

TPR23 vs TPR12

Rule 2 TPR23: Application

| TPR23 | TPR12 |
|---|---|
| (1) These Rules shall apply to a controlled transaction <u>mentioned under subsection 140A(2) of the Act.</u> | (1) These Rules shall apply to controlled transactions <u>for the acquisition or supply of property or services.</u> |
| (2) For the purposes of <u>determination and application of arm's length price</u> , a person shall determine and apply the arm's length price for the acquisition or supply of property or services in accordance with the manner provided in these Rules. | (2) For the purpose of <u>subrule (1)</u> , a person shall determine and apply the arm's length price for the acquisition or supply of property or services in accordance with the method and manner provided in these Rules. |

Rule 3 TPR23: Interpretation

| TPR23 | TPR12 |
|--|--|
| <i>Refer to Rule 2(1) TPR23</i> | "controlled transaction" means the transaction referred to in subsections 140A(2) and (5) of the Act |
| "contemporaneous transfer pricing documentation" means transfer pricing documentation <u>as provided under rule 4</u> | <i>Refer to Rule 4(3) TPR12</i> |
| "property" includes any goods, movable or immovable thing, or intangible property and beneficially owned property | "property" includes any goods, movable or immovable thing, or intangible property and beneficially owned property |
| "service" includes any rights, benefits, privileges or facilities provided, or are to be provided, granted or conferred under an arrangement for or in relation to any work and assistance which includes financial assistance | "service" includes any rights, benefits, privileges or facilities that are, or to be, provided, granted or conferred under an arrangement for or in relation to any work and assistance including financial assistance |
| "uncontrolled transaction" means a transaction carried on by an independent person dealing with one another at arm's length | <i>Refer to Rule 7(6) TPR12</i> |

Rule 4 TPR23: Contemporaneous Transfer Pricing Documentation

| TPR23 | TPR12 |
|---|---|
| Refer to Rule 3 TPR23 | (3) For the purpose of this rule- "contemporaneous transfer pricing documentation" means <u>transfer pricing documentation which is brought into existence-</u> <u>(a) when a person is developing or implementing any controlled transaction; and</u> <u>(b) where in a basis period for a year of assessment the controlled transaction is reviewed and there are material changes, the documentation shall be updated prior to the due date for furnishing a return for that basis period for that year of assessment.</u> |
| (1) A person who enters into a controlled transaction shall prepare a contemporaneous transfer pricing documentation <u>which is brought into existence prior to the due date for furnishing a return in the basis period for a year of assessment in which a controlled transaction is entered into.</u> | (1) A person who enters into a controlled transaction shall prepare a contemporaneous transfer pricing documentation. |
| (2) The contemporaneous transfer pricing documentation shall contain— <u>(a) information of the Multinational Enterprise Group as specified in Schedule 1;</u> <u>(b) information regarding the person's business as specified in Schedule 2;</u> <u>(c) information and documents regarding a cost contribution arrangement under rule 10 as specified in Schedule 3;</u> (d) index to documents prepared under this rule; <u>(e) the date on which the contemporaneous transfer pricing documentation is completed;</u> (f) any documents which— (i) become the foundation for the development of the transfer pricing analysis; | (2) The contemporaneous transfer pricing documentation shall <u>include records and documents that provide a description of the following matters:</u> <u>(a) organizational structure, including an organization chart covering persons involved in a controlled transaction;</u> <u>(b) nature of the business or industry and market conditions;</u> <u>(c) the controlled transaction;</u> <u>(d) strategies, assumptions and information regarding factors that influenced the setting of any pricing policies;</u> <u>(e) comparability, functional and risk analysis;</u> <u>(f) selection of the transfer pricing method;</u> <u>(g) application of the transfer pricing method;</u> |

