The Transfer Pricing Law Review

Fourth Edition

Editors
Steve Edge and Dominic Robertson

The Law Reviews

THE TRANSFER PRICING LAW REVIEW

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PREFACE

It has been a great pleasure to edit this fourth edition of *The Transfer Pricing Law Review*. This publication aims to give readers a high-level overview of the principal transfer pricing rules in each country covered in the *Review*. Each chapter summarises the country's substantive transfer pricing rules, explains how a transfer pricing dispute is handled, from initial scrutiny through to litigation or settlement, and discusses the interaction between transfer pricing and other parts of the tax code (such as withholding taxes, customs duties, and attempts to prevent double taxation).

Other than Brazil, all the countries covered in this *Review* apply an arm's-length standard and adhere, at least to some extent, to the Organisation for Economic Co-operation and Development Transfer Pricing Guidelines (the OECD Guidelines); and Brazil itself has recently launched a project to align its transfer pricing rules with the OECD norm. However, as the chapters make clear, there remains significant divergence, both in countries' interpretation of the arm's-length standard (e.g., the transactions it applies to, the pricing methods preferred and whether secondary adjustments are imposed) and in the administration of the rules (e.g., the documentation requirements imposed, and the availability of APAs). Transfer pricing practitioners, therefore, cannot simply assume that the OECD Guidelines contain all the answers but must in fact engage with their detailed application within each country.

As we have said in earlier editions of the *Review*, transfer pricing rules will be high on the corporate tax agenda for many years to come, and they are continuing to evolve at a rapid pace. Over the next year or so, we expect the following to be among the main areas of focus.

First, as in so many other areas of endeavour, the covid-19 pandemic raises new challenges for transfer pricing, and may in some cases invert the 'normal' argument between taxpayers and tax authorities. For example, will tax authorities which have previously argued that a company is not a routine service provider, and should be rewarded through a profit split, now accept that the company therefore needs to bear a share of the group's covid-19 losses? Looking further forward, the experience from the 2008 financial crisis suggests that, in the medium term, the need for tax revenues is likely to push tax authorities towards a more assertive approach in transfer pricing cases.

Second, a number of countries may see disputes over the extent to which transfer pricing can be used to recharacterise transactions, rather than merely to adjust the pricing of transactions. For example, the German courts held last year that transfer pricing rules are not limited to pricing adjustments alone; and Ireland introduced rules that enable the Irish Revenue to impose a 'substance over form' principle.

Third, the long-awaited OECD Transfer Pricing Guidance on Financial Transactions was published in February 2020. Although its immediate impact has been rather overshadowed by the covid-19 situation, many taxpayers, and tax authorities, will need to get to grips with the potential impact of this guidance on them.

Finally, the OECD/G20 project to address the tax consequences of digitalisation continues to work towards its target of presenting an agreed solution by the end of 2020. The current Pillar One and Pillar Two proposals would, if enacted, be the most far-reaching change to transfer pricing principles in close to 100 years, and would mark a significant shift away from the arm's-length principle. The desire to shore up tax revenues in light of covid-19 may well encourage the countries that expect to be 'winners' from the proposals to push for an agreed outcome. It is worth noting, however, that the reforms will not be a silver bullet for public finances. The OECD expects the reform to increase corporate tax revenues by 4 per cent; in the UK, for example, that would raise enough money to fund the National Health Service for only one week.

We would like to thank the authors of all of the country chapters for their comprehensive and illuminating analysis of each country's transfer pricing rules; and the publishing team at Law Business Research for their diligence and enthusiasm in commissioning, coordinating and compiling this *Review*.

Steve Edge and Dominic Robertson
Slaughter and May
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Chapter 18

POLAND

Sławomir Łuczak, Magdalena Polak and Wojciech Węgrzyn[1]

I OVERVIEW

Polish transfer pricing regulations refer to and link directly to the Organisation for Economic Co-operation and Development (OECD) principles. Moreover, they are changing to be in line with current OECD standards: Poland has already incorporated rules on country-by-country reports (CbCRs); a three-step approach to transfer pricing documentation (a master file, a local file and a CbCR); and guidelines on low value-adding services. Despite this, OECD standards are not formally implemented as a part of Polish domestic law. However, they are a source of interpretation in practice, not only for taxpayers or tax authorities, but also for administrative courts. Usually the most recent version of the OECD Transfer Pricing Guidelines is applied, also with respect to transactions predating those Guidelines.

