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› [Transfer pricing](#)

TPM-05R2

Requests for Contemporaneous Documentation

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On this page

- [Application](#)
- [Introduction](#)
- [Background](#)
- [Policy](#)
- [Method of delivery](#)
- [Three-month deadline](#)
- [Documents provided to the CRA](#)
- [Reasonable efforts](#)
- [Conclusion](#)

Application

Transfer pricing memoranda (TPM) are issued periodically to communicate the Canada Revenue Agency's (CRA) transfer pricing policy and provide guidance on specific aspects of the transfer pricing legislation. While the content of this particular memorandum relates to provisions of the law that was in force at the time it was written, the information provided is not a substitute for the law. Since this memorandum may not address your particular situation, you should refer to the *Income Tax Act*, any applicable regulation and relevant case law.

Introduction

1. This memorandum cancels and replaces Transfer Pricing Memorandum TPM-05R, *Requests for Contemporaneous Documentation*, dated March 28, 2014. The policies included in this memorandum are effective as of the date of this publication.
2. The purpose of this memorandum is to outline the legislation, requirements and procedures for contemporaneous documentation requests issued by the CRA.
3. The information provided in this memorandum is not intended to be exhaustive and is not meant to restrict the spirit or intent of the legislation.
4. While the focus of this memorandum is on requests for transfer pricing documentation, it also applies to requests for documentation to establish whether an arrangement is a qualifying cost contribution arrangement as defined in subsection 247(1) of the Act.
5. For the purposes of this memorandum, all references to a **taxpayer** include a partnership.

Background

6. Subsection 247(3) of the Act imposes a penalty ¹ on certain transfer pricing adjustments where the net amount exceeds a specific threshold. This is a compliance penalty, focusing on the efforts made by a taxpayer to determine and use arm's length transfer prices or allocations, rather than a penalty on the ultimate accuracy of the transfer prices or allocations. Therefore, provided a taxpayer makes reasonable efforts ² to determine and use arm's length transfer prices or allocations, the transfer pricing penalty will generally not apply.
7. Subsection 247(4) of the Act deems a taxpayer not to have made reasonable efforts to determine and use arm's length transfer prices or allocations for purposes of the penalty provision in subsection 247(3) of the Act, for the taxation years (or fiscal periods) under review, unless the taxpayer complies with the following three requirements:
 - a. The taxpayer makes or obtains, on or before the taxpayer's documentation-due date (defined in subsection 247(1) of the Act) for the taxation year or fiscal period in which the transaction is entered into, records or documents that provide a description that is complete and accurate in all material respects of :
 - i. the property or services to which the transaction relates;
 - ii. the terms and conditions of the transaction and their relationship, if any, to the terms and conditions of each other transaction entered into between the participants in the transaction;
 - iii. the identity of the participants in the transaction and their relationship to each other at the time the transaction was entered into;
 - iv. the functions performed, the property used or contributed and the risks assumed for the transaction by the

- participants in the transaction;
 - v. the data and methods considered and the analysis performed to determine the transfer prices or the allocations of profits or losses or contributions to costs, as the case may be, for the transaction; and
 - vi. the assumptions, strategies and policies, if any, that influenced the determination of the transfer prices or the allocations of profits or losses or contribution to costs, as the case may be, in respect of the transaction.
- b. For each subsequent taxation year or fiscal period in which the transaction continues, the taxpayer has made or obtained, on or before the taxpayer's documentation-due date for that year or period, records or documents that completely and accurately describe each material change in the year or period to the matters referred to in any of subparagraphs 247(4)(a)(i) to 247(4)(a)(vi) in respect of the transaction; and
- c. The taxpayer provides the records or documents described in paragraphs 247(4)(a) and 247(4)(b) to the Minister within three months after service, made personally or by registered or certified mail, of a written request therefor.

Policy

8. The objectives of this policy are to:

- create a consistent approach to transfer pricing audits;
- facilitate the transfer pricing audit process;
- increase transfer pricing compliance; and
- facilitate the evaluation, by the Transfer Pricing Review Committee (TPRC), of reasonable efforts.

9. Requests for contemporaneous documentation **must be issued** at the stage of initial contact with the taxpayer in **all** audits where there are transactions (as defined in subsection 247(1) of the Act) between

a taxpayer and a non resident person with whom the taxpayer does not deal at arm's length. Regardless of the length of the taxation year or fiscal period, separate requests must be issued to each taxpayer for each taxation year or fiscal period under audit or later added to the audit period. If requests were restricted to transactions involving a specific non-resident, additional requests must be issued for other non residents if the scope of the audit is later expanded.

10. If auditors were not aware of these transactions when they first contacted the taxpayer, they must issue requests for contemporaneous documentation when they first learn about these transactions.
11. A tax services office (TSO) **must not** issue a request for contemporaneous documentation for transactions occurring in a taxation year or fiscal period that are covered by an advance pricing arrangement (APA) without first discussing the matter with the Competent Authority Services Division (CASD). If the CRA does not accept a taxpayer's request for an APA (which may include a rollback period), the TSO may then issue a request for contemporaneous documentation. The TSO may also issue a request for contemporaneous documentation for transactions not covered by an APA or an APA rollback.³
12. Contemporaneous documentation request letters must be issued:
 - to Canadian corporations that have transactions with non-residents with whom they do not deal at arm's length; and
 - to Canadian permanent establishments or branches of non-residents carrying on business in Canada that have transactions with other non-residents with whom they do not deal at arm's length.

