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Development and Evaluation of Regulations concerning Transfer Pricing Documentation

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The new regulations that have been introduced since 2017 extend significantly the scope of the TP documentation and reporting requirements to be provided to tax authorities. Therefore they increase administrative and financial burden in particular for multinational enterprises. Taxpayers should prepare for next changes (2019) by i.a. assessing the necessary resources to complete the extended reporting requirements and developing revised standards of intercompany TP documentation (master file, local file, benchmarking analysis). As a consequence, the preparation of TP documentation should no longer be regarded as a purely compliance exercise but instead should become an inherent part of the capital group's tax risk management.

Słowa kluczowe: TP documentation, master file, local file, benchmarking analysis

Introduction

The article is a review. An author's assessment of regulations on requirements for transfer pricing documentation (as regards tax records) as well as their evolution are presented below.

Since transfer pricing assumes greater and greater importance, comprehensive regulations are being introduced in order to prevent base erosion and profit shifting.

The development of the requirements for transfer pricing documentation in Poland can be divided into the following periods:

There were no special requirements for transfer pricing documentation until the end of the year 2000.

On 01 January 2001, an obligation to maintain tax records of transactions with related entities (or ones residing in tax havens) was imposed on taxpayers.

On 01 January 2015, documentation obligations were extended to cover, in particular, events that entities without a legal personality took part in.

Since 01 January 2017, radically altered regulations on the requirements for documentation of transactions (and other events) between related parties have been in force, excluding regulations on the so-called CIT-CBC information, which have already been applicable since January 2016.[1]

[1] Act of 09 October 2015 amending the Personal Income Tax Act, the Corporate Income Tax Act, and some other acts (Journal of Laws 2015, item 1932).

New amendments as regards documentation obligations will also be introduced after 01 January 2019.[2]

The regulatory trend is clear-cut; the complexity and level of detail of information handed over to tax authorities is being increased, including as regards sensitive financial data. The year 2019 will mark the beginning of a new era in transfer pricing in Poland owing to the introduction of altered reporting and documentation obligations.

1. Tax Incidence

The distribution of the burden of proof exerts profound influence on the scope of obligations in terms of maintaining tax records. During the trail of facts, the tax authority is obliged to collect and exhaustively consider all the evidence. During the administrative proceedings, including tax proceedings, the administrative authority is the executive body, which means that the burden of proving facts is placed on the administrative authority and may not be shifted onto the taxpayer.[3] Whereas the party to a case is entitled to provide necessary evidence.[4] That is why, the 'burden of proof' is placed on the tax authority which should prove that the transfer prices adopted by the taxpayer deviate from arm's length prices. The Supreme Administrative Court ruled in one of its judicial decisions[5] that the stipulations of the Article 9a of the CIT Act (regarding the documentation obligation), which specifies the elements of tax records, imposes the burden of proof ratione materiae on the taxpayer, understood as an obligation to indicate particular information proving that transactions between the taxpayer and related parties, which result in payment to these entities, are carried out on an arm's length basis. Thus the intention of the legislator is for the tax records to be the basic source of evidence providing information that allows to carry out analysis of the essence of business operations and assess whether remuneration in transactions between related parties has been established on an arm's length level, that is, if it does not differ from the conditions that independent entities would establish. And so if the tax authority questions the correctness of tax records, the consequence is that the presumption that the price actually paid is an arm's length price is challenged. The burden of proving that a given price or expense deviates from arm's length prices or expenses paid to a domestic entity is placed on the tax authorities. The documentation obligation has not shifted the burden of proof on the taxpayer.[6]

Due to the fact that determination and verification of transfer prices requires that the functions, risks, and special conditions known to the taxpayer be taken into consideration, the tax authority needs to cooperate with the taxpayer. For instance, as far as intangible renderings are concerned, where the character of such services makes it more difficult to find evidence that they have been rendered without active participation of the party, it is justified for the taxpayer to assume the burden of proving that such services have been performed and that there is a correlation between them and the remuneration. The Supreme Administrative Court ruled that owing to their character, intangible services should be documented in a way that allows to indisputably verify whether they have been rendered. The taxpayer is the one that must ensure there is substantial evidence demonstrating that such services have actually been performed. The taxpayer shoulders the burden of proof in this respect.[7]

[2] Act of 23 October 2018 amending the Personal Income Tax Act, the Corporate Income Tax Act, the Tax Ordinance Act, and some other acts (hereinafter referred to as the Amendment Act of 2019).

[3] See, e.g., judgement of the Supreme Administrative Court of 26 August 1998, I SA/Gd 1675/96.

[4] See, e.g., judgement of the Supreme Administrative Court of 26 June 1998, I SA/Lu 1404/97.

[5] See, e.g., judgement of the Supreme Administrative Court of 27 April 2012, II FSK 2121/10,

[6] See, e.g., judgement of the Regional Administrative Court of 16 August 2010, I SA/Wr 678/10.

[7] See judgement of the Supreme Administrative Court of 06 May 2015, I FSK 589/14 and judgement of the Supreme Administrative Court of 13 December 2012, I FSK 188/12.

2. The Essence of Transfer Pricing Documentation

Tax records are the basic source of evidence providing information that allows to carry out analysis of the essence of business operations and assess whether remuneration in transactions between related parties has been established on an arm's length level.

In order for the tax authority to determine that price arrangements are not arm's length, it must obtain a lot of information about transactions and the circumstances that surround them, which is first and foremost financial and economic information. Therefore, there are legal provisions that regulate transfer pricing documentation as regards its content and time of compilation, adjustment or handing over to the tax authority. Failure to maintain tax records is sanctioned in various ways.