| | |
|---|---|
| <p>(ii) support the development of the transfer pricing analysis; or</p> <p>(iii) <u>were referred to in the development of the transfer pricing analysis</u>; and</p> <p>(g) <u>any information, data or other related documents used by the person entering into the controlled transaction to determine an arm’s length price under rule 6, including the effect of the material changes to the business conditions during the basis period.</u></p> | <p>(h) documents that provide the foundation for or otherwise support or were referred to in developing the transfer pricing analysis;</p> <p>(i) index to documents; and</p> <p>(j) <u>any other information, data or document considered relevant by the person to determine an arm's length price.</u></p> |
| <p>(3) Where any of the information, data or other related documents required under subrule (2) is not applicable to the person who enters into a controlled transaction, the person shall indicate the non-applicability of the information, data or documents in the contemporaneous transfer pricing documentation</p> | <p>N/A</p> |
| <p>(4) For the purposes of this rule, “Multinational Enterprise Group” means a collection of enterprises related through ownership or control which is required to prepare consolidated financial statements for financial reporting purposes under the applicable accounting principles or would be so required if equity interest in any of its enterprises were traded on public securities exchange which includes—</p> <p>(a) two or more enterprises for which the tax residence is in different jurisdictions; or</p> <p>(b) an enterprise that is resident in Malaysia and is subject to tax with respect to the business carried out through a permanent establishment in another jurisdiction, or is resident in another jurisdiction and is subject to tax with respect to the business carried out through a permanent establishment in Malaysia.</p> | <p>N/A</p> |
| <p>(5) For the purposes of this rule, the Director General may issue any guidelines to facilitate the implementation of these Rules.</p> | <p>N/A</p> |

| TPR23 | TPR12 |
|---|-------|
| (1) In preparing a contemporaneous transfer pricing documentation as specified under rule 4, a person shall determine an arm’s length price based on the most current reliable information, data or documents that are reasonably available at the time of determination of that person’s arm’s length price. | N/A |
| (2) The information, data or documents used in preparing the contemporaneous transfer pricing documentation shall be kept and retained in such a manner as to enable the information, data or documents to be readily ascertained and accessible by the Director General. | N/A |
| (3) The Director General may, by notice under his hand require any person to furnish the contemporaneous transfer pricing documentation in writing within fourteen days from the date of service. | N/A |

Rule 6 TPR23: Method to Determine Arm’s Length Price

| TPR23 | TPR12 |
|--|---|
| (1) A person shall determine the arm’s length price for a controlled transaction by applying the most appropriate method as follows: (a) the traditional transactional method; (b) the transactional profit method; or (c) any other method allowed by the Director General which provides the highest degree of comparability between the transactions. | (1) A person shall apply the traditional transactional method to determine the arm's length price of a controlled transaction. (2) Where the traditional transactional method cannot be reliably applied or cannot be applied at all, the person shall then apply the transactional profit method. (3) Where both the traditional transactional method and transactional profit method cannot be applied at all, the Director General may allow the application of other methods which provides the highest degree of comparability between the transactions. |
| (2) The person shall ensure the basis for the method selected under subrule (1)— | N/A |

Appendix to Income Tax (Transfer Pricing) Rules 2023 - For Better or For Worse?

| | |
|--|--|
| <p>(a) be supported by an explanation and reasons that the method selected and the profit level indicator are appropriate as a better approximation to determine the arm’s length price; and</p> <p>(b) be based on the facts and circumstances, including the economically relevant characteristics of the controlled transaction which has been accurately delineated</p> | |
| <p>(3) The Director General may—</p> <p>(a) make a review for the method selected by that person in subrule (2); and</p> <p>(b) upon making the review under paragraph (a), replace the selected method with the other most appropriate method as specified in subrule (1) if he has reason to believe that the person’s selected method is not the most appropriate method in determining the arm's length price.</p> | N/A |
| <p>(4) For the purposes of this rule—</p> <p>“transactional profit method” means the profit split method or the transactional net margin method;</p> <p>“traditional transactional method” means the comparable uncontrolled price method or the resale price method or the cost plus method;</p> <p><u><i>“profit level indicator” means a measure of a person’s profitability that is used to compare a controlled transaction with a comparable uncontrolled transaction.</i></u></p> | <p>(4) For the purpose of this rule-</p> <p>"traditional transactional method" means the comparable uncontrolled price method or the resale price method or the cost plus method;</p> <p>"transactional profit method" means the profit split method or the transactional net margin method.</p> |

