

## **CTIM's Comments on Advance Pricing Arrangement Guidelines 2012 ("APA Guidelines") – 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 in the APA Guidelines.

| Paragraph                    | Comments   | Proposal  |
|------------------------------|--|---|
| 1 Introduction               | -  | -   |
| 2 Purpose                    | -  | -   |
| 3 Relevant provisions        | -  | -   |
| 4 Who can apply              | Paragraph (b) states that APA application will only be considered to taxpayer with turnover of more than RM100 million and value of related party sales and purchases exceed 50% of total sales/purchases. | This minimum threshold in this paragraph should be aligned with paragraph 3.1(a) of the Transfer Pricing Guidelines.<br><br>For example, a taxpayer may have a turnover of RM1 billion and have related party sales of RM400 million (40%). Based on the current conditions, the taxpayer will not qualify for an APA on its sales although the amount involved is significant. |
| 5 Who can sign the agreement | -  | -   |
| 6 Competent Authority        | The IRB should not be involved in the application and review of APAs.  | Applications and assessments for APAs should be undertaken by the Ministry of Finance.  |
| 7 Overview                   | -  | -   |
| 8 Benefits                   | -  | -   |

| Paragraph                           | Comments  | Proposal  |
|-------------------------------------|---|---|
| 9 Scope of agreement                | -   | -   |
| 10 The APA process                  | -   | -   |
| 11 Pre-filing meeting               | <p>Paragraph 11.1 states that the pre-filing meeting must be requested at least 12 months prior to the first day of the proposed covered period which is too long.</p> <p>The objective of the pre-filing meeting is to decide whether the taxpayer qualifies for an APA. As such the information required at this juncture should be preliminary and not be too burdensome on the taxpayer to avoid duplication of work that will be carried out during the processing stage of the APA. For example information on TPM and application may not appropriate as the IRB may not agree with the TPM used by the taxpayer and the taxpayer would have to incur cost/time to re-do the TP documentation based on the IRB's requirements.</p> | <p>The period of 12 months shall be amended to 6 months.</p> <p>For purposes of the determining whether a taxpayer qualifies for an APA, the submission of information under Paragraph 11.3(a) to (c) with elaboration by the taxpayer on the proposed methodology pricing should be sufficient.</p> <p>During the pre-filing meeting, the authorities and the taxpayer can agree on the information to be contained in the TP documentation that the taxpayer should prepare should they qualify for an APA including TPM and other information in paragraph 11.3(d) to (i).</p> <p>Upon receiving approval for the APA, the taxpayer has 2 months pursuant to paragraph 15.1 of the Guidelines to prepare the TP documentation based on the terms agreed with the authorities for submission together with the prescribed form.</p> |
| 12 Critical assumption              | -   | -   |
| 13 Covered period                   | -   | -   |
| 14 Opinion by an independent expert | -   | -   |
| 15 Submission of application        | -   | -   |

| Paragraph   | Comments  | Proposal   |
|---|---|--|
| 16 Processing an APA application                      | At the point of submitting the APA application, the taxpayer would have prepared TP Documentation based on the terms agreed with the authorities. 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). | 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) of the APA Rules] to prepare the TP Documentation based on the methodology agreed with the Authorities.<br><br>Paragraph 16 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. |
| 17 Reviewing, analyzing and evaluating an application | -   | -  |
| 18 Completion of processing an application            | -   | -  |
| 19 Declining an application                           | -   | -  |
| 20 Withdrawal of application                          | -   | -  |
| 21 Proposal for BAPA/MAPA                             | -   | -  |
| 22 Negotiations with DTA partners(s)                  | -   | -  |
| 23 Binding parties to the APA                         | -   | -  |
| 24 Term and conditions of the APA                     | -   | -  |
| 25 Rollback   | The Guidelines is silent on the period of rollback.   | Rollback should be restricted to 1 January 2009 when specific transfer pricing legislation was introduced as roll back to years prior to 1 January 2009 would involve the application of anti  |

| Paragraph                                 | Comments   | Proposal   |
|---|--|--|
|   |  | avoidance provisions (Section 140(6)) which may not be in order.<br><br>It must be stated clearly that rollback is purely at the application by the taxpayer and if no application is made, the authorities should not apply the roll back as an “express” audit and impose additional taxes and penalties.                                      |
| 26 Filing of APA Annual Compliance Report | -  | -  |
| 27 Annual Compliance Review               | -  | -  |
| 28 Adjustments                            | -  | -  |
| 29 Revision of APA                        | -  | -  |
| 30 Cancellation and revocation of APA     | Paragraph 30.1.1(b) states that the authorities may cancel an APA due to an error or mistake in the APA application, annual compliance reports or renewal submissions of the covered transactions by the parties to the APA.<br><br>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 include error or mistake in any computations relevant to the APA. | An APA should not be canceled merely due to mistake and errors as these could be unintentional errors made by the taxpayer. In the event of an unintentional errors or mistake that have an effect on the terms or agreed pricing of the APA, the APA should be revised to take into account of the error of mistake as opposed to cancellation. |
| 31 Renewal of APA                         | -  | -  |
| 32 Fresh application                      | -  | -  |
| 33 Confidentiality and disclosure of      | Taxpayers may not keen to apply for an   | “In the event that the APA is cancelled or revoked,  |

| Paragraph                               | Comments  | Proposal  |
|---|---|---|
| information                             | 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.                                  | a full audit may be conducted” should be removed from the paragraph.  |
| 34 Power to request further information | -   | -   |
| 35 Record keeping requirements          | -   | -   |
| 36 Disbursements                        |   | For MAP the authorities do not charge the taxpayer for any overseas travelling and accommodation costs.   |
| 37 Penalties                            | The objective of the rollback is to encourage taxpayers to seek for an APA and thus using the rollback clause to obtain agreement on the open years. It should not be used a “express” tax audit by the authorities to collect penalties. | The imposition of penalties on rollback years will deter taxpayers to even apply for an APA. To make it clear that while a roll back may result in additional taxes due to adjustments, no penalties will be imposed as any adjustments from the roll back arises from a voluntary disclosure by the taxpayer (via the APA process) and not a tax audit conducted by the IRB. |
| 38 Further information                  | -   | -   |