

Malaysia

Malaysia has met all aspects of the terms of reference (ToR) for the calendar year 2018 (year in review) except for timeliness in providing information on rulings to the Competent Authority and undertaking spontaneous exchange of information on all tax rulings within scope of the transparency framework (ToR II.5), and identifying and exchanging information on new entrants to the grandfathered IP regime (ToR I.4.1.3). Malaysia receives two recommendations on these points for the year in review.

In the prior year report, Malaysia received two recommendations. One of these recommendations has been addressed and is removed. The second recommendation has not been addressed and remains in place, and a new recommendation has been added.

Malaysia can legally issue five types of rulings within the scope of the transparency framework. In practice, Malaysia issued rulings within the scope of the transparency framework as follows:¹

- 428 past rulings;
- For the period 1 September 2017 - 31 December 2017: 21 future rulings, and
- For the year in review: 54 future rulings.

Peer input was received from three jurisdictions in respect of the exchanges of information on rulings received from Malaysia. The input was generally positive, noting that information was complete, in a correct format and almost all received in a timely manner.

Introduction

This peer review covers Malaysia's implementation of the BEPS Action 5 transparency framework for the year 2018. The report has four parts, each relating to a key part of the ToR. Each part is discussed in turn. A summary of recommendations is included at the end of this report.

A. The information gathering process

Malaysia can legally issue the following five types of rulings within the scope of the transparency framework: (i) preferential regimes;² (ii) cross-border unilateral APAs and any other cross-border unilateral tax rulings (such as an advance tax ruling) covering transfer pricing or the application of transfer pricing principles; (iii) rulings providing for unilateral downward adjustments; (iv) permanent establishment rulings; and (v) related party conduit rulings.

Past rulings (ToR I.4.1.1, I.4.1.2, I.4.2.1, I.4.2.2)

For Malaysia, past rulings are any tax rulings within scope that are issued either (i) on or after 1 January 2015 but before 1 April 2017; and (ii) on or after 1 January 2012 but before 1 January 2015, provided they were still in effect as at 1 January 2015.

The prior year peer review report noted that Malaysia had a process for identifying all relevant past rulings and potential exchange jurisdictions that met the ToR, however Malaysia was still in the process of completing the identification under that process. Malaysia was recommended to finalise the information gathering process for past rulings.

Rulings related to preferential regimes are granted by the relevant Investment Promotional Agency. The promotional agencies identifies whether the rulings are in scope of the transparency framework as past rulings by reviewing the internal database of all rulings, and referring to the issue date. In addition, they identify the potential exchange jurisdictions by reviewing the internal database for the name and structure of the MNE group, and other group financial information if available, as well as utilising the "best efforts approach" and seeking further information from the taxpayer where relevant. These rulings and information is then transmitted to be processed by the Tax Incentive Advisory Division under the Tax Policy Department of Inland Revenue Board Malaysia (IRBM).

Rulings in relation to APAs or permanent establishments are issued by the Mutual Agreement Procedure and Transfer Pricing Policy Division under the Department of International Taxation in IRBM. Designated officers in the division identify whether the rulings are in scope of the transparency framework as past rulings by reviewing the internal records of all rulings, and by referring to the issue date. Potential exchange jurisdictions are identified based on the information contained in the ruling request and on file, consulting the internal database, as well as utilising the "best efforts approach" and seeking further information from the taxpayer where relevant.

During the year in review, Malaysia has completed the identification of past rulings and all potential exchange jurisdictions which meets the ToR and therefore the recommendation is now removed.

Future rulings (ToR I.4.1.1, I.4.1.2, I.4.2.1)

For Malaysia, future rulings are any tax rulings within scope that are issued on or after 1 September 2017.

In the prior year, Malaysia was still in the process of completing that information gathering. Malaysia was recommended to finalise the information gathering process for future rulings.

During the year in review, Malaysia has completed the identification of future rulings and all potential exchange jurisdictions, using the same information gathering process for future rulings as for past rulings. Future rulings are identified at the point of issue. All potential exchange jurisdictions are able to be identified from the information contained in the ruling, or by obtaining this from the taxpayer if necessary. This meets the ToR and therefore the recommendation is now removed.

Review and supervision (ToR I.4.3)

The prior year peer review report noted that Malaysia's review and supervision mechanism was implemented in 2018. During the year in review, Malaysia has implemented its review and supervision mechanism as described in the prior year peer review report. This meets the ToR and therefore the recommendation is now removed.

Conclusion on section A

Malaysia has met all of the ToR for the information gathering process and no recommendations are made.

B. The exchange of information

Legal basis for spontaneous exchange of information (ToR II.5.1, II.5.2)

Malaysia has the necessary domestic legal basis to exchange information spontaneously. Malaysia notes that there are no legal or practical impediments that prevent the spontaneous exchange of information on rulings as contemplated in the Action 5 minimum standard.