Rule 7 TPR23: Comparability of Transactions

| TPR23 | TPR12 |
|---|--|
| <p>(1) An uncontrolled transaction shall be used as a comparable in determining an arm’s length price of a controlled transaction</p> | <p>(1) <u><i>For the purpose of rule 5</i></u>, an uncontrolled transaction shall be used as a comparable in</p> |

Appendix to Income Tax (Transfer Pricing) Rules 2023 – For Better or For Worse?

| | |
|--|--|
| | determining an arm's length price of a controlled transaction. |
| (2) Before a comparable in subrule (1) is determined, a person shall accurately delineate the controlled transaction by identifying the commercial or financial relations between associated persons based on the economically relevant characteristics mentioned under subrule (4). | N/A |
| (3) An uncontrolled transaction may be used as a comparable if— (a) the <i>economically relevant characteristics</i> of such uncontrolled transaction and the controlled transaction are sufficiently similar; (b) none of the differences in respect of the <i>economically relevant characteristics</i> between such uncontrolled transaction and the controlled transaction, or between persons entering into any of those transactions, are likely to materially affect the price or cost charged or paid or the profit arising from those transactions in the open market; or (c) reasonably accurate adjustments can be made to eliminate the material effects of such differences referred to in paragraph (b) | (2) An uncontrolled transaction may be used as a comparable if- (a) the <i>comparability factors</i> of such uncontrolled transaction and the controlled transaction are sufficiently similar; or (b) none of the differences in respect of the <i>comparability factors</i> between such uncontrolled transaction and the controlled transaction, or between persons entering into any of those transactions, are likely to materially affect the price or cost charged or paid or the profit arising from those transactions in the open market; or (c) reasonably accurate adjustments can be made to eliminate the material effects of such differences referred to in paragraph (b). |
| (4) The <i>economically relevant characteristics for the purposes of accurate delineation of the controlled transaction and determination of the comparable under this rule</i> includes— (a) the contractual terms of the controlled transaction; (b) <i>the functions performed by each of the associated persons to the controlled transaction taking into account the assets used and risk assumed, including—</i> <i>(i) how those functions relate to the wider generation of value by a group to which the parties</i> | (3) The <i>comparability factors referred to in subrule (1)</i> include- (a) the characteristics of the property or services; (b) <i>the functions performed, assets employed and the risk assumed by the respective persons in the transactions;</i> (c) the contractual terms; (d) <i>economic circumstances;</i> and (e) business strategies <i>of the persons in the transactions.</i> |

| | |
|--|---|
| <p><u>belong, the circumstances surrounding the transaction and industry practices; and</u></p> <p><u>(ii) determining the economic significance of risks, contractual and actual assumption of risks, functional analysis relating to the risks and how the risks affect the pricing to the transaction between parties;</u></p> <p>(c) the characteristics of the property or services;</p> <p>(d) the economic circumstances <u>and the market in which the parties operate;</u> and</p> <p>(e) the business strategies <u>pursued by the relevant parties.</u></p> | |
| <p>(5) The Director General may allow <u>the application of data from the year under examination and prior years</u> if—</p> <p>(a) complete and accurate data are available to prove the effect of the life cycles or the business cycles of the <u>property</u> or services in the industry of the person in the controlled transaction <u>where such data can increase the reliability of the comparability analysis;</u> and</p> <p><u>(b) the Director General is satisfied that the effect of the life cycles or the business cycles of the property or services are not impacted by the conditions of commercial or financial relations between associated persons.</u></p> | <p>(5) The Director General may allow <u>for the basis period for a year of assessment the application of data from other years prior to or after that basis period</u> if complete and accurate data are available to prove the effect of the life cycles or the business cycles of the <u>products</u> or services in the industry of the person in the controlled transaction.</p> |
| <p>(6) For the <u>purposes of this rule</u>—</p> <p>(a) the results of the controlled transaction <u>as accurately delineated in accordance with subrule (2)</u> shall be compared with the results of the uncontrolled transaction for the same basis year for a year of assessment <u>using the method as determined under rule 6; and</u></p> <p><u>(b) the data mentioned in subrule (5) shall only be used to assist in the selection of the comparable and not for the use of multiple year averages.</u></p> | <p>(4) For the purpose of <u>determining the arm's length price</u>, the results of the controlled transaction shall be compared with the results of an uncontrolled transaction for the same basis year for a year of assessment.</p> |