Polish transfer pricing regulations apply to income taxes, both corporate income tax (CIT) and personal income tax (PIT), covering corporations (legal persons or units without legal personality) and individuals. As Polish law does not recognise trusts, there are no specifics applying to them. Further, there are also transfer pricing regulations implemented on the grounds of value added tax (VAT), applicable in specific circumstances.

i CIT/PIT

Polish transfer pricing regulations provided for in the CIT[2] and PIT[3] Acts cover a wide definition of related parties. Accordingly, a relationship between parties occurs when:

a an entity exercises a significant influence on the other entity;

b significant influence on both entities is exercised by the same other entity or the spouse or a relative by consanguinity or affinity up to the second degree of a natural person exercising a significant influence on at least one entity;

c a partnership without legal personality is established; or

d a permanent establishment is created.

The exercise of a significant influence is understood as:

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2 Act dated 15 February 1992.

3 Act dated 26 July 1991.

a holding directly or indirectly at least 25 per cent of shares in the capital or voting rights in the supervisory, decision-making or managing bodies, or shares in or rights to participate in the profits or the property or their expectative, including participation units and investment certificates;
b the actual ability of a natural person to influence key economic decisions taken by a legal person or an organisational unit without legal personality; or
c being the spouse or a relative by consanguinity or by affinity up to the second degree.

Since 1 January 2017, Polish legislators have implemented a very wide definition of transfer price. As of that date, the transfer price is not only the price used in all transactions, but also other events reported in accounting books between related parties. This also includes a company deed of a company without legal personality, a joint venture agreement or another similar agreement. The definition of a transfer price also covers making payments of receivables – whether directly or indirectly – to an entity having its place of residence, registered office or management board within a territory or country that applies harmful tax competition, where such payments arise out of transactions or other events, including a company deed of a company without legal personality, a joint venture agreement or another similar agreement.

The CIT and PIT Acts explicitly provide that associated enterprises are obliged to set transfer prices on terms that would be agreed between unrelated entities. Otherwise, the tax authorities are entitled to reassess the reported income tax to align it with the arm's-length principle. As from 2019, the tax administration has also been specifically endowed with the power not to recognise, or to recharacterise, a transaction that is economically irrational, namely a situation in which unrelated entities, guided by economic rationality, would not conclude a given controlled transaction or would conclude a different transaction, or would take another action.

Since 2018, regulations have been introduced that limit costs deductibility from certain services with related parties. According to those regulations, costs from the following are limited to 5 per cent of tax-EBITDA:[4]

a advisory services, market research, advertising, management and control, data processing, insurance, guarantee and surety services, and similar;
b all kinds of fees and charges for the use of or the right to use rights or values; and
c transfer of the risk of debtor's insolvency in terms of debt receivables due to loans other than loans granted by banks and credit unions, including under derivatives agreements and similar.

Excluded from the above are services covered with advance pricing agreements (APAs), as well as costs of intangible services directly related to production of goods or provision of services. Limitations will apply to services in excess of 3 million zlotys.

4 The tax-EBITDA of a company is a measure of its earnings before interest, tax, depreciation and amortisation computed according to corporation tax rules.

ii VAT

A slightly different definition of related parties is provided for in the VAT Act.[5] The qualified relationship exists when, among contracting parties, there are the links mentioned above or links based on adoption or employment.

The tax authorities are entitled to reassess remuneration for the supply of goods or services established between associated enterprises if it does not satisfy the arm's-length principle, but only in specific conditions (see Section VIII). Excluded from the above are supplies covered in advance pricing agreements (APAs).

II FILING REQUIREMENTS

Since 2017, a tripartite approach to transfer pricing documentation has been introduced in Poland. This means that, depending on a taxpayer's situation, a taxpayer may be obliged to prepare transfer pricing documentation that meets the requirements of a local file, a master file or a CbCR. As well as documentation requirements, there are other tax obligations.