Amendment to the regulations on the requirements for documentation of transactions (and other events) between related parties, which took effect on 01 January 2017, has resulted from OECD's activity within the framework of the BEPS (Base Erosion and Profit Shifting) project. Final BEPS reports were published on 05 October 2015[8]; and BEPS Actions 8-10 (i.e., "Aligning Transfer Pricing Outcomes with Value Creation") and 13 (i.e., "Transfer Pricing Documentation and Country-by-Country Reporting") are concerned with transfer pricing and tax records. Implementation of the recommendations arising from 13 BEPS Action may be found to be advanced in the most industrialised countries.[9]

In turn, the justification to the draft Amendment Act of 2019 stresses facilitations and exemptions from documentation obligations as well as unification of documentation requirements with the OECD standards. The elements of the so-called local file and master file documenting transfer prices undergo changes "so that they would reflect the requirements arising from the OECD's guidelines."

3. Identification of the TP Documentation Obligation

3.1. The Subject-Matter of the TP Documentation

Between 2001 and 2016, the obligation to maintain special tax records as regards transfer prices was applicable to **transactions** with related entities or ones that reside in tax havens. However, the term 'transaction' was interpreted in various ways. Tax authorities (and not only them) often equated a transaction with a contract. For example, interpretation of the Ministry of Finance of 21/02/2001[10] indicates that a 'transaction' should be understood as a contract(s) concluded with the same partner(s), whose subject-matter are goods or services covered with one price. For instance, a transaction may be a contract of sale or purchase of one type of goods, a contract of sale of several goods or services that are sold at a single total price, or a long-standing contract of delivery of a type of goods or several goods or services at a specified price.

Transaction and contract should not be treated in the same way. These are two different notions. Such conclusion can be drawn, for instance, from the provisions that impose the documentation obligation[11], which stipulate that the obligation covers, among others, transactions arising from contracts concluded after 31 December 2000. Such claim is supported by, for example, a definition provided in the regulation of the Minister of Finance of 04 May 2001 on enforcement of some of the provisions of the Tax Ordi-

[8] See http://www.oecd.org/tax/beps-2015-final-reports.htm.

[9] KPMG, BEPS Action 13: Country implementation summary, last update: 26 October 2018; https://home.kpmg.com/content/dam/kpmg/xx/pdf/2018/10/tnf-beps-action-13-october16-2018.pdf

[10] PB4/AK-060-1192-46/01.

[11] Act of 09 June 2000 amending the Corporate Income Tax Act (Journal of Laws No. 60, item 700), Act of 09 November 2000 amending the Personal Income Tax Act and some other acts (Journal of Laws No. 104, item 1104).

nance Act (which has been overridden)[12]: "transactions are events arising from bilateral or multilateral relationships under civil law." It should be noted though that in some court rulings, the notion 'transaction' was equated with the notion 'contract'.[13] Transaction arises from a contract(s); for instance, handing over goods (which is a transaction) may result from a contract of delivery. Several transactions may arise from a single contract between related parties, for example, handing over goods or a license for use or rendering of consulting services. Whereas renderings performed as part of a franchising package (such as licences or services, etc.) and remunerated at a single rate constitute a single transaction.

On 1 January 2015, the documentation obligation was extended on taxpayers that enter into partnership agreements, joint venture agreements or an agreement of a similar type with a related party or an entity from a tax haven.

Between 2017 and 2018, the obligation to maintain special tax records was concerned with:

- related party **transactions** that have a considerable influence on income (or loss); or
- recognition of **other events** whose conditions have been arranged with related parties or imposed on them, which have a significant impact on income (or loss).

The documentation obligation was also imposed on 'other events' of the same type, which are not transactions and have been arranged with related parties (or imposed on them), produce considerable impact on taxpayer's income (or loss), and should be recognized in the accounts. Due to the fact that the documentation obligation has been extended on 'other events', analysis of whether there has been a transaction or an event that is not a transaction became devoid of any deeper practical sense. Hence the documentation obligation covered, among others, contributions in kind, operational reorganisations or cash pooling.

The definition of a controlled transaction that was introduced on 01 January 2019 has replaced the notions 'transactions and other events of a single type'. The controlled transaction has been broadly defined as any economic operation (including commercial, capital, financial or service operation) whose true content is determined based on actual behaviours of the parties.

It is a good thing that the Amendment Act of 2019 stipulates that local files for transfer prices are compiled for controlled transactions of a uniform character. In order to determine whether a controlled transaction is uniform, the following criteria are taken into consideration:

- uniformity of a controlled transaction in economic terms;
- comparability;
- methods of verification of transfer prices;
- and other significant circumstances surrounding a controlled transaction.

3.2. Entities Obliged to Maintain TP Documentation

Between 2001 and 2016, the obligation to maintain special tax records was imposed on:

- related parties;
- residents making directl or indirect payments to entities with a registered office in countries or on territories that adopt 'harmful competition' (i.e., tax havens);
- non-residents running a business through a permanent establishment located in Poland.

Between 2017 and 2018, the obligation to maintain tax records covering the same scope ratione personae was only imposed on taxpayers whose revenues or costs within the meaning of the regulations on accounting and determined based on the accounts exceeded EUR 2 million in the previous tax year. Estimation of whether the threshold value has been exceeded or not takes into account all the revenues and costs, including other operating revenues (or costs) arising from the taxpayer's accounts. The criterion ratione personae did not cover payment of receivables to a resident of a tax haven.