Appendix to Income Tax (Transfer Pricing) Rules 2023 – For Better or For Worse?

| | |
|-----|--|
| N/A | (6) For the purpose of this rule, "uncontrolled transaction" means a transaction carried on by an independent person dealing with one another at arm's length. |
|-----|--|

Rule 8 TPR12: Re-characterization of Transactions

| TPR23 | TPR12 |
|-------|---|
| N/A | <p>8. (1) The Director General may disregard any structure adopted by a person in entering into a controlled transaction if-</p> <p>(a) the economic substance of that transaction differs from its form; or</p> <p>(b) notwithstanding that the form and substance of that transaction are the same, the arrangements made in relation to the transaction, viewed in totality, differ from those which would have been adopted by independent persons behaving in a commercially rational manner and the actual structure impedes the Director General from determining an appropriate transfer price.</p> |
| N/A | <p>(2) Where the Director General disregards any structure adopted by a person in entering into a controlled transaction under subrule (1), the Director General shall make adjustment to the structure of that transaction as he thinks fit to reflect the structure that would have been adopted by an independent person dealing at arm's length having regards to the economic and commercial reality.</p> |

Rule 11 TPR23: Intangible Property

| TPR23 | TPR12 |
|---|---|
| <p>(1) Where in a controlled transaction an intangible property is sold or licensed—</p> <p>(a) the owner or <u>licensor</u> shall charge an arm's length</p> | <p>(1) Where in a controlled transaction an intangible property is sold or licensed out-</p> <p>(a) the owner or <u>licensee</u> shall charge an arm's length</p> |

Appendix to Income Tax (Transfer Pricing) Rules 2023 – For Better or For Worse?

| | |
|--|--|
| <p>price; and (b) the value of that property to the purchaser or <u>licensee</u> shall be the benefit that the intangible property is expected to generate.</p> | <p>price; and (b) the value of that property to the purchaser or <u>licensor</u> shall be the benefit that the intangible property is expected to generate.</p> |
| <p>(3) Notwithstanding subrule (2), the Director General may allow the application of <u>any other method under rule 6</u> if such other method provides the highest degree of comparability between transactions</p> | <p>(3) Notwithstanding subrule (2), the Director General may allow the application of other methods if the method provides the highest degree of comparability between transactions.</p> |
| <p>(4) <u>Notwithstanding the legal ownership of the intangible property, if a person contributes to the value of the intangible property through the functions performed, assets used or risks assumed in connection with the development, enhancement, maintenance, protection or exploitation of the intangible property,</u> the person shall be entitled to an arm's length consideration for undertaking such activity.</p> | <p>(4) <u>Where the legal ownership of the intangible property does not vest with the person that has developed that property,</u> such person shall receive an arm's length consideration for the development of such property.</p> |
| <p>(5) Where a person who is not the owner of a trademark or trade name undertakes marketing activities and bears marketing costs of such trademark or trade name in excess of those <u>borne by a comparable independent person, the person</u> shall be entitled to an arm's length consideration for undertaking such activities from the owner of the trademark or trade name.</p> | <p>(5) Where a person who is not the owner of a trademark or trade name undertakes marketing activities and bears marketing costs of such trademark or trade name in excess of those <u>of a comparable independent person, he</u> shall be entitled to an arm's length consideration for undertaking such activities from the owner of the trademark or trade name.</p> |
| <p>(6) <u>The owner of the intangible property is not entitled to any income attributable to that intangible property if he neither performs the functions nor controls the functions or risks related to the development, enhancement, maintenance, protection or exploitation of the intangible property.</u></p> | <p>(6) <u>In this rule, a person shall be deemed to be an owner of an intangible property and is</u> entitled to any income attributable to that property <u>if the expenses and risks associated with the development of the intangible property are borne by that person.</u></p> |
| <p>(7) For the purposes of this rule— "intangible property" <u>refers to an asset which is neither a physical asset nor a financial asset but such asset is capable of being owned or controlled for use in commercial purposes, whose use or transfer would be compensated had it occurred in a transaction between independent persons in comparable circumstances which</u> includes patent,</p> | <p>(7) For the purpose of this rule— "intangible property" includes patent, invention, formula, process, design, model, plan, trade secret, know-how or marketing intangible; "marketing intangible" <u>includes</u> an intangible that is concerned with marketing activities, which <u>aids in the commercial exploitation of the property</u> or has an</p> |

