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Poland

Introduction

Poland has well-established transfer pricing regulations that apply to cross-border as well as domestic transactions. These regulations draw heavily on the Organisation for Economic Co-operation and Development (OECD) Guidelines (Poland has been a member of the OECD since 1996). The statutory thresholds for the documentation requirements (introduced in 2001) are relatively low, and the requirements apply to a wide range of transactions. Since 2007, legislation also requires taxpayers to document the allocation of profits to permanent establishments.

On 1 May 2004, Poland joined the European Union. Poland, therefore, accepts the EU Transfer Pricing Code of Conduct. Nonetheless, based on local regulations, the tax authorities accept only documentation that is written in Polish and covers all items required under local law.

In January 2006, Poland introduced APA legislation which, from 1 January 2007, also applies to the allocation of profits to permanent establishments.

Statutory rules, other guidelines

Methods for determination of the arm's-length price

From 1 January 1997, Article 11 of the Corporate Income Tax (CIT) Law and Article 25 of the Personal Income Tax (PIT) Law, have presented the methodology for determining arm's-length prices by use of:

- Comparable uncontrolled price (CUP).
- Resale price.
- Reasonable margin (cost plus).

Where these methods cannot be applied, transactional-profit methods may be used. However, the tax authorities prefer traditional transaction-based transfer pricing methods when estimating income from given transactions.

In October 1997, the Ministry of Finance issued a regulatory decree on the methods and procedures for determining taxable income by estimation of prices applied in transactions between taxpayers. The decree was replaced in October 2009 by two decrees on the methods and procedures for determining taxable income by estimation and the methods and procedures of eliminating double taxation in case of a transfer pricing adjustment (TP decrees). One decree concerns PIT law, while the other concerns CIT law. However, for all intents and purposes, both decrees contain the same rules and regulations.

The new decrees introduced more detailed regulations with regard to comparability and new provisions concerning the procedure of eliminating double taxation in case of transfer pricing adjustments. The decrees also present in more detail the application of the five pricing methods in a manner similar to that outlined in the OECD Guidelines. The decrees oblige the tax authorities to verify transfer prices using these methods.

Definition of related parties

Polish transfer pricing regulations apply to domestic and cross-border relationships. However, the definitions of these relationships differ.

A Polish and a foreign company are considered 'related' if one of the following three conditions is met:

- A Polish taxpayer participates directly or indirectly in the management or control of a company located abroad or holds a share in its capital.
- A foreign resident participates directly or indirectly in the management or control of a Polish taxpayer or holds a share in its capital.
- The same legal or natural person, at the same time, participates directly or indirectly in the management or control of a Polish and a foreign entity or holds shares in their capital.

Polish companies are considered 'related' when one of the following conditions is met:

- A domestic entity participates directly or indirectly in the management or control of another domestic entity or holds a share in its capital.
- The same legal or natural person participates, at the same time, directly or indirectly, in the management or control of two domestic entities or holds a share in their capital.
- Relationships of a family nature, resulting from employment contracts or common property, exist between (1) two domestic entities or (2) persons involved in their management, control or supervision.
- The same person combines managerial, supervisory or controlling duties in both entities.

Documentation requirements

From 1 January 2001, the CIT law imposes compulsory documentation requirements on taxpayers concluding transactions with related parties and for transactions resulting in payments to entities located in tax havens. Entities are obliged to prepare documentation comprising:

- A functional analysis.
- The determination of costs, including the form and terms of payment.
- The method and manner of calculating the profit and determination of the price applied.
- The business strategy adopted.
- Other factors if they influenced the transaction.
- In the case of contracts relating to intangible products and services, determination of the benefits.

The reporting thresholds are 20,000 euros (EUR) for transactions with entities located in tax havens and EUR 30,000 – EUR 100,000 (depending on the company's share capital and the nature of the transaction) for transactions with related parties.

