

## CTIM COMMENTS ON INCOME TAX (ADVANCE PRICING ARRANGEMENT) RULES 2012

### Income Tax (Advance Pricing Arrangement) Rules 2012 [P.U. (A) 133/2012] (“APA Rules”) – Task Force

#### General comments

- In order to ensure independence, applications and assessments for APAs should be undertaken by the Ministry of Finance as opposed to the MNE Department of the IRB who is also in charge of transfer pricing compliance and audits.
- This is to ensure that the information submitted for the application of APA will remain confidential and not be used for the purpose of tax audit.
- Taxpayers may not keen to apply for an APA if it is found out that the information submitted to the IRB for APA application may expose them to the risk of tax audit in the event and agreement for an APA is not reached with the authorities.

The following table shows the comments and proposal in respect of each paragraph of the APA Rules.

Rule	Comments	Proposal
1 Citation and commencement	-	-
2 Interpretation	<p><u>Definition of “covered transaction”</u></p> <p>While Section 140A and the TP Rules are applicable to certain domestic transactions, the current definition does not cover these transactions.</p> <p>Tax payers would be keen to seek advance confirmation on their domestic transactions to ensure certainty in their transfer pricing policies.</p>	To not restrict the definition of covered transactions to only cross border transactions but to include all controlled transactions.
3 Scope and application	<p><u>3[1]</u></p> <p>In order to promote independence, applications should not be made to the Director General.</p>	All applications should be made to the Ministry of Finance and not the Director General.

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4 Request for pre-filing meeting	<p><u>4[1] Submission of request for pre-filing meeting</u> Request for pre-filing meeting which shall be done 12 months prior to the first day of the proposed covered period is too long.</p> <p><u>4[2](a) Industry information in the draft outline</u> Industry information is unnecessary at this phase as it would not have any bearing on whether a taxpayer qualifies for an APA or not.  It will be more relevant in the later phase in determining the transfer prices.</p> <p><u>4[3] Other information relating to the request for a pre-filing meeting</u> “Other information” is a very wide and is “catch all” phrase.  It is deemed unfair for the taxpayer to continuously furnish information other than those requested in paragraph 2 for the purpose of pre-filing meeting as this will delay the date of the pre-filing meeting.  There is no timeline or deadline for the authorities to revert with a pre-filing meeting date upon submission of all required information by the taxpayers.  In practice, there have been cases where the IRB has continuously requested for information over a period of 3 months and for which a pre-filing date has still not been fixed.</p>	<p><u>Submission of request for pre-filing meeting</u> The period of 12 months shall be amended to 6 months from the first day of the covered period.</p> <p><u>Industry information in the draft outline</u> Industry information shall be excluded from the draft outline.</p> <p><u>Other information relating to the request for a pre-filing meeting</u> It will be more appropriate to set out exactly what information is required for the purposes of setting the pre-filing meeting</p> <p>Upon submission of all information requested via Paragraph (2), the authorities should respond within 14 days with a date for the pre-filing meeting.</p>

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5 Submission of application of arrangement	<p><u><a href="#">5[1] Multilateral APA prescribed form</a></u> Please note that there is currently no prescribed form for Multilateral APA at the moment although it is mentioned in the APA Rules.</p> <p><u><a href="#">5 [2] Proposal of alternative methodology</a></u> In reviewing the application, Paragraph 5 (2) allows the DG to propose an alternative methodology, or restrict or expand the scope of the APA.</p> <p>At the point of submitting the APA application, the taxpayer would have prepared TP Documentation based on the requirements of the TP rules for purposes of seeking the APA. Hence, the proposal of an alternative methodology by the Director General (Competent Authority) will be deemed unfair to the taxpayer as they would have to redo the entire analysis to accommodate to the request from the Director General (Competent Authority).</p>	<p>To issue a prescribed form.</p> <p><u><a href="#">Proposal of alternative methodology</a></u> The TP methodology to be applied should be agreed with the taxpayer at the pre-filing stage and upon receiving the decision, the taxpayer has two months [under Paragraph 5(1)] to prepare the TP Documentation based on the methodology agreed with the Authorities.</p> <p>Paragraph 5(2) should be restricted to the application of the agreed methodology as opposed to the proposal of new methodologies or restrict or expand the scope of the APA as these conditions imposed by the Authorities may result in the APA not being a favorable outcome for the taxpayer.</p>
6 Circumstances where APA is declined	<p>Some of the circumstances where an application for APA is declined are vaguely stated in the APA rules.</p>	<p>To provide more guidance or further define terms such as:</p> <p><i>[1](b) “where the proposed covered transaction is based on <u>hypothetical situation or not seriously contemplated</u>.” Due to the prospective nature of APAs, there would be transactions that are hypothetical in nature.</i></p> <p><i>[1](c) “where it appears to be an <u>inefficient use of</u></i></p>

