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GLOBAL TRANSFER PRICING SERVICES

Global Transfer Pricing Review

Ukraine

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TAX



Ukraine

KPMG observation

On 1 September 2013, a Law of Ukraine “On the Amendments to the Tax Code of Ukraine Regarding Transfer Pricing” became effective, introducing enhanced transfer pricing rules, which are generally in line with the Organisation for Economic Co-operation and Development (OECD) framework, but with some local specifics. In particular, the following transactions are deemed controlled, if the annual transaction volume between the parties exceeds 50 million Ukraine Hryvnia (UAH):

- Transactions with non-resident related parties.
- Transactions with all parties (related and non-related) which are registered or effectively pay corporate income tax in jurisdictions where the tax rate is lower than in Ukraine by 5 percentage points and more (listed by the Cabinet of Ministers of Ukraine).
- Transactions with domestic related parties which are using a preferential or special tax regime or have declared tax losses in the previous tax year.

Five transfer pricing methods recognized by OECD, as well as combinations of methods, are allowed to be used. A list of official information sources is defined.

The Advance Pricing Agreements (APAs) mechanism is introduced to be used by large taxpayers. However, there is no certainty as to when APAs can become practically available.

Basic information

Tax authority name

Previously – Ministry of Revenues and Duties of Ukraine (is currently under reorganization).

Citation for transfer pricing rules

Tax Code of Ukraine (TC) (general section): paragraph 14.1.159 (definition of related parties), article 39 (arm’s length principle, transfer pricing methods, official sources of information, advance pricing agreements), Corporate Profits Tax (CPT) (section): paragraph 92 (disposal of assets under a tax pledge), paragraph 135.5.4. (recognition of taxable income from free-of-charge acquisition of goods, works and services), 140.1.6. (insurance costs), 144.1.(subpara.8)

(depreciation of fixed assets in concession), 146.7–146.10 (depreciable value of fixed assets), 153.2. (related parties transactions), 153.9. (REPO and derivative transactions), 153.10 (barter transactions), 157.15. (income of nonprofit organizations).

TC (PIT section): 164.2.17. (fringe benefits), 164.5. (recognition of in-kind income).

TC (VAT section): 184.7., 189.11. (deemed sale), 188.1., 190.2. (taxable base), 198.3. (VAT credit), 210.2. (marginal profits on the sale of arts and antiques).

Effective date of transfer pricing rules

1 September 2013.

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

Ownership of at least 20 percent of shares, based on voting power, share capital, and are under common control.

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

The general statute of limitations for tax issues (including transfer pricing issues) is 3 years following the deadline for submission of the tax return or the actual date of submission of the tax return (if the tax return was not submitted in time). However, no limitation period applies in cases of a proven fraud (criminal proceedings against a taxpayer’s management) or a taxpayer’s failure to file a tax return.

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)?

Taxpayers who have performed controlled transactions during a reporting period are obliged to file a Report on Controlled Transactions with the Ukrainian tax authorities no later than 1 May of the next calendar year. The first reporting period is from 1 September to 31 December 2013. After this, a calendar year is treated as a reporting period for transfer pricing. The first reporting date is 1 May 2014. Transfer pricing documentation must be submitted upon request of the tax authorities only.

What types of transfer pricing information must be disclosed?

The Report on Controlled Transactions must contain detailed information on the subjects of controlled transactions, including (physical) characteristics, industry-specific codes, prices applied, transfer pricing method used, arm's length price etc.

What are the consequences of failure to prepare or submit disclosures?

Penalties for non-compliance are set as follows:

- Five percent of the total controlled transactions' amount – for failure to file the Report on Controlled Transactions in a timely fashion.
- One hundred minimal wages – for failure to submit transfer pricing documentation at request (applicable to large taxpayers only).

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?

Yes.

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

By law, the burden of proof is on the tax authorities but a taxpayer must be able to substantiate the fair market level of contract prices upon request of the tax authorities.

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 on a transaction-by-transaction basis must be submitted upon request from the tax authorities within 30 days of such request for regular taxpayers, and within 60 days for large taxpayers.

When a transfer pricing study is prepared, should its content follow Chapter V of the OECD Guidelines?

Yes.

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

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

Yes. For customs purposes, the transfer pricing methods which can be used to determine the customs value of imported goods are as follows (and are to be applied in a consecutive order (on a tiebreaker basis)):

- contract price of imported goods
- contract price for identical goods
- contract price for similar goods
- resale minus method
- cost plus method
- reserve method.

Is there a priority among the acceptable methods?

Generally, the first priority is given by the tax authorities to the comparable uncontrolled price.

The customs authorities apply the transfer pricing methods listed above in the consecutive order shown but give preference to contract price for identical/similar goods, or the reserve methods, as they typically result in a higher customs value and, accordingly, higher import taxes.

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

Not applicable.

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?

Regular taxpayers will have 30 days within the request to prepare a transfer pricing documentation. Large taxpayers will have 60 days.

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

Following the administrative procedure, a taxpayer can apply to the tax authority of a higher ranking. If still dissatisfied, the taxpayer can file a claim to District Administrative Court, Administrative Court of Appeal, High Administrative Court and Supreme Court of Ukraine (for limited instances only), in that order.

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

If a transfer pricing adjustment results in additional tax liabilities, the taxpayer can be subject to penalties of 25 percent and up to 75 percent of the tax underpayment if there is a recurring violation.

