



cutting through complexity

Global Transfer Pricing Review

Poland

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TAX



Poland



KPMG observation

On 18 July 2013, amendments to Decrees of Ministry of Finance relating to transfer pricing came into force. They reflect changes in the Organisation for Economic Co-operation and Development (OECD) Guidelines and were aimed at integrating the conclusions developed by the European Union Joint Transfer Pricing Forum (EU JTPF) in the area of low value adding services into the Polish tax system.

The scope of the implemented changes is complex and extensive and includes provisions encompassing the following areas:

- business restructuring
- low value adding services (new documentation possibilities but no safe-harbor of mark-ups has been introduced)
- shareholder costs
- choice of transfer pricing method; and
- procedure for conducting benchmarking studies, including requirements for a comparability analysis.

Regulations on business restructuring must be especially emphasized, as this is an area of special interest to the tax authorities in Poland. In addition to the regulations implemented in July 2013, extensive guidelines on business restructuring were published by the Ministry of Finance in March 2014.

Following the OECD's Base Erosion and Profit Shifting (BEPS) initiative, a series of amendments to the Polish tax law have been implemented. The most important includes new more restrictive thin cap rules and controlled foreign corporation (CFC) rules.

Furthermore, completely new transfer pricing documentation rules may potentially come into force starting from 1 January 2017. Under the draft of amendments to the current regulations, the documentation obligation would depend on a taxpayer's turnover or costs. Three types of different documentation obligations are envisaged, among them, a domestic benchmarking study. Currently, the proposed amendments to the regulations also introduce an obligation to file an affirmation signed by a board member stating that a taxpayer's transfer pricing documentation is completed at the financial year-end. Such a statement is supposed to be filed together with the annual corporate income tax (CIT) return.

In 2014 and 2015, KPMG in Poland has noted a significant increase in the number of transfer pricing audits. Areas subject to scrutiny include, but are not limited to: localization of transfer pricing documentation (that is, documentation should be in line with the Polish transfer pricing documentation regulations; group transfer pricing documentation is not accepted) and charges for services provided by foreign related parties. KPMG in Poland expects that tax authorities' interest in related party transactions will become even stronger, especially due to the fact that a special central transfer pricing audit team was constituted in the Ministry of Finance last year.

Transfer pricing study snapshot

The purpose of a transfer pricing study

	Applicable	Not applicable
Legal requirements		●
Protection from penalties	●	
Reduce risk of adjustment	●	
Shifts burden of proof	●	

Basic information

Tax authority name

Ministerstwo Finansów.

Citation for transfer pricing rules

- Reassessment of Income: Article 11 Corporate Income Tax (CIT) Act.
- Decree of the Ministry of Finance of 10 September 2009 establishing the taxpayers' income through the assessment of prices, and on the method and procedure for the elimination of double taxation of the legal person in the case of profit adjustments for related parties, in force as of 17 October 2009, amended as of 18 July 2013.
- Information requirements: Article 82 and 82a of the Tax Ordinance Act and the Decree of the Ministry of Finance of 24 December 2002 on tax information.
- Documentation requirements: Article 9a CIT.
- Documentation requirements (sanctions): Article 19, sec. 4, CIT Act.
- Harmful tax competition: Decree of the Ministry of Finance of 9 April 2013.
- Advance Pricing Agreement (APA): Article 20a–20q, Tax Ordinance Act.

Effective date of transfer pricing rules:

- Arm's length principle — 15 February 1992.
- Application of methods — 1 October 1997.
- Information requirement — 31 December 1997.
- Documentation requirement — 27 July 2000.
- Advance Pricing Agreements (APA) — 1 January 2006.

What is the relationship threshold for transfer pricing rules to apply between parties?

Ownership of greater than five percent share capital means that the entities are under common control.

What is the statute of limitations on assessment of transfer pricing adjustments?

Six years from tax year-end.

Transfer pricing disclosure overview

Are disclosures related to transfer pricing required to be submitted to the revenue authority on an annual basis (e.g. with the tax return)?

Yes. Certain transfer pricing information about transactions with foreign parties must be submitted to the tax authorities and statutory transfer pricing documentation must be prepared (but submitted only upon request).