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		<i>resources to pursue an advance pricing arrangement if the proposed transaction is limited in nature and value, or the arm's length principle on the proposed transaction can be reliably be applied without material doubt."</i>  <i>[1](e) "where the proposed covered transaction involves a <u>tax avoidance scheme</u>."</i>
7 Withdrawal of APA application	-	-
8 Power to request further information	-	-
9 Critical assumptions	<a href="#">9[2]</a> The terms critical assumptions.	The term "assumptions" to be defined as broad as possible.
10 Opinion by independent expert	-	-
11 Effect of APA	-	-
12 Covered period under APA	-	-
13 Request for rollback	<a href="#">13[2]</a> There is no indication on how many years a rollback can be applied for.	Rollback should be effective on 1 January 2009 and not beyond that as "anti avoidance" provisions under Section 140(6) will have to be addressed for years prior to that.
14 Filing of APA compliance report	<a href="#">14[1]</a> It is noted that there is no prescribed form to be filled in by the taxpayer at the moment for the filing of APA compliance report.  To clarify if there is a prescribed form to be completed by the taxpayer for the submission of	A copy of the audited financial statements or a similar statement of the other person involved in the covered transactions with the taxpayer shall be obtained by the Competent Authority via the relevant exchange of information clause in the tax treaty as such information may not be publicly available in some countries and as such the local

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	all the relevant information and documents or they have to be submitted in the form of a report.	taxpayer may not have access. <u>[2](b)</u> Such report may not be available to the local entity. <u>[2](c)</u> <i>“a description of any <u>material changes</u> in the financial or tax accounting methods or principles...”</i> To provide more guidance on the definition on “material changes.”
15 Compensating adjustments	<ul style="list-style-type: none"> <li>The term “materially different” is vague rule.</li> </ul>	Guidance on definition of the term “materially different” to be provided.
16 Review of APA compliance	There is no indication on when the Director General (Competent Authority) will be responding after performing the review of APA compliance report.	The Director General (Competent Authority) shall respond to the taxpayer within 30 days or other time frame which is deemed reasonable and agreed upon by both taxpayer and Director General (Competent Authority) from the date of receipt of the APA compliance report with an affirmative confirmation.
17 Revision of APA	-	-
18 Cancellation of APA	<u>[1](b)</u> <i>“if any of the person in the covered transaction in respect of that arrangement makes an <u>error or mistake</u> in the advance pricing arrangement applications, reports or renewal submissions;”</i> It will be unreasonable to cancel a taxpayer’s APA in the event the taxpayer makes an error or mistake in the APA applications which may	<u>[1](b)</u> shall be removed from this rule.

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	include unintentional error or mistake in any computations relevant to the APA.	
19 Revocation of APA	-	-
20 Renewal of APA	[1] A taxpayer may request the Director General or Competent Authority to renew an advance pricing arrangement not later than six months before the expiration of that arrangement by submitting the appropriate <u>supporting documentation similar to those required for the request and application of that arrangement.</u>	The Rule shall be amended to specify the supporting documentation necessary for the renewal of APA.
21 Confidentiality of information	-	-
22 Permanent establishment as a separate entity	-	-