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GLOBAL TRANSFER PRICING SERVICES

# 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. New regulations reflect changes in the Organisation for Economic Co-operation and Development (OECD) Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (hereinafter: 'OECD Guidelines') and are 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
- procedure of 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 new regulations implemented in July 2013, extensive guidelines on business restructuring were published by the Ministry of Finance in March 2014. Although there has not been much in terms of an official response to the OECD's Base Erosion and Profit Shifting (BEPS) initiative, it is expected that Polish authorities will closely monitor developments in this area. Introduction of certain restrictive provisions in the tax law (such as controlled foreign corporation (CFC) rules or anti-abusive clause) is very likely in the near future.

## 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.

APA – 1 January 2006.

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

Ownership of greater than 5 percent share capital means 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 prepared or 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 prepare or submit disclosures?

Persons responsible for the company's tax compliance may be held responsible under the penal-fiscal code for not submitting required tax information.

## Transfer pricing study overview

### Is preparation of a transfer pricing study required – i.e. can the taxpayer be penalized for mere failure to prepare a study?

There is a statutory requirement to prepare certain documentation (statutory transfer pricing documentation) for transactions exceeding certain thresholds. However, there is no penalty for a mere failure to possess the documentation, although there have been attempts to penalize individuals responsible for the company's tax compliance under the penal-fiscal code for not submitting required tax information.

A taxpayer is required to provide the tax authorities with statutory transfer pricing documentation, within 7 days of receiving the request.) Such transfer pricing documentation should be prepared for transactions concluded by a taxpayer with a related party which exceed, in the given tax year, the following thresholds:

- EUR30,000 for transactions involving intangibles and services.
- EUR50,000 or 100,000 (if a transaction does not exceed 20 percent of a company's share capital) for transactions involving goods and tangibles.

Additionally, each transaction exceeding EUR20,000 should be documented if concluded with an entity operating in a country listed by the Ministry of Finance as a tax haven.

If the transfer pricing documentation is not presented to the tax authorities within 7 days following the request and the price is successfully challenged, the tax authorities may apply the penalty tax rate of 50 percent instead of a standard CIT rate of 19 percent to the amounts adjusted. Obviously penalty interest for late payment of the outstanding tax is due as well.

### Other than complying with a requirement per the previous question, describe the benefits, if any, of preparing and maintaining a transfer pricing study?

Transfer pricing documentation strongly decreases the eagerness of the tax authorities to investigate related party transactions and eliminates the possibility of applying the 50 percent CIT rate to assessed income instead of the usual 19 percent rate.

As statutory transfer pricing documentation does not require the inclusion of a benchmarking analysis, the tax authorities should verify the arm's length nature of the transactions during the tax audit. It is therefore highly recommended to supplement the statutory documentation with a benchmarking analysis demonstrating that the pricing is compliant with the arm's length standard. It will force the authorities to prepare stronger arguments if they intend to challenge the pricing methodology accepted by the taxpayer.

Transfer pricing documentation and a benchmarking study help to mitigate risk of personal responsibility under the penal-fiscal code for decreasing a company's tax liability (it can become an issue if the tax authorities assess additional income to the company).

Transfer pricing documentation prevents the tax authorities from shifting the burden of proof to the taxpayer and makes challenging the established prices more difficult.

### To satisfy the requirement and/or obtain the benefits, are there any requirements on when the transfer pricing study must be prepared and submitted?

Transfer pricing documentation must be provided in Polish, within 7 days of the tax authorities' request, which is a very short period, especially with regard to transactions concluded a few years earlier. It is strongly recommended that such documentation is prepared in advance. At the moment of filing the CIT return, the taxpayer must submit information on whether the obligation to prepare transfer pricing documentation exists.

### When a transfer pricing study is prepared, should its content follow Chapter V of the 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)
- 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 formal qualifications are required to prepare transfer pricing documentation. However, it is normally done by licensed tax advisors. In the case of benchmarking analyses – access to databases (like Amadeus or Tegiel – a Polish database including information on local companies) is essential in order to prepare the study.

## Transfer pricing methods

### Are transfer pricing methods outlined in Chapter II of the OECD Guidelines acceptable?

Yes, with some exceptions (for example the Berry ratio is not an advisable method).