Malaysia has international agreements permitting spontaneous exchange of information, including being a party to the (i) *Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol* (OECD/Council of Europe, 2011^[4]) ("the Convention") and (ii) double tax agreements in force with 71 jurisdictions.³

Completion and exchange of templates (ToR II.5.3, II.5.4, II.5.5, II.5.6, II.5.7)

In the prior year peer review report, it was noted that Malaysia was still in the process of implementing a process to complete the templates on relevant rulings, and making them available to the Competent Authority for exchange of information.

During the year in review, Malaysia has implemented this process as follows. Within the Inland Revenue Board of Malaysia, there are two divisions responsible for the exchange of information on tax rulings.

The first division, the Tax Incentive Advisory Division within the Tax Policy Department, is responsible for the exchange of information on rulings relating to preferential regimes and cooperates with the promotional agencies to gather all the data required to complete the template as contained in Annex C of the 2015 Action 5 report (OECD, 2015^[5]). The designated officers are supervised by a manager from each promotional agency. For the Pioneer status - contract R&D and the MSC Malaysia regimes, Malaysia uses a two-step approach whereby a letter of award for these regimes is issued which states eligibility for the regime, and taxpayers have 24 months within which to activate the incentive. Information will only be exchanged after the incentive is activated and becomes a ruling in scope of the transparency framework, and by which time related parties to transactions covered by the preferential treatment can be known. For all other preferential regimes, the letter of award (i.e. the approval letter pursuant to a preferential regime in Malaysia) is the ruling in scope of the transparency framework. For all preferential regime rulings, the Annex C template is sent to the applicable investors, who are required to provide the relevant information within six months of the activation of the incentive or the letter of award being issued, as applicable. The

information is then reviewed within the division and the completed template is approved by a supervisor before transmission to the Competent Authority. Malaysia is aware that the current timelines in this process are not in line with the terms of reference to provide information on rulings to the Competent Authority without undue delay, and are in the process of amending their procedures to reduce these timelines.

Second, the Mutual Agreement Procedure and Transfer Pricing Policy Division within the International Tax Department is responsible for all other types of rulings. A process flow has been designed containing all steps to be undertaken for the exchange of information. These steps include that the information in the template in the form of Annex C of the 2015 Action 5 report (OECD, 2015^[5]) is completed by the officer in charge at the point of issuing the ruling and afterwards verified and approved by a supervisor.

In all cases, the summary section of the template has to be completed in line with the internal FHTP suggested guidance. When the divisions have completed the templates for the exchanges, these will be sent to the Competent Authority for exchange.

The dedicated unit for the exchange of information has not yet been able to exchange information on all tax rulings, and therefore Malaysia still experienced significant delays in exchanges. Malaysia notes that a new officer has been hired for this dedicated unit, in order to expedite its exchange process.

For the year in review, the timeliness of exchanges is as follows:

Past rulings in the scope of the transparency framework	Number of exchanges transmitted by 31 December 2018	Delayed exchanges		
		Number of exchanges not transmitted by 31 December 2018	Reasons for the delays	Any other comments
	23	Approximately 405	Malaysia set up a unit for the exchange of information on tax rulings in September 2018 and is still in the process of collecting all data for exchange.	There are approximately 405 past rulings yet to be exchanged. The precise number of delayed exchanges will be reviewed in the subsequent year's peer review.
Future rulings in the scope of the transparency framework	Number of exchanges transmitted within three months of the information becoming available to the competent authority or immediately after legal impediments have been lifted	Delayed exchanges		
		Number of exchanges transmitted later than three months of the information on rulings becoming available to the competent authority	Reasons for the delays	Any other comments
	1	Approximately 74	Malaysia set up a unit for the exchange of information on tax rulings in September 2018 and is still in the process of collecting all data for exchange.	There are approximately 74 future rulings yet to be exchanged. The precise number of delayed exchanges will be reviewed in the subsequent year's peer review.
Total	24	Approximately 479		

Follow up requests received for exchange of the ruling	Number	Average time to provide response	Number of requests not answered
	0	N/A	N/A

Conclusion on section B

Malaysia has the necessary legal basis to undertake spontaneous exchange of information. Malaysia is recommended to continue its efforts to reduce the timelines for providing the information on rulings to the Competent Authority and to complete the templates for all relevant rulings and to ensure that the exchanges of information on rulings occur as soon as possible (ToR II.5).