[12] Journal of Laws No. 40, item. 463.

[13] See, e.g., judgement of the Supreme Administrative Court of 15 January 2013, II FSK 1052/11.

Since 1 January 2019, the criterion ratione personae has been completely replaced by the criterion of value of a controlled transaction just as the case was between 2001 and 2016. According to the project promoter, this allows to avoid a situation where taxpayers that make high value transactions with related parties but who simultaneously do not exceed the EUR 2,000,000 revenue or cost threshold are exempt from the obligation to document transfer prices; while taxpayers that slightly exceed this threshold are obliged to document transactions with related parties, whose total value exceeded the transactional threshold (see below). It was reasonable to take into consideration the fact that it is the value of transactions with related parties (rather than the level of taxpayer's revenues/costs) that is directly related to the degree of risk of under-reporting taxable profit.

The definition of relations, which is crucial in the context of transfer prices, has been considerably different since 01 January 2019. By that time, a capital link was understood as "having at least 25 per cent direct or indirect share in the capital of an entity" (but only 5% until the end of 2016); whereas an organizational (non-capital) link – as "direct or indirect participation in management or control." As far as relations between Polish residents, that is, only domestic relations, are concerned, related parties are also entities that have:

- family links;
- employment relations;
- capital links.

The same applies to links of the same character that are found between persons that carry out management, control or supervisory functions in these entities. It was difficult to provide a rational justification for the fact that the definition of relations was extended exclusively on domestic relationships.

Since 1 January 2019, the definition of related parties cites significant influence as an important factor establishing a link between entities, which is different from the previous regulations. Simultaneously, one entity may exert influence on other entities within three areas covered by the notion 'significant influence':

- significant influence arising from ownership, management or control relationships, where the 25% threshold has been preserved, however, it does not apply to capital exclusively but also to voting rights in control, decision-making or management bodies, participation units, certificates or other rights arising from profit or equity sharing or related expectancy rights;
- significant influence exerted by a natural person, who is capable of producing an actual impact on key economic decisions made by an entity despite the non-existence of their formal authority in decision-making or control bodies;
- family relations so far defined as maintaining a marriage or the existence of kindred relationships up to collateral affinity.

Additionally, an anti-abusive clause has been in force since 01 January 2019 as regards determination which entities are considered related parties. If there are "artificial" ownership structures or structures where entities have been added to the structure exclusively for the purpose of breaking the chain of relationships, all the entities that are part of such a structure are considered related parties. In the justification to the draft Amendment Act of 2019, any type of ownership structure manipulation (including fiscal fraud of running a business under somebody else's name) and circular relations are provided as examples of such entities / structures that might break the chain of relationships.

Undoubtedly, changes in terms of the prerequisites for relations will protect the state fiscal interests more effectively.

3.3. Significance Threshold

In 2001, an obligation to maintain tax records of transactions with related parties (or entities from tax havens) was imposed on taxpayers, if transaction value exceeded specified transactional limits that were in principle EUR 30,000 or EUR

50,000. The obligation had to be honoured, if transaction value arising from a contract or one that was actually paid within a tax year exceeded the thresholds stipulated in the act, that is, 20, 30, 50 or 100 thousand euro – depending on the type of translation and the ratio of this value to the adjusted share capital (which does not take into account, e.g., conversion of liabilities into equity).

Extension of the documentation obligation to cover agreements on companies without a legal personality, joint venture agreements or agreements of a similar type was followed by an introduction of a value threshold of 50 thousand euro. As far as agreements on companies without a legal personality are concerned, the obligation to maintain tax records of transfer prices was honoured, if the total value of shareholder contributions exceeded EUR 50,000 per agreement. In the case of joint venture agreements or other agreements of a similar type, the limit was imposed on the value of a joint venture specified in the agreement and if such value was not specified in the agreement – on the expected value of the joint venture as of the date of execution of the agreement. At the same time, the threshold decreased to 20,000 euro, if one of the parties to the agreement was an entity that resided, had a registered office or the management board on the territory of or in a country adopting harmful tax competition (Article 9a, section 3a of the CIT Act).

Interpretations and judicial decisions as regards the applicability of transactional thresholds were inconsistent. Ultimately, it was widely established – among others, in the judgement of the Supreme Administrative Court of 17 December 2014 – that the right way to group transactions is to sum their values based on three types of renderings without and referring to their character or conditions. The formation of the court ruled: "... In Article 9a, section 2 of the CIT Act, the legislator does not use the terms 'renderings' or 'specified service' but only makes a distinction ratione materiae between rendering of services, sales of intangible assets, and offering intangible assets for use and made no references to individual services, sales or offerings. (...) If value of a single, individual rendering (or service) is deemed a prerequisite for the imposition of an obligation to maintain tax records, which is provided for in Article 9a, sections 1 and 2 of the CIT Act, without taking into account the totality of transactions with a given related party, it would be impossible to take an overall look on the economic links between these parties and so the objective of the legal regulations in question would not be met. (...) To recapitulate, it is appropriate to once more note that Article 9a, section 2, point 2 of the CIT Act only provides for one way of grouping transactions, that is, services, sales of intangible assets, and offering intangible assets for use. (...) Thus, if a company only indicates transactions documenting services, the prerequisite for the imposition of the documentation obligation in such a case is the total value arising from contracts for services, which have been concluded with a given entity within a tax year (or the total amount of payments due within a tax year)."