What types of transfer pricing information must be disclosed?

Information on whether an entity is obliged to prepare statutory transfer pricing documentation; information on agreements concluded with related parties when the value exceeds 300,000 euros (EUR) (total value of receivables or liabilities resulting from all agreements concluded with one related party within a fiscal year) or EUR5,000 if an agreement is concluded with a related party which has a permanent establishment in Poland; information on remuneration paid by foreign related parties to foreign individuals providing services (working) for the Polish subsidiary.

What are the consequences of failure to submit disclosures?

Individuals responsible for the tax compliance of companies may be held responsible under the penal-fiscal code for not submitting required tax information.

Transfer pricing study overview

Can documentation be filed in a language other than the local language? If yes, which ones?

No.

When a transfer pricing study is prepared, should its content follow Chapter V of the Organisation for Economic Co-operation and Development (OECD) Guidelines?

Generally yes, however there are specific requirements to be met.

The statutory transfer pricing documentation requires a functional analysis identifying:

- functions performed, risks borne, and assets employed in the given type of transaction
- determination of anticipated types of costs associated with the transaction
- description of the method adopted to calculate transaction price
- information regarding terms and form of payments for each transaction (e.g. currency of payments, due date of payments, manner of transferring money, periods in which the invoices are issued, etc.)

- data on value of the transaction

- determination of the strategy influencing the transfer price (this element becomes obligatory if it influences the value of the transaction)
- determination of other factors influencing the transfer price (this element becomes obligatory if it influences the value of the transaction); and
- determination of the benefits expected due to services purchased (regarding the purchase of services or transfer of intangibles).

The statutory transfer pricing documentation is not required to include a benchmarking study or other comparable economic analysis documenting the compliance of the transaction with the arm's length standard. However, inclusion of such an analysis prepared following the OECD Guidelines is highly recommended.

Does the tax authority require an advisor/tax practitioner to have specific designation in order to prepare or submit a transfer pricing study?

No.

Transfer pricing methods

Does your country follow the transfer pricing methods outlined in Chapter II of the OECD Guidelines? If exceptions apply, please describe.

Yes. With some exceptions (for example the berry ratio is not an allowed profit level indicator).

Transfer pricing audit and penalties

When the tax authority requests a taxpayer's transfer pricing documentation, are there timing requirements for a taxpayer to submit its documentation? And if so, how many days?

Yes, 7 days.

When the tax authority requests a taxpayer's transfer pricing documentation, are there timing requirements for a taxpayer to submit its documentation? Please explain.

Seven days following the request of the tax authorities.

If an adjustment is proposed by the tax authority, what dispute resolution options are available?

No dispute resolution options available (only litigation after the adjustment is made).

In case of cross-border adjustments leading to double taxation Mutual Agreement Procedure (MAP) may be initiated with the Competent Authority.

If an adjustment is sustained, can penalties be assessed? If so, what rates are applied and under what conditions?

Yes. If a taxpayer fails to submit such documentation or provides documentation which does not meet the legal requirements, and the tax authorities therefore assess additional income, the assessed income will be taxed at the penal 50 percent tax rate (instead of standard rate — currently 19 percent).

To what extent are transfer pricing penalties enforced?

Always.

What defenses are available with respect to penalties?

Documentation provides for penalty protection against the 50 percent penalty tax rate for adjusted incomes. Country specific documentation, including a benchmarking search with a local database, confirming the arm's length standard of the transactions will mitigate the risk of the prices being challenged.

What trends are being observed currently?

The following trends are currently being observed:

- strong emphasis on business restructuring issues: new regulations, additional explanations/guidelines published, media coverage following general OECD/global discussion on base erosion and tax 'morality'; bad press for companies adopting tax optimization measures
- new documentation possibilities for taxpayers concerning low value added services but no safe-harbor of mark-ups has been introduced scrutiny of shareholders cost charged to subsidiaries
- a shift to a significantly more flexible and business friendly approach by

the Ministry of Finance APA team to taxpayers and transactions subject to an APA

- transfer pricing audits conducted in cooperation with other countries' tax authorities (cooperation includes, for instance, exchange of information between the tax administrations); and
- transfer pricing audits focusing on more complicated transactions than the ones that were examined in the past (for instance, sale of economic ownership of a trademark).

