CHARTERED TAX INSTITUTE OF MALAYSIA

e-CIRCULAR TO MEMBERS

CHARTERED TAX INSTITUTE OF MALAYSIA (225750-T)

e-CTIM No.79/2012 **6 June 2012**

TO ALL MEMBERS

TECHNICAL

Income Tax (Advance Pricing Arrangement) Rules 2012 - [P.U. (A) 133/2012]

A taxpayer who carries on a cross-border transaction may apply to the Director General (DG) for an advance pricing arrangement (APA) to determine in advance the appropriate set of criteria for ascertaining the arm's length transfer prices (ALTP) in relation to a covered transaction for specified terms and conditions. One will note that APAs only apply to cross-border transactions and not to domestic transactions.

The ALTP in respect of an APA shall be ascertained in accordance with section 140A of Income Tax Act 1967 (ITA), the Income Tax (Transfer Pricing) Rules 2012 and the double taxation arrangement (DTA) made under section 132 of ITA.

These Rules lay down the operational framework and procedures for APA and are deemed to have come into operation on 1 January 2009.

Request for pre-filing meeting (Rule 4)

The taxpayer shall make a request in writing to the DG for a pre-filing meeting, 12 months prior to the first day of the proposed covered period. The request should be submitted together with a draft outline of the case, indicating the following:

a) the taxpayer's business model and industry information;

b) the scope of the transaction and periods to be covered; and

c) the proposed transfer pricing methodology (TPM) and an explanation of whether the method accords with the arm's length principle.

The DG may require the taxpayer to furnish any other information relating to the request for a pre-filing meeting.

Within 14 days after the pre-filing meeting, the DG shall notify the taxpayer of his decision on whether the taxpayer may proceed to submit an application for an APA.

Submission of application for arrangement (Rule 5)

A taxpayer may submit to the DG an application for a *Unilateral APA*, *Bilateral APA* or *Multilateral APA* in a prescribed form within two months after receipt of the notification of the decision of the DG. The DG, in considering the application, may propose an alternative methodology, or restrict or expand the scope of the proposed APA.

Circumstances where APA is declined (Rule 6)

The DG may decline an application for APA under the any of the following circumstances:

a) failure to comply with the requirements under the Income Tax (Transfer Pricing) Rules 2012 and the Malaysian Transfer Pricing Guidelines issued by the DG;

b) where the proposed covered transaction is based on a hypothetical situation or not seriously contemplated;

c) where it appears to be an inefficient use of resources to pursue an APA if the proposed transaction is limited in nature and value, or the arm's length principle on the proposed transaction can reliably be applied without material doubt;

d) where the matter on which the APA is sought is subject to an appeal under S. 99 of ITA ; or

e) where the proposed covered transaction involves a tax avoidance scheme.

Withdrawal of an APA application (Rule 7)

The taxpayer may withdraw an APA application at any time before the arrangement is concluded by notifying the DG in writing.

Critical assumptions (Rule 9)

The taxpayer shall identify, in his application for an APA, the assumptions made in developing the proposed TPM which are critical to the reliability of the methodology under the arm's length principle.

Critical assumption means any assumed objective criterion that would significantly affect the terms of an APA if the underlying conditions changed, which may include any fact or condition about the person, a third party or an industry, such as a new business strategy or a mode of conducting operations, or the cessation or transfer of a business segment or entity, or circumstances that would materially affect the suitability of the TPM or its application.

Effect of APA (Rule 11)

The Unilateral APA, Bilateral APA or Multilateral APA entered into by the relevant parties shall, during the covered period, constitute a binding undertaking on the parties to the arrangement that the ALTP is ascertained in accordance with the arrangement.

Covered period under APA (Rule 12)

The covered period under an APA shall be a minimum of 3 years of assessment and a maximum of 5 years of assessment.

Request for rollback (Rule 13)

A taxpayer may request that the application of the terms and conditions of an APA be applied to prior years' assessment if the proposed TPM is relevant to the TP issues, and the particular facts and circumstances are substantially the same as the prior years'.

Compliance report (Rule 14 & Rule 16)

The taxpayer shall furnish an APA compliance report for each year of assessment of the covered period within 7 months from the date following the close of the accounting period. Some of the information/documents required for the compliance report are listed in Rule 14(2).

The DG shall review the compliance report to establish whether the terms and conditions have been complied with.

Compensating adjustments (Rule 15)

The taxpayer shall make a compensating adjustment to ensure the results of the covered transaction substantially conform to the results that would have been arrived at, if the TPM agreed to under the APA is applied.

Revision of APA (Rule 17)

The DG may revise an APA under any of the following circumstances:

a) The taxpayer failed to meet the critical assumptions as provided in the arrangement; or

b) There has been a change in the law or the arrangement under section 132 of ITA that affects the APA.

Cancellation of APA (Rule 18)

The DG or the Competent Authority, as the case may be, may cancel an APA under any of the following circumstances:

- if any of the persons in the covered transaction in respect of that APA
  - fails to comply with any term or condition of that APA; or
  - makes an error or mistake in the APA application, reports or renewal submission; or
  - fails to provide information, documentation and compliance report as required under these Rules, or
- if the revised APA is not concluded.

The DG or the Competent Authority shall inform the taxpayer or the other Competent Authority of the cancellation in writing and the grounds for cancellation.

The taxpayer may apply to the DG to cancel the APA on reasonable grounds.

The cancellation shall be effective as of the beginning of the basis period for the year of assessment which relates to the circumstances provided for above.

Revocation of APA (Rule 19)

The DG or Competent Authority may revoke an APA if any of the persons in the covered transaction makes any misrepresentation, fraud, omission or makes a statement that is false or misleading in the APA application, reports or renewal submissions.

The DG or the Competent Authority shall inform the taxpayer or the other Competent Authority of the revocation in writing and the grounds for the revocation. The revocation shall be effective from the first day of the first basis period for the year of assessment of the covered period.

Renewal of APA (Rule 20)

A taxpayer may request for renewal of an APA not later than 6 months before the expiration of that APA by submitting the appropriate supporting documentation. The DG or the Competent Authority shall inform the taxpayer in writing of the decision on the request, and the grounds for the decision.

The APA may be renewed under similar terms and conditions if:-

a) There has been no change in the facts and circumstances underlying the APA;

b) The critical assumptions as identified by the taxpayer remain valid and relevant; and

c) The taxpayer has complied with the terms and conditions of the previous APA.

The taxpayer may file a fresh application for APA if:-

a) The covered transaction has changed;

b) There are material and anticipated changes in fact and circumstances of the covered transaction; or

c) A different TPM is proposed.

Confidentiality of information (Rule 21)

All the information obtained in respect of the APA process is subject to the confidentiality provisions of the Act and the Articles on Exchange of Information of the double taxation arrangement made under section 132 of the Act.

Permanent establishment (PE) (Rule 18)

A PE shall be treated as a distinct and separate entity from its head office and related branches. PE shall have the same meaning assigned to it in the Double Taxation Agreement (DTA) or, if there is no DTA, it means a fixed place of business through which the business of a person is wholly or partly carried on, or a fixed place of business of another person, through which the particular person makes supplies.