### Is there a priority among the acceptable methods?

No strict priority. The best method should be applied, but, classic, transaction-based methods are preferred. If their application is not possible profit-based methods can be applied.

### If there is no priority of methods, is there a "best method" rule?

Yes, as described above.

## Transfer pricing audit and penalties

### When the tax authority requests a taxpayer's transfer pricing documentation, how long does the taxpayer have to submit its documentation?

Seven days following the request.

### If an adjustment is proposed by the tax authority, are dispute resolution options available to the taxpayer outside of competent authority?

No.

### 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 defences 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)

- 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: Tegiela (Polish database), Amadeus, Monitor Polski "B" (registry court data).

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

High.

### Are management fees deductible?

Yes. 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. Withholding tax regulations apply, unless a double taxation treaty is in force. Therefore, in practice, there is no withholding tax on management fees for countries with treaty protection.

### Are year-end transfer pricing adjustments permitted?

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, 3 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).

## Other recent developments

- New regulations on taxation of Controlled Foreign Corporations (CFC rules) may be introduced in the near future. The draft provides for taxation of the foreign subsidiaries when a 25 percent ownership threshold is exceeded, they do not perform a regular business activity and major

part of their income is derived from payments received from the parent company.

- Introduction of an anti abuse clause is under consideration. Under proposed regulations, the tax authorities may disregard transactions or structures created solely for the purposes of the tax avoidance, and accordingly tax the income which would be reported if such transactions or structures were not in place. The clause was introduced a few years ago, existed shortly and was quickly declared unconstitutional, but the authorities are trying to return to this idea.
- New thin cap rules are expected to come in force starting from 2015. Under the planned amendment, the thin cap rules will be expanded to loans granted by all related entities (currently the rules covers only loan from direct shareholders or sister companies).
- Provisions and guidelines on the verification of arm's length conditions of business restructuring activities conducted by related entities will allow tax authorities far-reaching authority regarding the verification of the legitimacy of the restructuring activities of capital group, the expected benefits from restructuring, assessment of realistic alternative options, the legitimacy of assigning remuneration and the assessment of its amount. It is expected that direct implementation of the rules into the local legislation may increase the tax authorities' interest in this area.
- Implementation of the concept of low value adding services was expected to define regular, typical services. As a consequence any audit of such services should be simplified – verification should be conducted at first on the basis of description presented by taxpayer. However, the list of items required by the legislator is quite strict and may create a risk that such a description will become an additional documentation burden for taxpayer. As compared to EU JTFP recommendations, what is missing is an indication (range) of the levels

of percentage mark-ups on costs, which should be accepted by the tax authorities as arm's length.

- Implemented catalogs of exemplary low value adding services and shareholder costs are quite extensive and general which may cause interpretation problems and disputes with tax authorities.
- An attempt has been undertaken to systematize the kind of costs that can be considered as shareholder costs and which not tax deductible are according to relevant Polish tax regulations.
- A determination has been made of which elements a comparability analysis conducted by tax authorities should include and take into account indicating what kind of data should be collected and presented in case of a tax audit. This may act as a guide for taxpayers who are interested in reducing risk by preparing similar analyses.
- The replacement of the superior role of the comparable uncontrolled price method by a selection of the method which most appropriately reflects the background and terms of the transaction should be assessed as a positive change. This enables the choice of the best possible transfer pricing method for the specifics of particular transaction.

## 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, and multilateral.

**Is there a filing fee for APAs?**

Yes. The filing fee is 1 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
- 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?**

Statistics on the number of motions submitted and decisions issued (positive

and negative) are provided on request only. There is no formal annual report or similar publication. However the authorities provide relevant statistics to OECD, EU JTPF etc.

**Please provide some information on how successful the APA program is and whether there are any known difficulties?**

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.

## Language

**In which language or languages can documentation be filed?**

Polish.

### KPMG in Poland

**Jacek Bajger**

Tel: +48225281173

Email: jbajger@kpmg.pl

As email addresses and phone numbers change frequently, please email us at [transferpricing@kpmg.com](mailto:transferpricing@kpmg.com) if you are unable to contact us via the information noted above.

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