Special considerations

Are secret comparables used by tax authorities?

Secret comparables are not allowed. Nevertheless, in practice, cases of the tax authorities using secret comparables do occur.

Is there a preference, or requirement, by the tax authorities for local comparables in a benchmarking set?

Yes, but it is a preference. The consequences of not having local comparables depend on the level of comparability between Poland and other markets. The worst-case scenario is challenging the whole search.

Do tax authorities have requirements or preferences regarding databases for comparables?

Preference (but no obligation) to use the local database, as it provides more details on local comparables. The preferred databases are: Tegiel (Polish database), Amadeus, Monitor Polski "B" (registry court data).

Does the tax authority generally focus on the interquartile range in a TNMM analysis?

Yes, sometimes.

Does the tax authority have other preferences in benchmarking? If so, please describe.

The tax authorities focus on the interquartile range, however the preference exists for the median (unless there are strong arguments for different values). The rules are different for interest — the regulations indicate the lowest interest in the market to be considered as arm's length.

What level of interaction do tax authorities have with customs authorities?

High.

Are there limitations on deductibility of management fees beyond the arm's length principle?

Yes, some. Management fees may be tax deductible if all of the following conditions are met:

- the recipient of the management service can prove that services have been factually rendered
- the expense is incurred for the purpose of earning revenue and does not arise from a simple shifting of expenses incurred on the group level with no factual benefit to the recipient (stewardship expense); and
- the expense is not listed in Article 16 of the CIT Act, which describes non-tax-deductible expenses.

Are management fees subject to withholding?

Yes.

Are there limitations on the deductibility of royalties beyond the arm's length principle?

Yes. Similar to management fees, royalties should be incurred for the purpose of earning revenue in order to be treated as tax deductible.

Are royalties subject to withholding?

Yes.

Are taxpayers allowed to file tax return numbers that differ from book numbers?

Yes. Preferably, the adjustment should be reflected in the correction of the original transaction price, the financial statement and tax return. An adjustment triggers VAT and customs implications. No special tax declaration needs to be submitted. Year-end adjustments may trigger a tax audit, especially if the amount of the corporate income tax pre-paid during the tax year is higher than the total tax due (i.e. when the refund of the pre-paid tax is requested in the final tax return).

Other unique attributes?

Multiple year data are required (on average, three year period) for comparables. The testing of a single year result of the tested company against a multiple year period is preferred.

No safe-harbors exist.

Polish regulations envisage personal responsibility for decreasing a company's tax liability (financial penalty, records in the criminal register, imprisonment). Polish tax authorities do exercise this rule and penalize company management (financial penalties mostly).

Tax treaty/double tax resolution

What is the extent of the double tax treaty network?

Extensive.

If extensive, is the competent authority effective in obtaining double tax relief?

Sometimes, only limited experience.

When may a taxpayer submit an adjustment to competent authority?

After acknowledgement of a double taxation.

May a taxpayer go to competent authority before paying tax?

Yes.

Advance pricing agreements

What APA options are available, if any?

Unilateral, bilateral, multilateral.

Is there a filing fee for APAs?

Yes. The filing fee is one percent of the value of a transaction with the following provisions:

- for unilateral agreements with domestic entities, no less than 5,000 Polish zloty (PLN) and no more than PLN50,000
- for foreign entities no less than PLN20,000 and no more than PLN100,000; and
- for bilateral or multilateral, no less than PLN50,000 and no more than PLN200,000.

Renewal fees are half of the amount of the original filing fee.

Does the tax authority publish APA data either in the form of an annual report or through the disclosure of data in public forums?

No.

Are there any difficulties or limitations on the availability or effectiveness of APAs?

Yes. The Ministry of Finance is open to discussions about all types of transactions and already has some experience with the APA program. However taxpayers are still reluctant to use the APA route, mostly due to the costs of the proceedings. We have noticed a clear change of attitude of the authorities who are becoming significantly more business friendly and are encouraging taxpayers to benefit from the APA possibility.

KPMG in Poland

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