

12 & 13 AUGUST 2014 | KUALA LUMPUR CONVENTION CENTRE

DAY 2 : Wednesday 13 August 2014

BASE EROSION & PROFIT SHIFTING

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Malaysian context :

- Involvement
- Views with focus on transfer pricing aspects
- Concerns



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The BEPS Project

Our Involvement

- Status (in OECD/G20 BEPS Project): invitee
- OECD
 - Working Parties
 - WP1 Action 6, 7, 12, 14, 15
 - WP6 Action 8, 9, 10, 13
 - WP11- Action 2, 3, 4, 12
 - Regional Consultation Seoul 2013
- Internal committee IRBM



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The BEPS Project – United Nations' Role

- UN observer to OECD CFA
- UN Committee of Experts
 - Subcommittee on BEPS for Developing Countries (Oct 2013)
 - Impact of BEPS on developing countries
 - Modalities to support developing countries in addressing BEPS
 - Key role of capacity development
 - Other sub-committees
 - Transfer Pricing
 - Extractive Industries Taxation Issues for Developing Countries
 - Tax Treatment of Services
 - Exchange of Information



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The BEPS Project – United Nations' Role

- Subcommittee on BEPS for Developing Countries
- Monitor developments on BEPS
- Communicate on BEPS issues:
 - Inform developing countries especially less developed
 - Facilitate input and views into on-going UN work as well as OECD/G20 Action Plan



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THE BEPS ACTION PLAN



Topic : BASE EROSION & PROFIT SHIFTING Speaker : Noor Azian Abdul Hamid

	Relevance of Action Items on Developing Countries	Relevance	
4	Limit base erosion via interest deductions		
6	Prevent treaty abuse		
7	Prevent artificial avoidance of PE	High	
10	Assure TP outcomes are in line with value creation - Other high risk transactions		
11	Establish methodologies to collect & analyse data on BEPS, actions to address it		
13	Re-examine TP documentation		
1	Address tax challenges in digital economy		
5	Counter harmful tax practices more effectively		
8	Assure TP outcomes are in line with value creation - Intangibles	Medium	
9	Assure TP outcomes are in line with value creation - Risks & capital		
12	Require disclosure of aggressive tax planning arrangements		
14	Make dispute resolution mechanisms more effective		
2	Neutralise effects of hybrid mismatch arrangements	_	
3	Strengthen CFC rules	Low	
15	Develop multilateral instrument		





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Transfer Pricing Aspects of the BEPS Action Plan

Action 8	Develop rules to prevent BEPS by moving intangibles among group members
Action 9	Develop rules to prevent BEPS by transferring risks among, or allocating excessive capital to, group members
Action 10	Develop rules to prevent BEPS by engaging in transactions which would not, or would only very rarely, occur between third parties.
Action 13	Develop rules regarding transfer pricing documentation (two tiered approach, country-by-country reporting)
Action 4	Develop transfer pricing guidance regarding the pricing of related party financial transactions.



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Other BEPS Actions with a Transfer Pricing Component

Action 1	Work on the digital economy.
Action 7	Work on permanent establishments including the attribution of income to permanent establishments.
Action 11	Establish methodologies to collect and analyse data on BEPS and the actions to address it.
Action 14	Make dispute resolution more effective.



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Highlights

Action 8 – Intangibles	Relevant action
 Revisions to OECD TPG Work started in 2010 Definition of intangibles Local market features, group synergies How to ensure intangibles are aligned with economic activity 	 TP Rules: Rule 11 – definition UN Practical Manual on TP
Common practice: Sell intangible asset to low or no-tax jurisdiction & strip profits out of higher tax jurisdiction by charging royalty/license fees	Royalty payments, WHT



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Action 9 – Risks & Capital - Align transactions to MNEs economic activity	Relevant action
 Common practice: Provide capital from or assign risk to low tax jurisdiction – profits shifted through interest payments, guarantee fees No change in MNEs overall capital position but substantial change in tax position 	 ITA Provisions related to interest expense deductions Pending outcome of Action 13 – indicators of income vs economic activity
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MALAYSI

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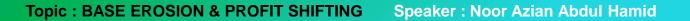
Action 10 Other high-risk transactions Develop rules to prevent BEPS by engaging in transactions which would not or would only very rarely occur between 3 rd parties	Relevant action
 Clarify circumstances where transactions can be recharacterised Application of TP methods – clarify profit split Provide protection against common types of base eroding payments such as management fees, head-office expenses 	 TP Rules – Rule 8 Documentation – enforcement TP Rules – Rule 5 on methods TPG - methods



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Malaysia

Types of base eroding payments	Enforcement issues
Management services	BenchmarkingComparablesDocumentation
Routine low-value added HQ costs	 Allocation key Indirect-charge methods Is safe-harbour an option?
Related party financial assistance	Guidance
Use of intangibles	ComparablesValuation
Technical services	TypesWHT?



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Action 13 TP Documentation

Challenges

- Access to full group or even single related party information
 - transactions, financial
- Local entity has to be the tested party due to inaccessibility



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- Action 13 TP Documentation, country-by-country documentation
 - To enhance transparency: providing tax administrations with adequate information to conduct TP risk assessments and audits
 - Revised standards for TP Documentation
 - 3 tiered approach:
 - master-file standardised information relevant for all MNE gp members
 - Iocal file specific transactions of local taxpayer
 - c-b-c report (template) info relating to global allocation of MNE's income, taxes paid, certain indicators of location of economic activity
- How to implement?
- Relevant action: Changes in domestic law, TPG



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- Existing domestic legislation for countering BEPS
- S 140A ITA 1967
- Malaysian Transfer Pricing Rules 2012
- Malaysian Transfer Pricing Guidelines (2012)
- S 140 (General anti-avoidance)
- S 140A (4) for Thin Capitalisation (after Dec 2015)
- MAPS with treaty partners



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- Are existing anti-avoidance measures adequate?
- S140, 140A?
- Early detection: audits take place after the fact, mandatory disclosure rules?
 - Related work on co-operative compliance
- Treatment of intra-group financial transactions
- Other anti-avoidance measures?
 - Royalties paid to entities in low-tax jurisdictions
- Business restructuring issues
- Digital economy, PE
- Implementation success depends on consensus, multilateralism, local awareness, decision by policy makers

