible for proving that the controlled transactions are not at arm's length. The methodology in determining arm's length transactions, which was by way of Comparable Uncontrolled Price (CUP) method,was correct.CUP, is a method accepted by the IRBM in ascertaining arm's length price under the TP Guidelines 2003. The audit done by IRBM was based on the TP Guidelines 2003 which hadbeen argued as not having any legal effect.The adjustment had been done arbitrarily in view that the purchase with its related Company is indeed at the same price or lower compared with purchased from independent company. The taxpayer's CUP method is more suitable than Transactional Net Margin Method (TNMM) applied by the IRBM despite thatTNMM is also a method accepted by the IRBM in ascertaining arm's length price under the TP Guidelines 2003.The taxpayer argued that they were not given the opportunity to address the penalty imposed under subsection 113(2) of the ITA and that section 140 of the ITA did not provide for imposition of a penalty. Nevertheless, the crucial arguments raised by the taxpayer is that they had acted in good faith and there was no incorrect return filed, all had been duly furnished with honesty, full cooperation had been given and professional advice had been obtained. The appeal by the tax payer was allowed and the penalty imposed was set aside by the SCIT.

Without a doubt, there are many cases on imposition of penalty either decided in favour of the taxpayer or IRBM. The courts have taken various approaches in confirming or rejecting the penalty that was imposed. To add to the uncertainty, except for *IbracoParemba's* case, there are no written grounds given by the higher court, in particular,the Court of Appeal on this issue. As such, there is no clear direction to the public or tax practitioners on these aspects of the law. Furthermore, there is no specific penalty case on transfer pricing that has been decided by the higher court. More so, there is no special penalty provision for transfer pricing cases. IRBM has over the years relied on subsection 113(2) of ITA, the general penalty provision in raising a transfer pricing assessment. Indeed, thelower penalty rate on transfer pricing cases is not the right solution given the cases discussed above. In short, the same argument or issue would continuously be raised by the taxpayer when penalty is imposed upon the determination of a transfer pricing audit.

It has been contended that penalty is the discretion of the Revenue, and it should not be exercised at whim and fancy. The Revenue must consider all relevant facts and circumstances of each case (*Kim Thye Co. v. KetuaPengarahJabatanHasilDalamNegeri, Kuala Lumpur,* 1991). There have been times when the

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taxpayer had been successful in setting aside a penalty imposed on the ground that they have acted in good faith in submitting the return and had obtained professional advice in preparing the return(*Office Park Development SdnBhd v KetuaPengarahHasilDalamNegeri,* 2011). In contrast, the Revenuetakes the stand that good faith is not a defence available for the tax payer under subsection 113 (2) of the ITA and good faith is only relevant as a defence in a prosecution conducted under subsection 113(1) of the ITA(*Syarikat Ibraco – ParembaSdnBhd v KPHDN, 2013*).

It is trite law that IRBM must establish the above ingredients which were set out in *Kim Thye's*case, i.e. that the incorrect return or information was given dishonestly with an intention to evade tax or possibly fraud (negligently) upon the standard of beyond reasonable doubt at that material time. Even if section 140 of ITA was applicable, the procedure adopted by the IRBM in automatically imposed penalties is mechanical, unreasonable and illegal(*DGIR v Shell Refining Company (Federation of Malaya) Berhad,* 2013 *and DGIR v Kok Fai Yin Co. Sdn. Bhd,* 1990).

The imposition of penalty by IRBM's audit team is based on the Audit Framework issued to the public. In practice then all transfer pricing cases will be subjected to imposition of penalty without considering the relevant facts and circumstances of the case. Such conduct amounts to a mechanical decision making, which can be easily challenged in a court of law.

It has been argued that in transfer pricing cases brought to the courts, there has been no finding that the Company has not given full co-operation to IRBM in disclosing all information requested by IRBM. They have acted in good faith throughout the entire field audit and did not, in any way, try to withhold any information from the IRBM. This is clear from the audit report prepared by the IRBM's audit team.

It is also pertinent to note that there is no specific penalty provision in the ITA to address transfer pricing adjustment. The reliance on good faith as a defence against a penalty imposed undersubsection 113(2) of ITA would lead to having to adduce evidence of bad faith on the part of the taxpayer thus creating an onerous burden for the IRBM, more so when the taxpayer has prepared transfer pricing documents as requested by the IRBM. The analysis carried out in transfer pricing case is very subjective as it depends on the evidence from other parties or entities carrying out similar activities. It is finally purely a question of facts that could be open for various interpretations.

RECOMMENDATIONS AND CONCLUSIONS

Transfer pricing is an important international tax issue. In Malaysia, IRBM like every tax authority around the world have issued guidelines and laws to address profit shifting issue of multinationals. The first guidelines on transfer pricing were issued in 2003. The guidelines were published based on section 140 of the ITA, the general anti-avoidance provision. A new and specific transfer pricing law was introduced in 2009, followed by new Rules and Guidelines.

Adjustments raised by IRBMhave been disputed before the SCIT and courts on numerous grounds.The IRBM must have clear authority to make transfer pricing adjustments. Any ambiguity or doubt in the law will be interpreted in favour of the taxpayer (*National Land Finance Co-Operative Society Ltd v Director General of Inland Revenue,* 1993).The imposition of penalty arising from transfer pricing audit is one of the areas where there is a need to provide for a clear law. This is so having regard to various inconsistent judgements and rulings by the SCIT and courts on the application of subsection 113(2) of ITA. More so when there is no specific provision on penalty for transfer pricing cases despite the introduction of a specific provision to address the problem of transfer pricing.

A clear law on the imposition of penalty will not only protect the interest of the government but will also assist the taxpayer to comply with the law, especially in the era of self-assessment. The study's findings

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and recommendations should help refocus the attention of Malaysia's lawmakers in creating a comprehensive transfer pricing legislation. Furthermore, in line with having specifictransfer pricing provisions, the general imposition of penalty needs to be revisited.Specific and clear provisions for the imposition of penalty relating to transfer pricing need to be drafted into the existing tax law.

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