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SPECIAL ALERT!

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# *Income Tax (Advance Pricing Arrangement) Rules 2023: What Changed?*

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On 29 May 2023, the Income Tax (Advance Pricing Arrangement) Rules 2023 ("2023 Rules") was gazetted. The advent of the 2023 Rules also marks the revocation of the Income Tax (Advance Pricing Arrangement) Rules 2012 ("2012 Rules"). In this alert, we set out a summary of the key changes in the 2023 Rules.

## Summary of the 2023 Rules

In essence, the changes to the 2023 Rules:

- addresses the effects of double taxation agreements ("**DTA**") on advance pricing agreements ("**APA**");
- introduces new documents/information that has to be submitted in an application for APA;
- imposes new timelines on taxpayers seeking to apply for APA;

- restricts the availability of rollback in certain situations; and

- prescribes fees payable in an application for APA.

Notwithstanding these changes, the fundamental procedures governing APA applications remain substantially the same.

### *1. Application*

As with the previous 2012 Rules, a taxpayer carrying on a cross-border transaction may apply to the Director General of Inland Revenue ("DGIR") for an APA. However, the 2023 Rules prescribe new restrictions which vary depending on whether a DTA is available with the country with whom the cross-border transaction relates:

| A DTA is Not Available | A DTA is Available |
|---|---|
| The taxpayer may only apply for a unilateral APA. | The taxpayer may only apply for a bilateral APA or a multilateral APA. |
| - | The application by a permanent establishment must be made by its head office on behalf of the permanent establishment. |

The arm's length transfer price remains to be ascertained in accordance with Section 140A of the Income Tax Act 1967 ("**ITA**"), the Income Tax (Transfer Pricing) Rules 2023 and the applicable DTA (if any).

### *2. Request for Pre-Filing Meeting*

Similar to the previous 2012 Rules, the taxpayer must first request in writing to the DGIR for a pre-filing meeting 12 months prior to the first day of the proposed covered period. However, the taxpayer is now required to provide substantially more documents in its draft outline to the DGIR at this stage, including:

- contemporaneous transfer pricing documentation;
- a full description of the critical assumptions adopted for the proposed transfer pricing methodology and analysis, including relevant events to consider for those assumptions;
- financial statements and tax computations for the latest three years prior to the application;
- a written indication of whether the income in relation to the covered transactions is tax-exempted by the other Competent Authority; and
- any other information required to be furnished by the DGIR.

### *3. Submission of Application*

The procedure at this stage is largely unchanged. The DGIR will notify the taxpayer within 14 days whether or not to proceed to submit the APA application. However, the application must now be accompanied by the newly prescribed fees. Such fees are payable even if the taxpayer subsequently withdraws its application.

| Time when application is made | New APA Application |
|---|---|
| Within 2 months after receipt of the notification. | RM 5,000 + any expenses as the DGIR may determine. |
| After 2 months but within 6 months after receipt of the notification. | RM 10,000 + any expenses as the DGIR may determine. |

Under the 2023 Rules:

- the time period to submit an APA application after receiving the DGIR's notification has been extended from 2 months to 6 months under the 2023 Rules.

Therefore, taxpayers are afforded more time to prepare their application.

- the taxpayer must furnish any further information and document requested by the DGIR within 30 days.

These timelines are strict. If a taxpayer fails to comply with them, he would be deemed to have withdrawn his application and must submit a new draft outline should he wish to proceed with the APA application thereafter.

### 4. *Where an APA Application Is Declined*

The previous scenarios where the DGIR may decline an APA application remain the same. In addition, the 2023 Rules introduced a new provision which empowers the DGIR to decline an APA application if the proposed covered transaction involves improper use or abuse of a DTA to obtain unintended benefit. It remains to be seen how this provision will be applied by the DGIR in practice.

Where a taxpayer's application is declined, the taxpayer may still request the DGIR to review its application within 30 days from the receipt of the decision. Any decision made pursuant to this review is final.