Since 1 January 2017, value limits for transactions or other events have been linked to taxpayer's revenues (within the framework of the so-called rolling thresholds). For example, the transactional threshold raises by 5,000 euros per each 1 million euro of revenue over 2 million euro, if taxpayer's revenues amount to 2-20 million euro. The documentation obligation was also imposed on taxpayers that make direct or indirect payments of receivables to an entity residing or having a registered office or the management board on the territory of or in a country 'adopting harmful tax competition'.

Respectively, the TP documentation obligation was extended onto articles of association of partnerships without a legal personality concluded with a resident of a tax haven, if the total value of shareholder contributions exceeded 20,000 euros, as well as joint venture agreements or other agreements of a similar type, if the value of the joint venture specified in the agreement or its expected value as of the date of execution of

Table: Significance thresholds for transactions or other events (2017–2018)

Enumeration	Value of Transaction or Other Event (in EUR)	
	from	to
Threshold for entities from havens	20,000	
Basic threshold	50,000	
For entities that generated between 2 and 20 million euro revenue (or costs) last year	50,000	140,000
For entities that generated between 20 and 100 million euro revenue (or costs) last year	140,000	500,000
For entities that generated over 100 million euro revenue (or costs) last year	500,000	

the agreement, if not specified therein, exceeded 20,000 euros.

Doubts arose as to, among others, determination of the value of a transaction (or other event) – that is, as to whether it included VAT. Neutrality of VAT in relation to income taxes justifies that net prices be taken into consideration for the purposes of income tax. Taking VAT into account in determining transaction value leads to an unjustified differentiation between transactions that are economically the same but subjected to different VAT taxation rules depending on the party to a transaction (such as exempt taxpayer, foreign entity, etc.). What is more, the fact that records are maintained for transactions or other events that "have a significant influence on the amount of income (or loss)" is an additional factor advocating that VAT should not be taken into consideration owing to its essentially neutral character with respect to revenues or costs. It was not entirely clear whether revenues (or costs) disclosed on an accrual basis should be taken into consideration or the ones actually paid (and disclosed on a cash basis). One of the relevant tax interpretations[14] presented a view that there were no grounds for changing the approach followed until the end of 2016.

Since 1 January 2019, threshold values have changed considerably. Local files documenting transfer prices are maintained for controlled transactions of a uniform character, whose values less Value Added Tax exceeds the following documentation thresholds in a tax year:

- PLN 10,000,000 – for transactions in goods;
- PLN 10,000,000 – for financial transactions;
- PLN 2,000,000 – for transactions in services;
- PLN 2,000,000 – for transactions other than the ones specified above.

Simultaneously, documentation thresholds are set separately for:

- each controlled transaction of a uniform character regardless of categorization of a controlled transaction as transaction in goods, services or financial transaction or other;
- the revenue side and the cost side.

Value of a controlled transaction of a uniform character is determined regardless of the number of accounting documents, made or received payments, and related parties that the controlled transaction is concerned with.

These changes also deserve to be assessed positively. In order to specify the obligation to maintain local files of transfer prices, two rigid transactional threshold levels were defined in the Polish currency (apart from a much lower threshold of PLN 100,000 for entities from tax havens), Besides, it was clarified that the thresholds do not include VAT. Due to the fact that documentation thresholds were raised, the level of administrative burdens in terms of documentation obligations placed on the taxpayers was decreased. It was also clarified how controlled transaction

[14] See interpretation of the Director of the Tax Chamber in Katowice of 15 July 2016, IBPB-1-2/ 4510-646/16/JW.

value should be determined for the purposes of identification of the documentation obligation. In accordance with the justification to the draft amendment act, the uniform character of transactions should be understood as similarity of transaction items and other main parameters of transactions which are significant from the perspective of transfer prices (such as, e.g., significant functions, assets, risks, and the manner of calculation of the prices or significant payment conditions, etc.). The uniform character of transactions is determined by its main parameters and not the number of accounting documents or counterparties.

In order to dispel any doubts as regards determination of controlled transaction value for the purposes of identification of an obligation to maintain local files of transfer prices, values recorded on invoices were given priority and if invoices are not issued, values arising from contracts or other documents (e.g., arrangements or notes) are to be taken into account as an alternative, and if there are no such documents or it is impossible to determine controlled transaction value on their basis, the value should be determined based on payments that have been made.

3.4. Exemptions from the TP Documentation Obligation

Since the regulations on documentation obligations were introduced, the obligation has not been applicable to transactions whose price or manner of determining the price of an item of such a transaction arises from statutory provisions or normative acts issued on their basis. That was the case with, for example, prices of government-set wholesale and retail medicinal products and medical devices or government-set prices for transport services in public transport.

Since 1 January 2015, the documentation obligation has not been applicable to members of an agricultural manufacturers group in connection with their essential activity defined in separate provisions of the law. The basis for such an exemption was an assertion that they do not operate as typical commercial entities that are first and foremost oriented at generating profits since their main principle is to place (and sell) goods produced in the households of their members on the market and not purchase and repurchase for profit; all the money obtained from sales is distributed among the members less only the costs of operation[15]. Analogous solutions are offered for transactions between an initially approved group of fruit and vegetables producers or an approved organization of fruit and vegetables producers that operate in line with the act of 19 December 2003 on organization of the fruit and vegetables market and the hop market[16] and the members of these groups.

In principle, the possibility to apply the provisions regarding related parties to transactions conducted between companies forming a tax capital group was excluded.