The documentation requirements and other obligations are presented in the table below:

Threshold	Transfer pricing documentation	Other obligations
10 million zlotys (commodity or financial transactions); 2 million zlotys (other transactions)	The taxpayer is obliged to prepare a local file, which should include: • a description of the taxpayer; • a description of the transaction, including a functional analysis covering any functions, risks, and assets involved; • an analysis of the transfer prices, including: a benchmarking study or – if preparation of a benchmarking study is not appropriate in the light of a given transfer pricing method or where it is not possible – an analysis demonstrating the conformity of the terms on which the controlled transaction is concluded with the terms that would be agreed between unrelated entities; and • financial information.	The taxpayer is obliged to prepare a local file no later than the end of the ninth month following the end of a tax year. Within the same term, the taxpayer is obliged to: • inform the pertinent tax office, subject to penal fiscal liability, that the local file has been prepared and the prices conform to the arm's-length principle; and • submit a simplified report on the transactions or other events with related parties. On the request of the tax authority, the taxpayer is obliged to prepare and present a local file covering a transaction or other event below the threshold. This obligation should be fulfilled within 30 days of the delivery of the request.
200 million zlotys of consolidated revenues	The taxpayer is obliged to prepare a master file, which should include: • a description of the capital group; • a description of the important intangible assets of the group; • a description of the major financial transactions of the group; and • financial and tax information of the group.	The taxpayer is obliged to prepare a master file no later than the end of 12th month following the end of a tax year.
750 million euros (in case consolidated revenues are reported in zlotys: 3,250 million zlotys of consolidated revenues)	The taxpayer has to file the CbCR with its tax office. The CbCR includes information on: the amount of income generated and tax paid; locations in which the capital group pursued its activities; and the location of the activities of its subsidiaries and foreign establishments that form part of the capital group during a given fiscal year.	The taxpayer is obliged to file the CbCR with the tax office within 12 months of the end of the taxpayer's fiscal year.

The transfer pricing documentation pertaining to transactions or other events carried over into the next fiscal year has to be periodically reviewed and updated at least once in every fiscal year, before the end of the period for the submission of the annual tax return. Further,

5 Act dated 11 March 2004.

taxpayers are obliged to provide benchmarking studies of transactions or other events, and should also update these studies at least once every three years, unless there is a change of economic conditions that has a significant impact on the analysis of comparative data such that it justifies conducting a review during the year in which the change takes place.

In 2019, Poland introduced a mandatory disclosure regime. In certain cases, transfer pricing settlements may create a reportable tax scheme under these regulations. Specifically, the obligation should arise if hard-to-value intangibles are transferred between the associated enterprises or they carry out restructurings that may significantly impact the future earnings before interest and tax of any of the participating entities. The reporting obligation generally arises within 30 days of (1) the scheme being made available, (2) the scheme being prepared for implementation, or (3) the first step related to the implementation of the scheme being performed – depending which of these events took place earlier.

III PRESENTING THE CASE

i Pricing methods

The conditions under which transactions or other events are performed between related parties should comply with the conditions agreed upon between independent entities, or conditions established by the party with an independent entity in comparable circumstances. Therefore, transfer pricing regulations[6] indicate that all terms of transactions or other events between related parties should be presented in a comparability analysis (a benchmark or benchmarking study). It is an essential tool for both tax authorities (examining the terms of a transaction between related parties) and taxpayers (defending the method of transfer pricing applied). It also helps to evaluate whether the arm's-length principle is satisfied or not, as without it market prices would be hard to determine.

The analysis should take into account:

a the characteristics of goods, services or other benefits;

b the course of the transaction (parties' functions, engaged assets, human capital and incurred risks);

c the terms of the transaction;

d the economic conditions present at the time and place the transaction is executed; and

e an economic strategy – taking all the features of the analysis into consideration, its aim is to identify not only the conditions of the transaction that would be set by independent entities, but also the most appropriate pricing method.

Regarding pricing methods, to verify whether the conditions of transactions between related parties are consistent with market conditions, transfer pricing regulations define five pricing methods that may be used by tax authorities, which are:

a the comparable uncontrolled price method – most often used in reference to typical products that can be publicly traded (i.e., by online exchange of agricultural products and goods);[7]

6 The comparability analysis requirements are regulated in the Regulation of the Minister of Finance of 21 December 2018 on transfer prices in corporate income tax and in the Regulation of the Minister of Finance of 21 December 2018 on transfer prices in personal income tax.

7 Wójcik Zbigniew, 'Metoda porównywalnej ceny niekontrolowanej' in: Nykiel Włodzimierz, Strzelec Dariusz, *Podmioty powiązane. Ceny transferowe. Dokumentacja podatkowa*, LEX 2014.

b the resale price method – most often used in the case of distributors, who are inclined to further market goods without improvements;[8]

c the cost-plus method – most often used in the case of manufacturers or service providers selling goods or services in a standardised and routine manner;[9]

d the transactional net-margin method – most often used in the case of distribution business transactions;[10] or

e the profit split method.