### 5. *Where an APA Application Is Accepted*

Once the APA application is accepted, the DGIR and the taxpayer are bound by the terms of the arrangement during the covered period, which may range between 3 to 5 years of assessment ("YAs"). During the covered period, the taxpayer is required to furnish a compliance report for each year of assessment ("YA") within 7 months from the close of the basis period for that YA. Such compliance report shall include, amongst others:

- required information under the 2012 Rules;

- a copy of a report and analysis which consists of the ownership structure of the local and foreign entities involved in the covered transaction, local organisation chart, details of the controlled transactions and details of the covered transaction's flow;

- relevant accounting entries in relation to the compensating adjustments for taxpayer and foreign entities to ensure the economic and tax position of the arm's length price is aligned;

- all relevant information and computations necessary to support the application of the transfer pricing methodology for the covered transactions and the results which comply with the transfer pricing methodology for that YA; and

- other relevant documents as determined by the DGIR.

Where the results of the covered transaction is materially different from the APA, the taxpayer shall make a compensating adjustment to ensure that the results of the covered transaction substantially conforms to the results that would have been arrived at if the transfer pricing methodology agreed to under the APA is applied.

### *6. Rollback*

The taxpayer may also request to rollback the terms and conditions of an APA to prior YAs for a maximum of 3 YAs. However, this is only available if the proposed transfer pricing methodology is relevant to the resolution of the transfer pricing issues in the prior YAs and the particular facts and circumstances surrounding the prior YAs are substantially the same. In order to ascertain this, the DGIR may conduct a verification audit.

However, rollback is not available when:

- a tax audit has been conducted by the DGIR on the prior YAs;

- a voluntary disclosure for transfer pricing has been submitted for prior YAs;
- the matter on which the APA is sought has been decided by the SCIT or courts; or
- the taxpayer did not submit the amended tax computation for rollback years within 30 days from the date of signing the APA.

### *7. The DGIR's Powers (Revision, Cancellation, Revocation)*

The DGIR's power to revise, cancel or revoke the APA in certain situations remains undisturbed in the new 2023 Rules barring several new additions in relation to DTAs. Under the new 2023 Rules, the DGIR may cancel or revoke a bilateral APA or multilateral APA if the underlying DTA had been cancelled or revoked. An APA may also be revoked if there is any failure by the taxpayer to disclose any occurrence of voluntary disclosure, investigation, audit or incentive approval to the DGIR.

Conversely, the taxpayer may apply to the DGIR to cancel the APA on reasonable grounds. Similar to the 2012 Rules, "reasonable grounds" is not defined and it remains to be seen how this would be applied by the DGIR.

### *8. Renewing an APA*

As with the procedure under the 2012 Rules, there are 2 stages to renewing an APA. The taxpayer must first request the DGIR to renew an APA at least 6 months before the expiration of the APA by submitting relevant supporting documents. The DGIR will then inform the taxpayer of its decision in writing. Once the request is approved, the taxpayer has 2 months from the date of the decision to submit an application for renewal of the APA using the prescribed form. Such prescribed form must be accompanied by a non-refundable application fee of RM 5,000 and any further sum for expenses as determined by the DGIR.

Once the 2-months period lapses and no application has been submitted by the taxpayer, the taxpayer is deemed to have withdrawn its application. The taxpayer may still proceed by making a fresh request following that if the covered transaction has changed, there are material and anticipated changes in fact and circumstances of the covered transaction, or a different transfer pricing methodology is proposed.

## Conclusion

The 2023 Rules seeks to specifically address the effects of DTAs on APAs, something which the 2012 Rules did not. However, taxpayers should pay heed to the increased stringency in terms of deadlines under the new 2023 Rules to avoid being deemed to have withdrawn their APA applications.

Taxpayers are also advised to comprehensively prepare the required documents prior to their request for an APA in light of the substantial increase in documents needed by the DGIR under the 2023 Rules. The full 2023 Rules can be found here.

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If you have any queries pertaining to the 2023 Rules or transfer pricing matters generally, please contact *senior associate*, Chris Toh Pei Roo, or his team *partners*, Jason Tan Jia Xin, Ivy Ling Yieng Ping or *consultant*, Dato' Nitin Nadkarni at tax@lh-ag.com.

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