As far as transactions covered by a decision on recognition of the correctness of the choice and application of a method for determining transaction prices between related parties (APA) are concerned, tax records within the period of validity of such a decision only cover part of the required information (especially financial data, description of the course of transaction or other evens, including functions, risks, assets, human capital, and indication of the method and manner of calculation of income, including justification for their selection).

Since 1 January 2018, the catalogue of entities exempt from the documentation obligation has been extended on relations arising exclusively from relationships with the State Treasury and local government units or their associations.

However, a fundamental change applicable since 1 January 2019 is concerned with an exemption from an obligation to maintain local files of transfer prices for controlled transactions concluded exclusively by related parties residing, having a registered office or the manage-

[15] See justification to the draft act of 15 September 2000 on agricultural producer groups and their associations and amending other acts (Journal of Laws No. 88, item 983).

[16] I.e., Journal of Laws of 2016, item. 58.

ment board on the territory of Poland, if within the tax year when the said transactions are concluded, each related party meets the following conditions:

- is not subject to an exemption ratione personae or exemption resulting from the use of public aid due to running a business, e.g., on the territory of a special economic zone;
- has not incurred tax loss.

It is rational to grant an exemption for controlled transactions whose total value is not permanent revenue or tax deductible, excluding financial and capital transactions or ones concerned with investment, fixed or intangible assets. This is because, it is pointless to document transactions that have no influence on the tax result.

For the same reason, it should be assessed positively that an exemption was granted for controlled transactions consisting in assignment of income to a foreign establishment located on the territory of the Republic of Poland by non-residents, provided that the provisions of relevant international agreements that Poland is a party to stipulate that such income is subject to taxation in only one country.

4. Elements of TP Documentation

In line with the legislator's design, tax records are the basic source of evidence providing information that allows to carry out analysis of the essence of business operations and assess whether remuneration in controlled transactions has been established on an arm's length level.[17] The form of tax records is not regulated in the provisions of the law, however, there are minimum requirements as to their content. Between 2011 and 2016, tax records in principle comprised the following elements:

- determination of the functions that parties to a transaction perform, taking into consideration assets in use and risks taken, that is, the so-called functional analysis;
- determination of all the expected costs related to a transaction as well as payment form and deadline, that is, the so-called cost analysis;
- method and manner of calculation of profits and determination of the price of the transaction item;
- determination of the business strategy and other activity within its framework – if transaction value has been influenced by the strategy adopted by an entity;
- indication of other factors – if such factors are taken into account by parties to the transaction when setting the value of the transaction item;
- determination of the benefits arising from the renderings covered by a transaction provided by the entity obliged to maintain documentation – for contracts on intangible renderings (including services), that is, the so-called benefits analysis.

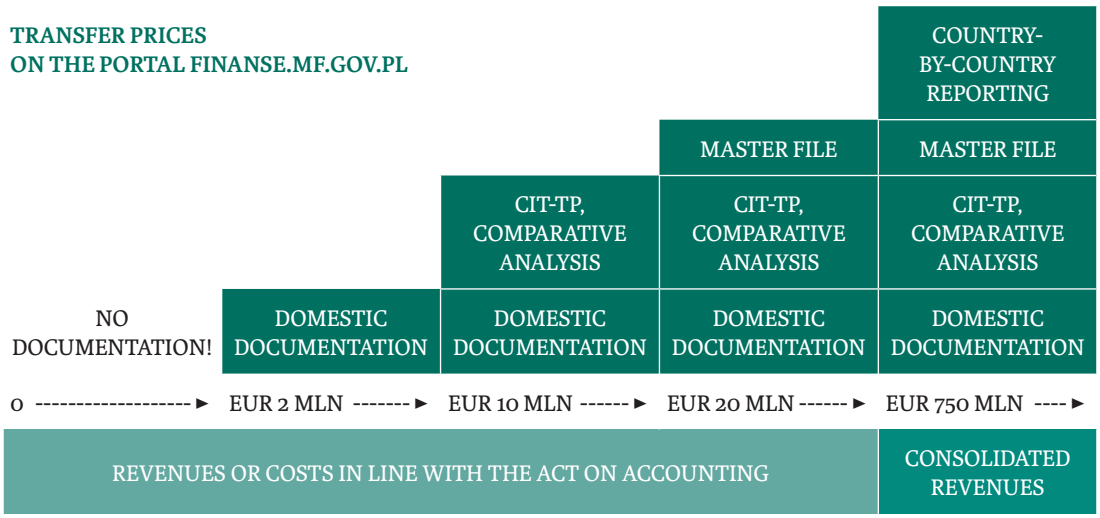
In practice, tax records should also include source documents confirming information provided in the descriptive part, such as invoices, orders, and specifications submitted by a counterparty, material effects of renderings, spreadsheets, business plans, budgets, other documents regarding the pricing policy, commercial correspondence, and data on competitors and the market.

Acting on the BEPS[18] recommendations, the concept of three-tiered transfer pricing documentation has been adopted since 1 January 2017:

- local file – detailed information on transactions or other events recognized in the taxpayer's accounts, which took place between the taxpayer and related parties, if the tax-

[17] As in judgement of the Supreme Administrative Court of 01 March 2011, II FSK 1924/09.

[18] OECD/G20, Base Erosion and Profit Shifting Project, Transfer Pricing Documentation and Country-by-Country Reporting, ACTION 13: 2015 Final Report, OECD Publishing, Paris 2015. Based on the recommendations contained in BEPS Action 13, new content of Chapter V of the OECD guidelines has been developed.