A taxpayer can reassess own tax liabilities in connection with transfer pricing adjustments and reflect them in the tax return. In this case, no penalties apply. Such reassessment can also be made and filed separately after the tax return is submitted. In such case, penalties will apply to the amount of underpaid tax for each day of delay.

To what extent are transfer pricing penalties enforced?

Even before the first official reporting date, a court practice is already present with regard to transfer pricing issues. After the first reporting date (1 May 2014), transfer pricing rules are expected to be strictly enforced.

What defences are available with respect to penalties?

A taxpayer must have documents supporting its transfer pricing policy. Such documents must be in Ukrainian and preferably include the market or statistical information coming from the officially approved information sources.

To reduce the potential penalties, prior to the tax audit, a taxpayer can voluntarily make a transfer pricing adjustment and self-assess a 3 or 5 percent penalty (only in case the adjustment is not made soon enough to be included in the annual tax return).

What trends are being observed currently?

The Ukrainian tax authorities demonstrate strong preferences for the application of comparable uncontrolled price method and the use of the officially approved information sources when substantiating the arm's length nature of prices in controlled transactions.

Special considerations

Are secret comparables used by tax authorities?

No. The use of secret comparables is forbidden.

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

Yes. Ideally, the comparables should be local or derived from the geographically closest market.

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

The tax authorities give preference to state statistical information and databases.

The following official sources of information will be acceptable for establishing the arm's length price:

- Information sources officially approved by the Cabinet of Ministers of Ukraine.
- Statistical data of the state authorities and agencies.
- Commodity exchange prices and stock exchange quotation.
- Benchmark prices of specialized commercial publications, including electronic and other databases.
- Reports and data provided by economic departments of Ukrainian diplomatic missions abroad.
- Results of public auctions.
- Taxpayer's internal comparable prices.

If the official sources do not contain sufficient information for the analysis of prices in controlled transactions, other information sources, including commercial databases (RUSLANA, Amadeus, Thomson Reuters, and Bloomberg etc.) can be used.

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

High.

Are management fees deductible?

Management fees payable to a non-resident service provider should generally be tax deductible in full, unless they qualify as consulting, marketing, advertising or engineering services.

Tax deduction of consulting, marketing and advertising service fees payable to a non-resident service provider (cumulatively) is limited to 4 percent of sales revenue (excluding VAT and excise tax) accrued in the preceding year. The tax deduction of such service fees if paid to a non-resident located in blacklisted offshore jurisdictions is not allowed. If management services are qualified as engineering services, the relevant fees can be deducted up to an amount not exceeding 5 percent of the customs value of the imported equipment, as long as a service provider is not a resident of a blacklisted offshore jurisdiction and is a beneficial recipient (owner) of such income.

The price evaluation statement is required to remit management fees to a non-resident service provider if they exceed, in total, EUR100,000. Such price evaluation statements incidentally, can confirm for tax purposes that the management fees are in line with fair market prices.

Are management fees subject to withholding?

No. Generally, management fees are not subject to withholding tax. However, when management services (partly) qualify as engineering services, they are subject to 15 percent withholding tax, unless protected under a relevant double tax treaty.

Management services received from a non-resident service provider are subject to 20 percent VAT which must be self-assessed by a local taxpayer, and can be credited based on a reverse charge mechanism (provided the relevant services are further used in the taxpayer's VAT able business transactions).

Are year-end transfer pricing adjustments permitted?

Generally, year-end adjustments are permitted. Reciprocal adjustments are allowed subject to an officially defined procedure.

Other unique attributes?

Information available at the moment when controlled transaction is performed and/or information available from previous years can be used. Common practice is to use multiple-year data (usually, data is used from 3 years preceding the year when controlled transaction took place).

Other recent developments

A draft law was recently submitted to the Ukrainian Parliament, with taxpayer-favorable provisions with regard to transfer pricing. However, the fate of the draft law is unclear.

Tax treaty/double tax resolution

What is the extent of the double tax treaty network?

Extensive (nearly 70 effective double tax treaties).

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

Frequently. Historically, double tax relief has been available to a taxpayer if there was a valid tax residence certificate of its counterparty confirming that the latter is tax resident in a jurisdiction which has an effective double tax treaty with Ukraine.

Since 2011, the TC introduced a beneficial ownership concept as an additional mandatory prerequisite for the application of a double tax treaty relief. It is still unclear how this concept will be implemented in practice and

which documents will be required to confirm the beneficial owner status. However, the tax authorities have already started challenging certain structures (e.g. trademark sublicensing contracts) which they believe have been introduced to benefit from the double tax treaty protection.

When may a taxpayer submit an adjustment to competent authority?

Not applicable.

May a taxpayer go to the competent authority before paying tax?

Provided a valid tax residence certificate of a non-resident counterparty is available, a taxpayer should not deduct withholding tax from the payment to be made. Otherwise, withholding tax should be deducted and can be claimed back once the tax residence certificate is available. The tax authorities are typically unwilling to refund overpaid withholding tax in cash and prefer offsetting such overpaid tax against current tax liabilities.

Advance pricing agreements

What APA options are available, if any?

APAs as they are understood in the international tax practice are introduced as from 2014 for large taxpayers.

Is there a filing fee for APAs?

No.

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.

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

Not applicable.

Language

In which language or languages can documentation be filed?

Official filings and supporting documents must be in Ukrainian (or translated into Ukrainian).

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