C. Statistics (ToR IV)

The statistics for the year in review are as follows:

Category of ruling	Number of exchanges	Jurisdictions exchanged with
Ruling related to a preferential regime	23	Australia, Brunei Darussalam, France, Germany, Hong Kong (China), Iceland, Indonesia, Japan, Netherlands, New Zealand, Norway, Singapore, Thailand, Viet Nam
Cross-border unilateral advance pricing agreements (APAs) and any other cross-border unilateral tax rulings (such as an advance tax ruling) covering transfer pricing or the application of transfer pricing principles	1	<i>De minimis</i> rule applies
Cross-border rulings providing for a unilateral downward adjustment to the taxpayer's taxable profits that is not directly reflected in the taxpayer's financial / commercial accounts	0	N/A
Permanent establishment rulings	0	N/A
Related party conduit rulings	0	N/A
<i>De minimis</i> rule	N/A	N/A
IP regimes: total exchanges on taxpayers benefitting from the third category of IP assets, new entrants benefitting from grandfathered IP regimes; and taxpayers making use of the option to treat the nexus ratio as a rebuttable presumption	0	N/A
Total	24	

D. Matters related to intellectual property regimes (ToR I.4.1.3)

Malaysia offered three intellectual property regimes (IP regime)⁴ that were abolished as of 1 July 2018 and are subject to transparency requirements under the Action 5 Report (OECD, 2015^[5]). It states that the identification of the benefitting taxpayers will occur as follows:

- **New entrants benefitting from the grandfathered IP regime:** Transparency obligations apply for the three regimes, because grandfathering is provided to entrants that entered the regime after the relevant date from which enhanced transparency obligations apply. Malaysia has not yet been able to identify these new entrants. Malaysia is therefore recommended to identify and exchange information on all new entrants to the grandfathered IP regime (ToR I.4.1.3).
- **Third category of IP assets:** not applicable as the IP regime has been abolished.

- ***Taxpayers making use of the option to treat the nexus ratio as a rebuttable presumption:*** not applicable as the IP regime has been abolished.

Summary of recommendations on implementation of the transparency framework

Aspect of implementation of the transparency framework that should be improved	Recommendation for improvement
Malaysia experienced delays in the provision of rulings to the Competent Authority and did not undertake spontaneous exchange of information on all tax rulings within scope of the transparency framework during the year in review.	Malaysia is recommended to continue its efforts to reduce the timelines for providing the information on rulings to the Competent Authority and to complete the templates for all relevant rulings and to ensure that the exchanges of information on rulings occur as soon as possible. This recommendation remains unchanged since the prior year peer review report.
Malaysia did not identify or exchange information on new entrants to the grandfathered IP regime.	Malaysia is recommended to identify and exchange information on all new entrants to the grandfathered IP regime.

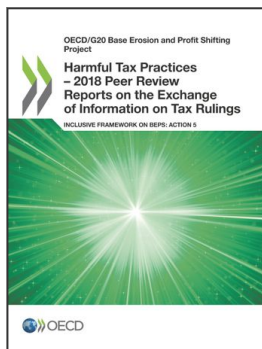
Notes

¹ In September 2018, Malaysia set up a dedicated unit for the exchange of information on tax rulings. This unit reconciled the records of tax rulings issued for the purpose of implementing the transparency framework, as there were some rulings that were in fact not in scope of the Action 5 transparency framework, double-counted rulings, rulings without cross-border related party transactions and withdrawn rulings. Therefore, the statistics on issued rulings within the Action 5 transparency framework have been amended.

² With respect to the following preferential regimes: 1) Pioneer status – contract R&D, 2) Biotechnology industry, 3) Principal hub, 4) MSC Malaysia, 5) Green technology services and 6) Special economic regions.

³ Parties to the Convention are available here: www.oecd.org/tax/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm. Malaysia also has bilateral agreements with Albania, Argentina, Australia, Austria, Bahrain, Bangladesh, Belgium, Bosnia and Herzegovina, Brunei, Canada, Chile, China (People's Republic of), Croatia, Czech Republic, Denmark, Egypt, Fiji, Finland, France, Germany, Hong Kong (China), Hungary, India, Indonesia, Iran, Ireland, Italy, Japan, Jordan, Kazakhstan, Korea, Kuwait, Kyrgyzstan, Laos, Lebanon, Luxembourg, Malta, Mauritius, Mongolia, Morocco, Myanmar, Namibia, Netherlands, New Zealand, Norway, Pakistan, Papua New Guinea, Philippines, Poland, Qatar, Romania, Russia, San Marino, Saudi Arabia, Seychelles, Singapore, South Africa, Spain, Slovak Republic, Sri Lanka, Sudan, Sweden, Switzerland, Syria, Thailand, Turkey, Turkmenistan, United Arab Emirates, United Kingdom, Uzbekistan, Venezuela, Viet Nam, Zimbabwe.

⁴ These regimes are: 1) Biotechnology industry, 2) MSC Malaysia and 3) Principal hub.



From:

Harmful Tax Practices – 2018 Peer Review Reports on the Exchange of Information on Tax Rulings Inclusive Framework on BEPS: Action 5

Access the complete publication at:

<https://doi.org/10.1787/7cc5b1a2-en>

Please cite this chapter as:

OECD (2020), “Malaysia”, in *Harmful Tax Practices – 2018 Peer Review Reports on the Exchange of Information on Tax Rulings: Inclusive Framework on BEPS: Action 5*, OECD Publishing, Paris.

DOI: <https://doi.org/10.1787/39730f52-en>

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