Source: http://www.finanse.mf.gov.pl/web/wp/cit/ceny-transferowe1/dokumentacja-cen-transferowych/aktualne-przepisy

payer's revenues (or costs) exceeded EUR 2 million in the previous tax year;

- master file – information about a group of related entities that the taxpayer is part of, if the taxpayer's revenues (or costs) exceeded EUR 20 million in the previous tax year;
- information about a group of entities (i.e., country-by-country Report, CbC Report) – information, in particular, on the amount of income generated and tax paid as well as places of operation of subsidiaries and foreign establishments that belong to a capital group, if consolidated revenues exceeded EUR 750 million in the previous tax year.[19]

Taxpayers whose revenues (or costs) exceeded the equivalent of EUR 10 million in the previous tax year are also obliged to submit a simplified corporate income tax report (CIT/TP, PIT/TP) containing information on the type of relations between entities, foreign establishments held, among others, on the number of related parties that the taxpayer has entered into transactions or other events with, primary activity, functional profile, undertaken restructuring activity and compensations received or paid on this account, types of transactions or other events entered into with related parties (along with specification of their value, percentage share in the taxpayer's total revenues, and the country where parties to a transaction have their registered offices).[20]

Documentation obligations between 2017 and 2018 are schematically presented in the table above.

4.1. Local file

Local file, which is the basic element of tax records, is prepared by taxpayers whose revenues (or costs) exceeded the equivalent of EUR 2 million in the previous tax year. In principle, the local file comprises:

- description of transactions or other events, including among others, indication of their type and item, description of functions, assets and risks, and indication of the method and manner of calculation of taxpayer's income (or loss) along with a justification for their selection, including the algorithm

[19] See more detailed information in the Regulation of the Minister of Development and Finance of 13 June 2017 on the detailed scope of data transmitted in the country-by-country report and the way it should be filled in (Journal of Laws of 2017, item 1176).

[20] See Regulation of the Minister of Development and Finance of 13 June 2017 on the detailed scope of data transmitted in the country-by-country report and the way it should be filled in (Journal of Laws of 2017, item 1176).

Table: Comparison of the scopes of local files

Provisions applicable until 2016.	Provisions applicable since 2017.
Description of entities – parties to a transaction (it should be simple; there are no specific requirements)	Detailed information about the taxpayer, including a description of: the organizational and the management structure; area and scope of business; relations between the parties; the competitive environment; and business strategy being pursued, including transfers of economically significant functions, assets or risks between related parties, which were carried out during the tax year or in the year preceding the tax year and affected the taxpayer's income (or loss)
Description of transactions – simple and containing functional analysis	Separate description of transactions or other events in a tax year for each type of activity, including extended functional analysis and specification of the taxpayer's functional profile
Description of the price estimation method	Description of the price estimation method along with detailed justification for its selection
Determination of all the expected costs related to a transaction as well as payment form and deadline	Description of the algorithm used for the calculation of settlements for a transaction or other event and the method of calculation of the value of settlements
Financial data (there is no obligation to analyse deviations)	Juxtaposition of the taxpayer's financial data enabling comparison of settlements arising from calculations with data found in the approved financial statement
Determination of the business strategy and other activity within its framework – if it has influenced transaction value	Description of the business strategy being pursued, including transfers of economically significant functions, assets or risks between related parties, which affected the taxpayer's income (or loss) (i.e., the so-called business restructurization)
Comparatives analysis (but optional)	Comparatives analysis (is an obligation for taxpayers with revenues / costs exceeding EUR 10 million)
Master file (there is no obligation)	Master file (is an obligation for taxpayers with revenues / costs exceeding EUR 20 million)

for calculating settlements for a transaction or other event;

- description of the taxpayer's financial data enabling comparison of settlements arising from transactions with data found in the approved financial statement;
- description of the taxpayer, including the description of the organizational and management structure of the enterprise, area and scope of business, business strategy being pursued, and competitive environment.

Income tax agreements (if concluded) as well as documents, in particular contracts and arrangements related to a transaction or other event, should also be attached to the documentation.[21]

Juxtaposition of the basic differences in documentation before and after the said amendment to the provisions on documentation obligations is presented in the table below. It is enough to compare the scope of the required basic local files to conclude that the implemented changes have been fundamental. Taxpayers' burdens arising from the obligation to prepare complete basic documentation have increased significantly.

If an agreement on a company without a legal personality, a joint venture agreement or other agreement of a similar type is entered into, the tax records should specify, in particular, the principles governing the rights of partners (i.e., parties to the agreement) to a share in the profit or participate in the loss, which were accepted within the framework of the agreement. Based primarily on functional analysis, tax records shall need to describe the scope of activities actually performed by individual partners (or investors), the degree of their involvement in company's affairs, and representation as well as the principles

[21] Details as regards the content of the documentation are specified in the Regulation of the Minister of Development and Finance of 12 September 2017 on corporate income tax information to be disclosed in the transfer pricing documentation (Journal of Laws of 2017, item 1753).

governing distribution of the right to share in the profit and participation in the loss.

Since 1 January 2019, the individual components of local files and master files documenting transfer pricing have remained essentially unchanged; however, details will be regulated by the anticipated Regulation of the Minister of Finance. The local file contains the following elements:

1) description of a related party;
2) description of transactions, including analysis of functions, risks, and assets;
3) transfer pricing analysis, which includes:
   a) analysis of data of unrelated parties or transactions concluded with unrelated parties or between unrelated parties, if deemed comparable to the conditions set out in controlled transactions (i.e., comparative analysis) or
   b) analysis of consistency between the conditions that a controlled transaction was based on and the conditions that would have been determined by unrelated parties (i.e., consistency analysis) – if comparative analysis is unsuitable from the perspective of a given transfer pricing verification method or cannot be performed with due care;
4) financial information.