From 1 January 2007, the same requirements apply to the allocation of profit to a permanent establishment.

A company is obliged to submit the required documentation within seven days of a tax inspector's request. Failure to submit the documentation is subject to a fine of up to 120 daily rates (the level of daily rate is set by the court in each case and may amount up to approx. EUR 5,000), while submission of false documentation is subject to a fine of up to 240 daily rates. Therefore, the maximum fine for submitting false documentation may be up to EUR 1.2 million. If the tax inspector makes an assessment of the taxable income/tax-deductible costs and there is no documentation in place for the transactions subject to the assessment, the difference between the profit established by the tax authority and that declared by the taxpayer will suffer a 50% CIT rate (in comparison with the 19% CIT rate applicable for 2011).

When filing its annual tax return, the company is required to state whether it was required to prepare transfer pricing documentation according to the requirements.

Reporting requirements

Information on agreements concluded with related entities (ORD-U form)
A taxpayer is obliged to submit information on agreements concluded with related entities. Taxpayers are required to report related party transactions concluded with one of the following:

- Non-residents where they exceed EUR 300,000 in a given year with the same entity.
- A non-resident owning a company, permanent establishment or representative office in Poland where the amount of receivables or payables resulting from a single transaction exceeds EUR 5,000.
- Both foreign and domestic related parties on the specific request of the tax authority.

The taxpayer is obliged to submit the information on a designated form (ORD-U). The information should be submitted to the tax office together with the annual tax return (i.e. by the end of the third month after the fiscal year-end). Failure to submit the notification or submitting false information is subject to similar fines as in the case of TP documentation, i.e. up to 120 daily rates or up to 240 daily rates respectively. The maximum fine may be approx. EUR 1.2 million.

Information on fees paid to specialist services providers (ORD-W1 form)
Polish entities must collect, draw up and submit information on fees paid for services provided by natural persons who are not Polish tax residents. The information should be presented on a special form (ORD-W1) by the end of the month following the month in which the non-resident started providing the services. This obligation arises only when:

- the fee is paid to a non-resident natural person by a foreign entity
- the foreign entity is related to the Polish entity, and
- the amounts paid have an impact on the tax obligation of the natural person performing the services (the taxpayer is obliged to submit the information under the same conditions as for the ORD-U report).

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Tax havens
Taxpayers concluding transactions that result in payments to companies located in tax havens, regardless of whether they are related, are required to prepare suitable documentation. A decree of the Minister of Finance lists countries applying harmful tax competition (tax havens). From 1 January 2007, if the transactions concluded by Polish taxpayers with companies located in tax havens are not arm's length, the tax authorities may assess taxable income on the same grounds as income from intragroup transactions.

Legal cases
Each year the Polish fiscal control office conducts several hundred tax audits concerning related party transactions. Proceedings might also be initiated by tax offices independent from fiscal control offices. Furthermore, there are approx. 40-50 administrative court verdicts related to TP each year. The court verdicts are formally not binding source of legal regulations in Poland. Nevertheless, they are often used as interpretative guidelines. Some of these court verdicts settled, among others, the matter that the tax authorities should take into account during transfer pricing audits not only local regulations but the OECD Guidelines as well.

Burden of proof
Taxpayers are required to maintain specific documentation describing the conditions applied in related party transactions. However, the burden of proof that non-arm's-length prices or other conditions are applied falls on the tax authorities.

When examining transfer prices, the tax authorities must determine the arm's-length value of a transfer using the method(s) previously applied by the taxpayer, provided that:

- The taxpayer established the transfer price using a traditional transaction-based transfer pricing method.
- The taxpayer submits documentation supporting the choice of a particular method, based on which the price calculation is performed and transfer pricing documentation required by the CIT law.
- The objectiveness and reliability of the documentation submitted, based on which a transfer price was calculated, cannot be reasonably questioned.
- Another method would not have been self-evidently more appropriate.

