
Recent changes to the transfer pricing rules in Ukraine

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In brief

Transfer pricing legislation in Ukraine has been changed effective from January 1, 2017. These changes aim to enhance tax authorities' control of transfer pricing compliance and to make compliance more effective.

Primary changes to the transfer pricing legislation include:

- Increased thresholds for recognition of a controlled transaction for transfer pricing purposes.
 - An expanded list of controlled transactions for transfer pricing purposes.
 - Changes to the penalties for violation of the transfer pricing legislation and introduction of new penalties for late submission of the report on controlled transactions and/or transfer pricing documentation.
 - Introduction of criteria for benchmarking studies.
 - Expanded scope of transfer pricing documentation.
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In detail

A summary of key changes to the transfer pricing legislation in Ukraine is provided below.

Controlled transactions for transfer pricing purposes

Starting from January 1, 2017, the criteria for recognizing controlled transactions were increased as follows:

- The annual income of the taxpayer from any type of activity exceeds USD 5.4 million (increased from USD 1.8 million in 2016).

- The total annual amount of cross-border transactions with a single counterparty — non-resident of Ukraine — exceeds USD 357,000 (increased from USD 179,000 in 2016).

As in previous periods, the transactions with related parties that are non-residents of Ukraine and transactions with residents of low-tax jurisdictions remain controlled for transfer pricing purposes.

The list of controlled transactions for transfer pricing purposes was expanded. In

addition to the controlled transactions mentioned above, the following types of transactions were added:

- Cross-border transactions involving purchase of goods/services through non-resident commissionaires.
- Transactions with non-residents that do not pay corporate income tax (CIT) and/or which are not tax residents of the state where they are registered as legal entities (the list of such legal

organizational forms of non-residents will be approved by the Cabinet of Ministers of Ukraine).

Further, the legislation clarifies that if within a chain of business transactions between related parties (tax residents of Ukraine and non-residents), the ownership of the object of the transaction (or result of work/services.) before being transferred from one counterparty to another, was transferred to an unrelated intermediary, these cross-border transactions between related parties are considered to be controlled if such intermediary does not: (i) perform significant functions, (ii) use significant assets, and (iii) bear significant risks in respect of such transaction.

In addition, criteria for grouping several controlled transactions for transfer pricing purposes have been prescribed.

Economic analysis of controlled transactions

The list of information sources for transfer pricing purposes was expanded. Among other sources of information, a taxpayer can also use:

- information received by the tax authorities under international agreements concluded by the Parliament of Ukraine; and
- other sources from which the information was received by the taxpayer in compliance with the law and that give the information about comparable transactions or entities, if such information was provided to the tax authorities.

The legislation further specifies that to calculate a profitability range when using multiple tax periods, the weighted average profitability margin must be used.

It is now possible to determine a profitability margin and perform a benchmarking study if no direct comparable data is available (i.e., if no or insufficient information on specific comparable non-controlled transactions is available). In such cases, the benchmarking study can be done based on financial information of comparable legal entities. In addition, certain criteria for selecting comparable companies while performing benchmarking studies for such entities have been introduced.

In particular, taxpayers should comply simultaneously with the following selection criteria:

- Comparable legal entity should engage in business activity that is comparable with the entity's activity and perform functions that are comparable to the entity's functions.
- Comparable legal entity should not have declared losses for more than one reporting period that might be used for the calculation of financial indicators.
- Comparable legal entity should not own directly or indirectly more than 20% of corporate rights of another legal entity and the said entity should not have more than 20% of its corporate rights owned directly or indirectly by another legal entity.

In addition, it is possible to use forward or futures exchange quotations for certain goods for the decade preceding the date of conclusion of the respective forward or futures contract and forward or futures prices closest to the date of the relevant futures or a forward contract date (for goods that do not have stock quotes), if the taxpayer notifies the State Fiscal Service of Ukraine about

the conclusion of such contracts in a respective way.

Submission of the report on controlled transactions and transfer pricing adjustments

The deadline for submitting the report on controlled transactions has been changed to October 1 of the year following the reporting year, from May 1 of the year following the reporting year.

According to the current legislation, a taxpayer can adjust the taxable profit for transfer pricing purposes. Starting from January 1, 2017, such adjustment can be made to maximum or minimum values of the range of prices (profitability), but not to the median, as it was previously envisaged.

Starting from January 1, 2017, there is no penalty for such adjustment if it is made via amendment to the CIT return until May 1 of the year following the reporting year (in previous periods a penalty in the amount of 3% was applied).

Transfer pricing documentation

The list of information that must be included in the transfer pricing documentation was expanded, in particular:

- information on entities, corporate rights of which 20% or more are owned by the taxpayer either directly or indirectly;
- information on entities, which the taxpayer provides with local management reports (names of the countries in which these entities hold their head offices);
- description of the management structure of the taxpayer, its organizational structure scheme;
- information about the taxpayer's participation in business

restructuring or transfer(s) of intangible assets during the reporting or preceding year, with an explanation of the aspects of those operations that had or still have an impact on the operations of the taxpayer;

- copies of the agreements (contracts) stipulating terms and conditions of the controlled transactions;
- information about the payments actually made in the controlled transaction (amounts and currency of payments, dates, payment documents);
- description and calculation of comparability adjustments of terms and financial results of the controlled and uncontrolled transactions; and
- if a cost allocation mechanism for the calculation of the profit level indicator has been applied to a particular controlled transaction, a description of such algorithm of allocating supplier's costs should be provided.

Tax audits on transfer pricing issues

Going forward, the only grounds for a transfer pricing audit can be:

- filing transfer pricing documentation, or
- non submission or submission with infringements of the report on controlled transactions or transfer pricing documentation.

Penalties for violation of transfer pricing legislation

The basis for calculating penalties for non-compliance with transfer pricing legislation was changed from the statutory minimum wage, which was USD 114 as of January 1, 2017, to the subsistence minimum (SM), which

was equal to USD 57 as of January 1, 2017.

In addition, new penalties were added:

- in case of non-submission of the report on controlled transactions (specifying report) and/or transfer pricing documentation within 30 calendar days following the last day of the payment of the penalty (for non-submission of the report on controlled transaction/transfer pricing documentation) — 5 SMs for each calendar day; and
- 2 SMs for each calendar day, but no more than 200 SMs in case of a late submission of transfer pricing documentation; 1 SM for each calendar day, but no more than 300 SM in case of a late submission of the report on controlled operations or late declaration of the controlled transaction in such report when submitting an adjusting report.

The takeaway

In view of the changes to transfer pricing legislation in Ukraine, affected Ukrainian taxpayers should perform a number of actions.

First, taxpayers should review their controlled transactions starting from January 1, 2017, the date for which controlled transactions and thresholds for recognition of a controlled transaction have been changed.

Second, taxpayers should prepare updated transfer pricing documentation keeping in mind the expanded requirements for documentation (including benchmarking studies prepared in accordance with new requirements).

Finally, taxpayers should maintain transfer pricing documentation and be

prepared to submit it to the tax authorities upon request.

Let's talk

For a deeper discussion of how this issue might affect your business, please contact:

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