It is especially worth noting that each local file already contains analysis of transfer pricing and comparative analysis, which is its component. If comparative analysis is unsuitable from the perspective of a given transfer pricing verification method or cannot be performed with due care, local file should include another analysis that demonstrates consistency between the conditions that a controlled transaction is subject to and arm's length conditions.

4.2. Comparative Analysis

Between 2001 and 2016, comparative analysis (or the so-called benchmarking analysis) was not obligatory. Since 2017, if taxpayer's revenues (or costs) exceeded the equivalent of EUR 10 million in the previous tax year, the local file has also had to include a description of comparatives or alternatively a description of consistency of the conditions that transactions or other events were subject to with the arm's length conditions. In such a case, the taxpayer should, as a rule, make references to data derived from unrelated parties, for example, data obtained from specialist databases (e.g., the QTPA database meant for Polish entities, the Amadeus database – for European entities, and the Orbis database for analysing enterprises on global markets).

The analysis of comparatives should primarily include information on parties to a transaction; explanation of why the party to a transaction or other event, which is under analysis, has been selected; assumptions that analysis of comparatives was based on and which affect the market value of the transaction item; reasons behind using one-year or multi-annual comparatives or comparatives, including financial data or financial indicators, describing business transactions with unrelated parties or between unrelated parties, which have been rejected or used by the taxpayer to apply an income calculation method; as well as information on any adjustments made; and on the designated market point or corridor along with a description of any statistical measures adopted.

The existing regulations (of 2017-2018) establish, among others things, the obligation for the final comparable group to include analysis of entities having a registered office in Poland and the obligation to justify why multi-annual data or financial data from one year have been used. As far as some types of transactions are concerned, this obligation cannot be fully met due to the unavailability of domestic data on specific types of transactions or other events. Public databases, such as RoyaltyStat, RoyaltySource, Markables or RoyaltyRange, contain mainly information about the conditions that transactions on foreign markets are subject to, for example, on the US market where the conditions of transactions consisting in granting licenses must be reported on an ongoing basis.

Depending on the origin of data that analysis of comparatives is based on, such analysis is divided into internal and external analysis of comparatives. The external analysis of comparatives is based on financial data derived from transactions that a given entity enters into with unrelated parties and which are comparable to the transaction under analysis. While it is possible for related companies whose business profile involves making transactions both with related parties and external contractors (e.g., distributors) to obtain such information; specialised companies operating as a group, which conclude transactions exclusively with related parties, must usually obtain information on comparable transactions carried out by unrelated parties from external databases in order to prepare analysis of comparatives. The external analysis of comparatives, on the other hand, requires much larger financial outlays to obtain information; preparation of a strategy to be followed in analysis referring to the functional profile of the test entity; and selection of appropriate profitability indicators, a suitable method verifying the level of arm's length, and a proper ultimate sample for comparison.

Since 01 January 2019, the new regulations have preserved the obligation to prepare and update the analysis of comparatives, which is part of the local file documenting transfer pricing, at least once in every three years, unless change in economic conditions justifies more frequent updating. Detailed information on the content of comparative analysis will be provided in the implementing provisions.

4.3. Analysis of Transfer Pricing

The table below presents an overview of the transfer pricing estimation (or verification) methods that have been applicable so far.

It is satisfactory that the new regulations in force since 1 January 2019 also allow to use other methods than the five basic ones, including valuation techniques. At the same time, if a different method is selected, the taxpayer is required to justify why none of the basic methods could be

Table. An overview of methods of determining taxpayer's income

Basic methods of determining taxpayer's income	
Comparable uncontrolled price method	Comparable uncontrolled price method consists in comparing the price of the transaction item set for a controlled transaction to the prices used in comparable transactions made by unrelated parties. The comparison is the basis for determining the arm's length value of the item of the transaction between related parties.
Resale price method	The resale price method consists in reducing the price of goods or services set in a transaction that an entity makes with an unrelated party by the resale price margin. The price determined this way can be considered an arm's length price in a transaction between the entity and a related party.
Cost plus method	The cost plus method consists in setting the selling price of goods and rights as well as services in a controlled transaction at the level of the sum of the cost base and the profit mark-up agreed upon by unrelated parties, taking into account comparable functions, risks incurred, and assets employed.
Income determination with transactional profit methods	
Profit split method	The profit split method consists in determining the total profits that related parties have earned from a transaction(s) and split these profits among these entities proportionally to how unrelated parties would distribute them. Distribution of profits is carried out based on: - residual analysis; - contribution analysis.
Transactional net margin method	The transactional net margin method consists in analysing the net profit margin that an entity obtains in a transaction(s) with a related party and determining it at the level of the margin that the entity obtains in transactions with unrelated parties or in comparable transactions between unrelated parties.

Source: Regulation of the Minister of Finance of 10/09/2009 on the mode and procedure of determining legal persons' income by estimation and mode and procedure of elimination of double taxation of legal persons in case of adjustment of profits of associated enterprises.

deemed the most appropriate. Therefore, the rigid set of five estimation arrangements has been abandoned, which in the light of specific complex conditions of many controlled transactions (e.g., reorganization) is fully justified. However, the five basic methods still take precedence over other methods.