Transfer prices should be verified using the method that is most appropriate under given circumstances. Where it is impossible to use the methods referred to above, another method that is most appropriate under given circumstances, including valuation techniques, may be used. In determining the most appropriate method under given circumstances the availability of information necessary for the correct use of the method, and any specific criteria for the use of the method should be taken into account.

In 2019, Poland introduced safe harbours for loans and certain categories of low value-adding intra-group services. If the criteria for application of the safe harbours are met, the transfer price established by a taxpayer may not be subject to reassessment by the tax authorities.

ii Authority scrutiny and evidence gathering

In January 2016, representatives of the Polish government signed the Multilateral Competent Authority Agreement concerning the automatic exchange of information contained in CbCR forms. In parallel, the specific provisions on CbCRs were also applied from 1 January 2016, imposing a tax obligation to submit information about the group within 12 months of the end of the taxpayer's fiscal year. The requirements of content and structure of the CbCR were introduced in the Regulation of the Minister of Development and Finance,[11] which is consistent with the forms recommended by the OECD in the 2015 Final Report on Action 13 of the OECD Base Erosion and Profit Shifting Action Plan. Moreover, the Act of 9 March 2017 on Tax Information Exchange with Other Countries introduced the exchange of tax information concerning, for example, the automatic exchange of information on advance pricing arrangements (APAs), tax rulings and CbCRs. Thanks to those regulations, Polish tax authorities have gained new tools to gather information and evidence about taxpayers and their related entities. Consequently, one may predict that the international and global tax position standard and the profit share per jurisdiction assessment will be standard in the future.

8 Kosieradzki Tomasz, Piekarz Radosław, *Ceny transferowe. Nowe zasady dokumentacji*, 'Rozdział 6 Metoda ceny odsprzedaży', WK 2016.

9 Kosieradzki Tomasz, Piekarz Radosław, *Ceny transferowe. Nowe zasady dokumentacji*, 'Rozdział 5 Metoda rozsądnej marży (koszt plus)', WK 2016.

10 Wójcik Zbigniew, 'Metoda marży transakcyjnej netto' in: Nykiel Włodzimierz, Strzelec Dariusz, *Podmioty powiązane. Ceny transferowe. Dokumentacja podatkowa*, LEX 2014.

11 See the Regulation of the Minister of Development and Finance on the detailed scope of data transferred information about a group of entities that will be passed in the CbCR dated 13 June 2017, in Polish: 'Rozporządzenie Ministra Rozwoju i Finansów w sprawie szczegółowego zakresu danych przekazywanych w informacji o grupie podmiotów oraz sposobu jej wypełniania'.

IV INTANGIBLE ASSETS

Polish transfer pricing regulations introduced in 2019 include specific provisions governing comparability analysis of hard-to-value intangibles (HTVIs). When carrying out the comparability analysis of HTVIs, the tax authorities are expected to take into account principles regarding the development, enhancement, maintenance, protection and exploitation (DEMPE) of intangibles, as well as determining whether independent entities in comparable circumstances would have adopted price adjustment clauses or contingent pricing arrangements, and whether the related entities took into account any foreseeable and predictable developments at the time of entering into the transaction.

In practice, the tax authorities had been scrutinising the substance behind transactions involving HTVIs and applying DEMPE principles even before the 2019 amendments to the law; this had been the case ever since the July 2017 update of the OECD Transfer Pricing Guidelines (the OECD Guidelines).

V SETTLEMENTS

APAs were introduced into the Polish tax system from 1 January 2006. They are issued by the central authority overseeing tax administration – the head of the National Fiscal Administration (NFA).

The procedure to issue an APA decision starts with a domestic entity's request, indicating the proposal of the pricing or cost distribution methodology; the reasoning for this method; and the necessary materials and documents, including a complex economic and financial analysis of the transaction and proposal regarding the decision's validity period. The scope of the request cannot include transactions completed before the date of the submission of the request or transactions started before that date that are already subject to tax audits before the tax authorities or administrative courts. However, the APA decision may cover the whole tax year in which the request is submitted.

