



Malaysia Budget 2021- TP amendments

1. Change in penalty for non-compliance with TP regulations

Existing

[Section 113(2) read with TP audit framework]

- Additional tax arising from TP adjustment in audit AND
- Non-filing or delay in filing or poor quality of TP documentation



Penalty @ 0-50% of tax undercharged

Proposed

Section 113B – Failure to furnish contemporaneous TP documentation

- On conviction, fine of RM20K to RM100K or imprisonment up to 6 months or both
- Burden of proof on taxpayer in case of prosecution
- On conviction, the court may further order to furnish TP documentation within 30 days or such other period as it deems fit
- If no prosecution is instituted, the DGIR may impose a penalty of RM20k to RM100k
- Taxpayer may appeal to SCIT against any order of penalty

Effective: 01 January 2021

Our commentary:

- With the proposed Section 113B, the DGIR reinforced its position that taxpayers should prepare contemporaneous TP documentation and furnish it upon request within the given timeframe. The IRB has indicated that the proposed Section 113B will apply separately to each year of non-compliance.
- In the absence of the definition of “*contemporaneous*” under ITA, reference can be made to the TP Rules, wherein TP documentation is defined as “*contemporaneous*” if it is prepared before entering into a controlled transaction and is updated prior to return filing due date for the relevant year of assessment. Further, according to FAQs released by the IRB dated 1 November 2018, the date of the comparable search must be stated in the TP documentation.
- Preparation of robust contemporaneous TP documentation for all open years of assessment (FY 2014-FY 2020) would help mitigate risk of fine/penalty. Further, taxpayers should ensure TP documentation is ready by return filing due date and is submitted to the IRB upon request.
- Revised TP Guidelines, TP Rules and TP audit framework are expected to be issued by the IRB early next year

2. Introduction of Surcharge

Section 140A (3C) & (3D) – Surcharge on TP adjustment in audit

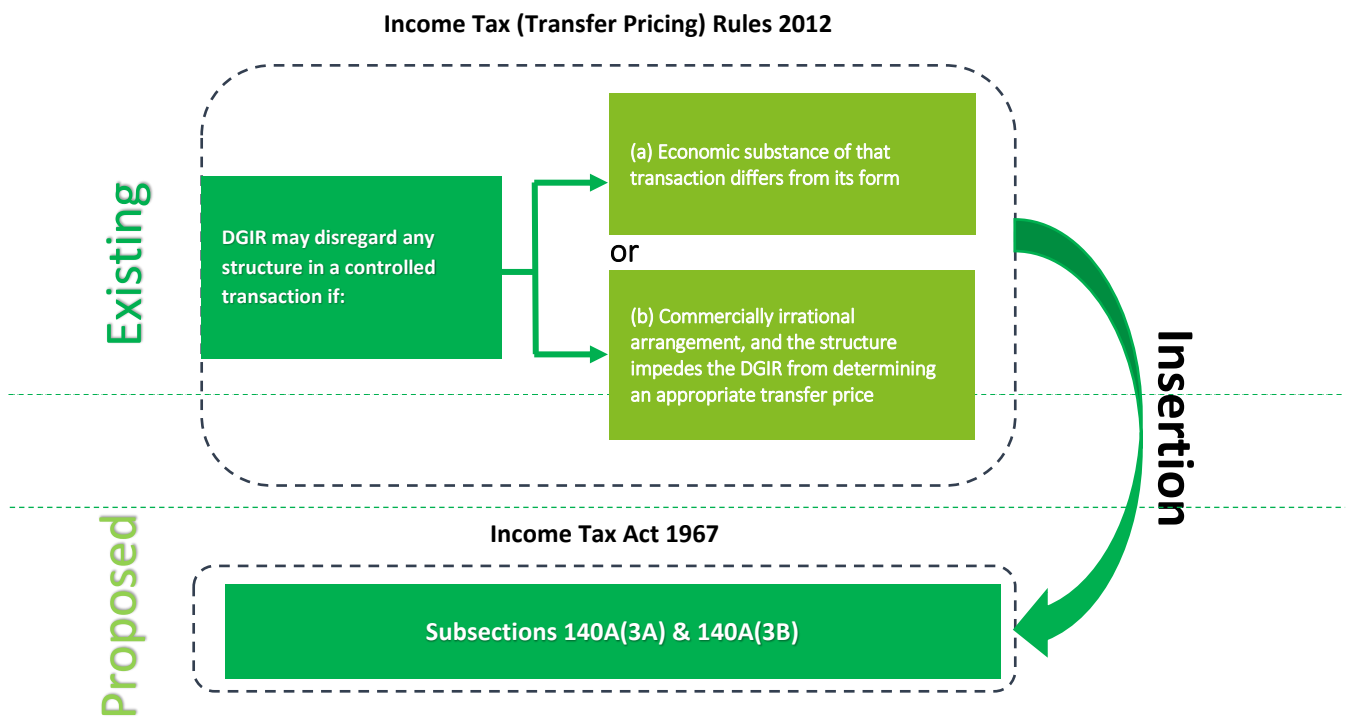
- Surcharge of not more than 5% of increase in income
- Surcharge will be collected as if it was tax payable for the purpose of collection and recovery of tax under Sections 103 to 106 of ITA

Effective: 01 January 2021

Our commentary:

- The proposed surcharge under Section 140A (3C) & (3D) will be applicable to all taxpayers with controlled transactions, irrespective of whether or not they are taxable or have any tax attributes (e.g. incentives, capital allowances, business losses, etc.) to offset the TP adjustment
Currently, the penalty under Section 113(2) of 0% to 50% is applied on the additional tax payable
- Initial check with the IRBM indicates that credit or refund will be given in MAP proceedings for an amount of surcharge that will be imputed in line with any TP adjustment by the IRB
- The IRBM has indicated that this Section will be mutually exclusive to Section 113(2) penalty; TP adjustments will only be subject to the surcharge.

3. Re-characterisation of controlled transactions



Effective: 01 January 2021

Our commentary:

- Through this insertion, the proposal fortifies the power of the DGIR to disregard the structure in a controlled transaction, as well as make adjustments to that structure as he deems fit.
- This proposal may lead to increased scrutiny of controlled transactions involving, among others, intragroup interest-free financial assistance arrangements and aggressive tax planning structures.
- To mitigate the risk of re-characterisation, taxpayers should ensure that their controlled transactions are accurately delineated through contemporaneous TP documentation, and the actual conduct is aligned with inter-company agreements.