4.4. Master File

Since 1 January 2019, the regulations on preparing transfer pricing documentation for a group (i.e., the so-called Master File) have been slightly modified by imposing this obligation onto related parties that belong to a group of companies; a (fully or proportionally) consolidated financial statement is to be prepared for such a group, if its consolidated revenues exceed PLN 200,000,000 or the equivalent of this amount in a different currency. No later than by the end of the 12th month following the end of a financial year, the taxpayers are required to attach to the master file for the completed financial year to the local file documenting transfer prices. The longer deadline for submitting the master file is intended to ensure that the documentation is available to the taxpayer, even if it is prepared by another entity within the group of companies.

It is also possible expresis verbis for the taxpayers to use the English version of the master file compiled by another entity belonging to the group of related entities. It is thus a facilitation as regards the obligation to prepare transfer pricing documentation for taxpayers belonging to international groups of companies. At the same time, upon request of the authorities, the taxpayer is obliged to submit the master file in Polish within 30 days from the date of delivery of the request.

The master file documenting transfer prices contains similar elements as before:

- description of the group of companies;
- description of significant intangible fixed assets of the group;
- description of the group's significant financial transactions;
- group's financial and tax information.

5. Safe Harbours

So far only the description of low-value-adding services could potentially be treated as a simplification in the TP documentation obligation. If a transaction in low-value-adding services was made, the taxpayer had the right to submit a description of the transaction. It was not an obligatory element of documentation of transactions in low-value-adding services between related parties, as opposed to maintaining obligatory tax records. Introduction of regulations in this respect was intended to be a facilitation for taxpayers. However, this goal had hardly been achieved since taxpayers were not exempted from the obligation to prepare transfer pricing documentation. If a related entity provides the tax authorities or tax audit authorities with a description of a transaction in low-value-adding services, the authorities shall, first and foremost, examine the transaction based on the description provided. The regulations on transfer pricing define low-value-adding services as routine services, which support the primary activity of the recipient of the services, are generally or readily available, and give rise to high added value neither for the service provider nor the recipient.

In 2019, the requirements for transfer pricing were actually simplified as regards low-value-adding services (i.e., safe harbour solutions were implemented). The tax authority will refrain from determining the amount of income or tax loss in transactions that meet all the following conditions:

1) the mark-up on costs of these services has been determined using the cost plus method or transactional net margin method and equals:
   a) no more than 5 per cent of the costs – if services are purchased;
   b) no less than 5 per cent of the costs – if services are rendered;
2) the service provider is not an entity residing, having a registered office or the management board on the territory of or in a country engaging in harmful tax competition;

3) the recipient of the service is in possession of a calculation that includes the following information on:
   a) the type and amount of costs taken into account in the calculation;
   b) the manner of application and justification for the choice of allocation keys for all related parties using the services.

At the same time, taxpayers using Safe Harbours for such services are exempt from the obligation to attach transfer pricing analysis to the transfer pricing documentation. The mechanism that has been introduced (including the content of the cost base) as well as the mark-up level at 5 per cent of the cost base constitute implementation of the recommendations provided in the OECD Guidelines[22] and the results of the work of the EU Joint Transfer Pricing Forum on low-value-adding services[23].

The safe harbour regulation is introduced as regards verification of the arm's length character of a loan interest rate and, on that basis, determination of income or tax loss for loans meeting all the following conditions:

- the loan interest rate as of the day of agreement execution is determined based on the type of base interest rate and margin specified in the announcement of the Minister of Finance valid on the day of agreement execution;
- no payment, including commissions or bonuses, related to granting or servicing a loan other than interest is stipulated;
- the loan was granted for a period not longer than 5 years;
- during the financial year, total liabilities or receivables of an entity arising from the principal of loans granted to or received from related parties, which are calculated separately for loans granted and received, amount to no more than PLN 20,000,000 or the equivalent of this amount;
- the lender is not an entity residing, having a registered office or the management board on the territory of or in a country engaging in harmful tax competition;

TP simplifications also apply to credits and issuance of bonds. The announcement is applicable to the types of base interest rates applied on the interbank financial market, which are related to a given currency and the duration of the interest period, such as the interbank WIBOR rate for loans in PLN.

If transactions meet these requirements, the taxpayer does not need to prepare comparative analysis either.

It is true that the safe harbour regulations that have been introduced increase transparency and simplicity of application of the rules governing documentation obligations. This is turn enhances taxpayers' confidence in meeting the transfer pricing requirements and reduces administrative burdens.

6. Conclusion

Growth in importance of transfer pricing both for the tax administration and groups of companies leads to an introduction of comprehensive regulations regarding documentation obligations. The regulatory trend is clear-cut; the complexity and level of detail of information handed over to tax authorities is being increased for the entities obliged to document transfer pricing, including as regards sensitive financial data. The provisions of the law that are currently applicable in Poland establish the obligatory elements of tax records but do not impose any particular form they should be handed over in.

It might turn out difficult to reconcile business goals with the safety of an enterprise in terms of taxation. The amendments that have been introduced to the regulations on reporting and doc-

[22] Point 7.61 of the OECD Guidelines of July 2017.

[23] Communication from the Commission to the European Parliament, the Council, and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the period from April 2009 to June 2010 and related proposals: 1. Guidelines on low-value-adding intra-group services and 2. Potential approaches to non-EU triangular cases 1. Appendix I, point 65 (Brussels, 25/01/2011, COM (2011) 16).

umentation obligations since 2017 cause enterprisers, especially the large ones, to incur larger administrative and financial expenses as well as risk connected to transfer prices. The year 2019 will mark the beginning of a new era in transfer pricing in Poland owing to the introduction of, among others, altered reporting and documentation obligations.

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