Tax audit procedures
Transfer pricing is examined as part of a normal corporate tax audit.

Foreign-owned companies that have been loss-making for more than three years are likely to be targeted. The tax authorities can request any information deemed necessary for the investigation and have full search powers. Noncompliance with information requests can result in severe penalties.

A particular characteristic of the audit procedure is the short time frame that taxpayers have to respond to transfer pricing assessments:

- Upon completion of a tax audit, the tax inspector issues a written protocol setting out his/her preliminary findings.

- The taxpayer has 14 (calendar) days to respond to this protocol in writing, presenting his/her explanations and objections.
- Within 14 days, the tax inspector issues a document of formal information on the method of dealing with the taxpayer's response.
- Subsequently, before issuing the tax decision, the tax authorities inform the taxpayer about the intended decision. The taxpayer has seven days to review the data collected during the tax audit and to present his/her opinion.
- The taxpayer can expect a tax decision or formal closing of the proceeding if the audit finds the taxpayer's reconciliation to be correct.
- The taxpayer may appeal in writing to the higher authority (the tax chamber) within 14 days.
- The verdict of the tax chamber may be further appealed to the administrative court within 30 days.
- The taxpayer has the right to appeal against the court's verdict to the Supreme Administrative Court within 30 days.

Tax investigations may examine related party transactions which are not time barred. Transactions are subject to the statute of limitations after five years from the end of the year in which tax returns concerning those transactions were filed (i.e. effectively six years). Penalty interest may be charged on underpaid tax, and the standard rate is currently (as of 1 August 2012) 14.5% per annum. Penalty interest is not tax-deductible.

Special tax offices for large entities

Special tax offices exist for large entities (i.e. taxpayers that exceed an annual revenue threshold of EUR 5 million). Additionally, all entities with a foreign shareholding exceeding 5% of voting rights and Polish holding companies are recognised as large entities.

Comparable information

Where possible during a tax audit, the Polish tax authorities try to use internal comparables (sometimes without carrying out all necessary adjustments). They also use external comparables drawing on data gathered through controls of comparable taxpayers. Here, however, due to commercial and fiscal secrecy, the taxpayer may have difficulty obtaining access to such data.

The tax authorities have access to databases to establish comparable information. However, it is rarely evident that they use such comparables during tax audits.

The tax authorities take a relatively sceptical view of foreign comparable data. In practice, while preparing benchmarking studies, domestic comparables should be examined first. If there is not sufficient information concerning domestic comparables, the search could be extended to comparables within the CEE region. If there is still not sufficient comparable data, a Pan-European benchmarking study may be conducted.

For taxpayers undertaking comparable analysis, the source of Polish company financial results is the government journal, Monitor Polski B. However, gathering the most up-to-date source financial data may sometimes be difficult as fines for not submitting financial information are low and many companies do not present their results at all or disclose them late.

Poland

Competent authority proceedings and advance pricing agreements

Rulings

Amended regulations relating to interpretations of the tax law by the tax authorities and the Minister of Finance were introduced on 1 July 2007. Currently, two types of rulings are issued by Polish tax authorities:

- General rulings – Issued by the Minister of Finance where there are differences in the interpretation of tax regulations by the tax authorities and apply to all taxpayers.
- Individual rulings – Issued by tax chambers appointed by the Minister of Finance and apply only to the case of the requesting taxpayer.

The request for an individual ruling is filed on a special form, ORD-IN, and should include:

- The background to the case.
- The applicant's standpoint with respect to the interpretation of the tax law.
- A declaration that the case subject to interpretation is not subject to a tax proceeding, tax control or earlier tax decision. If this condition is not met, the ruling is not binding and the person applying may be fined under the Penal Fiscal Code.

An individual ruling may not be harmful for the taxpayer (i.e. if the taxpayer follows the ruling, no penalty interest or sanctions under the Fiscal Penal Code may be imposed). If the ruling is issued before the transaction starts, no tax other than that resulting from the interpretation may be imposed on the taxpayer with respect to the transaction. This does not apply if the ruling is issued after the transaction started.