| | |
|--|--|
| <p>invention, formula, process, design, model, plan, trade secret, know-how or marketing intangible;</p> <p>"marketing intangible" <u>is</u> an intangible that relates to marketing activities of a property or service which has an important promotional value for the property or service concerned <u>which includes trademarks, trade names, customer lists, customer relationships and proprietary market and customer data that is used or aids in marketing and selling property or services to customers</u></p> | <p>important promotional value for the property concerned.</p> |
|--|--|

Rule 13 TPR23: Adjustment by Director General

| TPR23 | TPR12 |
|---|---|
| <p>(1) Notwithstanding any other provision under these Rules, where the Director General has reason to believe that any price including the rate of interest imposed or would have been imposed in a controlled transaction is not at arm's length, the Director General may make an adjustment to reflect the arm's length price or arm's length interest rate for that transaction by substituting or imputing the price or interest, as the case may be.</p> | <p>(1) Notwithstanding any other provision of these Rules, where the Director General has reason to believe that any price including the rate of interest imposed or would have been imposed in a controlled transaction is not at arm's length, the Director General may make an adjustment to reflect the arm's length price or interest rate for that transaction by substituting or imputing the price or interest, as the case may be.</p> |
| <p>N/A</p> | <p>(2) Any adjustment under these Rules in respect of an assessment made on one of the persons in a controlled transaction may be reflected by an offsetting adjustment on the assessment of the other person in that transaction upon request by that other person.</p> |
| <p>(2) Where the price at which a controlled transaction entered by a person is—</p> <p>(a) within the arm's length range, such price may be regarded to be the arm's length price; or</p> <p>(b) outside the arm's length range, the arm's length price shall be taken to be the median.</p> | <p>N/A</p> |
| <p>(3) For the purposes of paragraph (2)(a), the Director General may adjust the price of the controlled</p> | <p>N/A</p> |

Appendix to Income Tax (Transfer Pricing) Rules 2023 - For Better or For Worse?

| | |
|--|-----|
| <p>transaction to the median or any other point above median within the arm’s length range—</p> <p>(a) where the uncontrolled transaction is the kind which has a lesser degree of comparability; or (b) where any of the comparability defects cannot be quantified, identified, or adjusted.</p> | |
| <p>(4) For the purposes of adjustment made under subrule (1), the Director General may impose surcharge in accordance with subsection 140A(3C) of the Act.</p> | N/A |
| <p>(5) For the purposes of this rule—</p> <p>“arm’s length range” means a range of figures or a single figure falling between the value of 37.5 percentile to 62.5 percentile of the data set and acceptable by the Director General in determining whether the arm’s length price has been applied in a controlled transaction and such range, upon compliance with rule 7, is derived from—</p> <p>(a) applying the same transfer pricing methodology to multiple comparable data; or (b) applying different method as determined under rule 6;</p> <p>“median” means the value at the mid-point of the arm’s length range</p> | N/A |

Rule 14 TPR23: Permanent Establishment as a Separate Entity

| TPR23 | TPR12 |
|--|---|
| <p>In this rule, “permanent establishment” shall have the same meaning—</p> <p>(a) assigned to it in the arrangement made under section 132 of the Act; or (b) <u>as the definition of “place of business” under</u></p> | <p>(2) In this rule, "permanent establishment"-</p> <p>(a) shall have the same meaning assigned to it in the arrangement made under section 132 of the Act; or (b) if there is no arrangement made under section 132 of the Act, <u>means a fixed place of business through which the business of a person is wholly or</u></p> |

Appendix to Income Tax (Transfer Pricing) Rules 2023 – For Better or For Worse?

subsections 12(3) and (4) of the Act, if there is no arrangement made under section 132 of the Act.

partly carried on, or a fixed place of business of another person, through which the particular person makes supplies.