Transfer Pricing Alert

KPMG in Poland

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Proposed fundamental amendments to the transfer pricing regulations

On July 16, 2018 the Ministry of Finance published a draft bill amending the Personal Income Tax Act, the Corporate Income Tax Act and some other acts (hereinafter: the Draft Act).

One of the areas subject to the amendments is transfer pricing. The Draft Act indicates the direction of changes and provides for the deletion of the regulations existing so far in this respect and replacing them with a new, separate chapter dedicated to transfer pricing in both the CIT and the PIT Acts. Thus, the Ministry of Finance emphasizes the current importance of these issues. The new rules, in principle, could apply from January 1, 2019.

The scope of the proposed changes

The most important proposals of amendments contained in the Draft Act include:

- **reduction of documentation obligations**

The Draft Act provides for increasing documentary thresholds exceeding of which would result in obligation to prepare transfer pricing documentation. In addition, it provides for changing the mechanism for determining the existence of documentation obligations based on the value of the controlled transaction, and not on the basis of the level of taxpayer's costs or revenues, as it is currently the case.

- **extension of deadlines**

It is assumed to extend the deadline for submitting: (i) a statement on preparation of transfer pricing documentation and (ii) information on transfer prices from 3 to 9 months after the end of the tax year. In addition, the deadline for preparing the Master File documentation is proposed to be extended to 12 months after the end of the tax year.

- **documentary facilitations and relieves**

The Ministry of Finance allows explicitly to use the Master File documentation prepared by another entity from the group. Moreover the Draft Act provides for the possibility of preparing and using the Master File documentation in English. However, the tax authorities may request a Polish version to be submitted within 30 days. In addition new documentary relieves are introduced with regard to transactions that do not permanently constitute a tax revenue or tax deductible costs and in which prices were determined in an open tender procedure in accordance with the Public Procurement Law.

- **consideration of the OECD Guidelines**

The intention of the Ministry of Finance is to unify the documentation requirements with the OECD standards so that the elements of the local and group documentation reflect the provisions of the OECD Guidelines.

- **introduction of simplified settlements rules**

The Draft Act provides for the introduction of simplified solutions (*safe harbours*) for transactions related to loans and low value-added services. These solutions, through the statutory determination of an acceptable level of mark-up or other conditions of a given transaction, allow to consider the price as compliant with the arm's length rule without the need to prepare a benchmarking analysis.

- **extension of the list of methods**

The provisions of the Draft Act introduce the possibility for the tax authorities, in justified cases, to apply methods of determining/verifying the transfer price other than the five basic methods indicated in Polish tax law so far. Given this, it will be possible to use, among others, valuation techniques for determining or verifying the level of costs/revenues related to a given controlled transaction, especially when the taxpayer reports the arm's length character of the transaction in its mandatory documentation by preparation of the so-called "compliance analysis".

- **transfer pricing adjustments**

The Draft Act introduces rules for performing transfer pricing adjustments by taxpayers by indicating when and under what circumstances they can be made. Such adjustments would constitute, respectively, either tax revenues or tax deductible costs and should be recognized in the tax year to which they relate. The Draft Act also defines restrictions on the possibility of applying adjustments in order to limit the risk of abuse.

- **the right of the tax authorities to determine the taxpayer's income or loss**

The legislator grants the tax authorities a special right of an administrative discretion to rule that a controlled transaction would not have been carried out between unrelated parties or that it would have been concluded under different conditions and thus gives the right for the tax authorities to determine income different from the one reported by the taxpayer. Introduction of the above mentioned provisions of the Draft Act is the result of the implementation of the OECD Guidelines in the field of prevention of the tax base erosion and profits shifting (BEPS), however details of how such a right should be executed in practice are not known and are meant to be found in a relevant future decree.

- **transfer pricing reporting**

The Draft Act provides for the introduction of an obligation to report transfer prices in an electronic form (via the electronic TP-R form).

- **unification of terms and definitions**

The Ministry of Finance in the Draft Act introduces unified terms and definitions having fundamental practical significance in the area of identification and assessment of relations between related entities. In addition to terms such as "transfer price", "relations", "related parties" or "controlled transaction", the term "arm's length principle" is introduced, understood as the obligation to set transfer prices on terms that would be established between independent entities.

The Draft Act has been submitted to public consultations. We will keep you informed about the further developments of legislative works in the above field.

We address the other changes provided in the Draft Act (including the deletion of Article 15ca and amendments to Article 15e of the CIT Act) in a separate alert.

In case of any questions regarding the above or other issues related to transfer pricing, please contact us.

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