An individual ruling may be amended by the Minister of Finance at any time. If the amendment is less favourable for the taxpayer, the taxpayer is entitled to apply the earlier ruling until the end of the current accounting period.

The tax authorities must issue individual rulings within three months (this may be extended in complicated cases). The fee for an individual ruling is PLN 40 (approximately EUR 10) per question in the request.

Individual rulings cannot be used to confirm the correctness of the transfer pricing method.

Advance pricing agreements (APAs)

From 1 January 2006, a taxpayer may conclude an APA with the Minister of Finance to confirm the appropriateness of the taxpayer's transfer pricing policy. The purpose of an APA is to agree in advance the arm's-length character of the terms of the transactions between related parties. From 1 January 2007, APAs also cover the attribution of profit to permanent establishments. As a result, the local tax authorities will not be able to question the arm's-length character of these transactions.

The tax law allows for the following types of APAs:

- Unilateral APA – For transactions between domestic entities or a domestic entity and a foreign entity.
- Bilateral/multilateral APA – Issued by the Minister of Finance after obtaining foreign tax authorities' consent.

The administrative fee for the APA is approximately 1% of the transaction value. However, depending on the type of APA, the fee may not be lower than approximately EUR 1,250 or higher than approximately EUR 50,000 (exchange rate EUR 1 = PLN 4). The APA decision will include:

- Determination of the entities covered by the agreement.
- Determination of the type, subject and the value of the transaction covered by the agreement, as well as the period concerned.
- Determination of the transfer pricing method, method of calculation of the transfer price and rules of application of this method, including all crucial assumptions.
- Period during which the decision remains in force.

Starting from 1 January 2007, an APA will be concluded for a maximum period of five years, with the possibility of extending the period by another five years.

Corresponding adjustments
Poland ratified the convention on the elimination of double taxation in connection with the adjustment of profit of associated enterprises of 23 July 1990. The convention came into force on 26 August 2006.

The TP decrees introduced regulations regarding the procedure for elimination of double taxation. They are applicable to a price adjustment in cross-border transactions between related parties or in cross-border settlements between a head office and its permanent establishment. The procedure is based on the Arbitration Convention and double tax treaties.

According to the TP decrees, local taxpayers are entitled to file an application to the Minister of Finance to initiate a mutual agreement procedure (MAP) in order to avoid double taxation. In principle, the application should be submitted within three years from receipt of a decision or protocol that leads or may lead to double taxation. If the Minister of Finance believes the application is justified but cannot be settled under domestic proceedings, the Minister should initiate a MAP.

Liaison with customs and other tax authorities
In 2002, the customs authorities (GUC) merged with the Ministry of Finance. As a result, the flow of information between the two tax authorities improved. The tax authorities are now working on the digitisation of the tax system. Once finished, the information gathered by various tax departments is likely to be made available to the tax police.

The tax authorities cooperate with the tax authorities of other countries in conducting multijurisdictional international investigations. Poland also applies the procedure of mutual communication.

The tax authorities are active in information exchange procedures.

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Thin capitalisation

Thin capitalisation rules came into force on 1 January 1999. These rules generally apply to loans from a direct shareholder or a lending company which has the same shareholder as the tested entity. The debt-to-equity ratio is 3:1. For the purposes of these rules, equity is defined narrowly as paid-up share capital.

For thin capitalisation purposes, the word 'loan' includes bonds and deposits.

Management services

Fees paid by Polish companies for consulting, accounting, market research, marketing, management, data processing, recruitment, guarantees and warranties, and other similar services are subject to 20% withholding tax, unless a relevant double tax treaty states otherwise. Poland has entered into such agreements with approx. 80 countries around the world. However, to apply the treaty withholding tax rate, the taxpayer needs a valid certificate of fiscal residence.