Method of delivery

13. Contemporaneous documentation request letters must be either hand-delivered to the taxpayer or sent to them by registered or certified mail.

Three-month deadline

14. If the contemporaneous documentation is not provided within three months after a written request is served, taxpayers will be deemed by paragraph 247(4)(c) of the Act not to have made reasonable efforts. Paragraph 247(4)(c) of the Act states that taxpayers must provide “the records or documents described in paragraphs (a) and (b) to the Minister within 3 months after service [...] of a written request therefor.” This means that taxpayers will have three months from the day the letter is received to provide the documentation. Although the three-month period cannot be extended, auditors must still accept and review documentation provided after the deadline.
15. The three-month deadline cannot be altered or interpreted as meaning a number of days (such as 90 days or 92 days). Section 28 of the Interpretation Act provides guidance on how to calculate the three-month period. Under paragraph 28(c) of the *Interpretation Act*, the day on which the three-month period expires will bear the same calendar day number as the specified day.⁴ However, should that calendar day not exist in the month in which the stipulated period of time expires, the period will expire on the last day of that month. This addresses the months of the calendar year that do not have days 29, 30 and 31.
16. For example, where a request for contemporaneous documentation is served on April 15, the taxpayer has until July 15 of the same year to provide the documentation. Similarly, when a request is served on April 30, the taxpayer has until July 30 to provide the documentation,

not July 31. However, if a request is served on January 31, the taxpayer has until April 30 to provide the documentation because April does not have 31 days. If a request is served on March 31, the taxpayer has to provide the documentation by June 30. If the request is served on November 30, the taxpayer has to provide the documentation by February 28 of the following calendar year (or February 29 in the case of a leap year).

17. When the last day to comply falls on a holiday, the taxpayer has until the next day that is not a holiday to comply, according to section 26 of the *Interpretation Act*. A holiday includes statutory and provincial holidays, Saturdays, and Sundays. ⁵
18. Failure, on the part of the taxpayer, to provide the information does not relieve the auditor from having to use other methods to obtain the contemporaneous documentation after the three-month deadline, including:
 - requirements to provide documents or information;
 - requirements to provide foreign-based information; or
 - compliance orders (where warranted).

Documents provided to the CRA

19. To “provide records or documents” means to supply such information to an individual. For clarity, “provide” means the documents have to be delivered to and received at a CRA office and does not mean “made available.”
20. Auditors **must** respond to the taxpayer once the contemporaneous documentation has been provided. This will be done by issuing an acknowledgement letter. The sole purpose of the acknowledgement letter is to confirm that records or documents have been provided to the CRA. This letter is not in any way a confirmation to the taxpayer

that they made reasonable efforts to determine and use arm's length transfer prices or allocations.

21. Where the CRA previously requested contemporaneous documentation relevant to transactions entered into in a prior year, and such documentation was provided, it should not be provided again if it is relevant to a current request. However, a request for contemporaneous documentation must still be issued and the documentation must be specifically referenced and described in a written response from the taxpayer to the auditor, within three months after the current request is served.
22. Documentation provided to the CRA under different circumstances or obligations (such as documentation provided with an APA submission or in a return) is not considered documentation previously provided to the CRA for the purposes of the current request for contemporaneous documentation. However, the CRA does not need the documentation to be provided again, as long as it is specifically referenced and described in a response from the taxpayer to the auditor, within three months after the current request is served.
23. In both the above situations, the written response from the taxpayer to the current request must state the name of the CRA official (or area) to which the previously requested documentation was provided and the date on which it was provided. If these conditions are met and the documentation does exist, it will then be considered to have been provided within three months after the request for contemporaneous documentation was served.
24. In accordance with paragraph 247(4)(b) of the Act, taxpayers are still responsible for providing updates made to any contemporaneous documentation they previously submitted with respect to prior audit years. If there have been no material changes, taxpayers must still

respond within the three-month period stating that there have been no material changes and give the reasons that support this position.

Reasonable efforts

25. The contemporaneous documentation referred to in subsection 247(4) of the Act is not an exhaustive list of records and documents required to substantiate that a taxpayer's transfer pricing complies with the arm's length principle or that a taxpayer has made reasonable efforts to determine and use arm's length transfer prices or allocations. ⁶
26. The TPRC has the mandate of determining whether reasonable efforts have been made. The TPRC bases the determination of reasonable efforts on the facts and circumstances of the taxpayer's situation. Whether additional documentation is required will depend on the facts and circumstances of the particular transactions under review and, as a result, further requests for information could be made. ⁷

Conclusion

27. The Act is specific as to the requirements regarding contemporaneous documentation. The onus is on the taxpayer to maintain such documentation and provide it to the CRA as requested. Taxpayers must respond to all requests for contemporaneous documentation, even if the information has already been provided to the CRA under different circumstances or obligations.

Footnotes

- 1 For more information, refer to Memorandum TPM-13, *Referrals to the Transfer Pricing Review Committee*.
 - 2 For more information, refer to Memorandum TPM-09, *Reasonable efforts under section 247 of the Income Tax Act*.
 - 3 For more information, refer to Memorandum TPM-11, *Advance Pricing Arrangement (APA) Rollback*.
 - 4 “Specified day” is the day on which the request for contemporaneous documentation is served (received).
 - 5 Refer to section 26 and subsection 35(1) (including the notes) of the *Interpretation Act*.
 - 6 For more information, refer to Memorandum TPM-09, *Reasonable efforts under section 247 of the Income Tax Act*.
 - 7 For more information, refer to Memorandum TPM-13, *Referrals to the Transfer Pricing Review Committee*.
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