The regulations distinguish three categories of APA decisions: one-sided, bilateral and multilateral. One-sided APA proceedings are carried out by the Polish tax authorities. The bilateral APA decision is in turn concluded between domestic and foreign entities and requires the approval from a tax authority of the given foreign country. If an arrangement concerns entities from more than one foreign country, the approval of each foreign tax authority is necessary to be able to conclude the applicable multilateral APA decision.

The proceedings to issue the APA decision do not differ much from a typical tax audit: the applicant has to fulfil formal requirements, is entitled to submit additional clarifications and documents and even change the proposed pricing method (by the time the decision is issued) or withdraw the request. The APA proceedings should be completed without undue delay. The maximum limitation periods for case settlement are six months for a one-sided decision, a year for a bilateral decision, and 18 months for multilaterals. However, in practice, these terms may be extended.

The APA decision issued may be valid for no longer than five years, and may be renewed for subsequent periods, albeit no longer than five years, upon the request of a domestic entity filed no later than six months after the lapse of the previous period of validity. The renewal, which is also issued in the form of a decision, is possible if the elements of the decision have not changed in any significant manner.

The APA decision may be amended or declared expired before the end of its validity period only in the case of a change of economic relations that results in the agreed terms of transaction being grossly inadequate. The APA decision may also be declared expired *ex officio* by the NFA when the related parties do not apply the transaction price or the conditions defined in the decision.

APAs were not particularly popular in the past, but this situation changed dramatically with the introduction in 2018 of provisions limiting deductibility of costs of certain categories of intra-group services above 5 per cent of tax-EBITDA (see Section I). This limitation does not apply to transactions covered by an APA, therefore many MNEs incurring substantial costs for such services have submitted applications for APAs.

VI INVESTIGATIONS

Tax authorities are entitled to investigate taxpayers to assess whether transactions or other events between related parties were performed in accordance with transfer pricing regulations. Therefore, the subject of the transfer pricing investigation usually concerns:

a CIT or PIT grounds – whether the related parties have set the transaction's conditions differently than independent entities would agree on; or

b VAT grounds – whether the remuneration for goods or services set by related parties (a customer and a person supplying the goods or the supplier itself) was at the market-value level.

The transfer pricing investigation may then state that the pricing of the transaction or other event between related parties was in line with conditions that would be set by independent parties, or it may indicate some irregularities arising from the relationship between the parties. In the second case, the tax authorities have the right to determine the taxpayer's taxable amount and tax due (see Section VIII).

The investigation may be initiated if the taxpayer's tax liability expires. As a rule, the limitation period is five years beginning at the end of the calendar year in which the time limit to pay tax ended. That means that, owing to the effluxion of time, the tax liability expires by law and the tax authority cannot effectively demand payment of the tax due, as in fact it no longer exists. Nevertheless, the Polish tax system provides a catalogue of numerous circumstances that may suspend or interrupt the limitation period. The most common reasons to suspend the limitation period are: the application of an enforcement measure of which a taxpayer was notified; the commencement of proceedings in a case involving a fiscal crime or fiscal offence of which the taxpayer has been notified; or if a complaint against a decision concerning that liability is filed with an administrative court. Moreover, the limitation period is also interrupted with the taxpayer's declaration of bankruptcy.

There are three types of tax investigation that may consider transactions or other events between related parties: a tax audit; tax proceedings; and a customs and fiscal audit. The choice of tax investigation depends mostly on whether a taxpayer has been identified for investigation and what kind of tax authority is going to perform the investigation.

i Tax audit

A tax audit starts with a notification being sent to the taxpayer that a tax audit is to be conducted. The tax audit is initiated no earlier than seven days and no later than 30 days from delivery of the notification. In certain circumstances, a tax audit may be conducted without prior notification being given (e.g., a fiscal or commercial offence has been committed).

The tax audit ends with the delivery of the tax authority protocol. The protocol consists of a description of the facts of the case and a legal assessment, but it does not constitute the taxpayer's liability. If the tax audit indicates some irregularities, after the delivery of the protocol, the taxpayer may agree with the tax authority and correct its tax settlements and tax return; or make reservations and clarifications to the protocol within 14 days of its delivery. The tax authority is then obliged to review these within the next 14 days. A tax audit that has ended in a dispute between the tax authority and the taxpayer usually continues in the form of tax proceedings.

ii Tax proceedings

The main aim of a tax proceeding is to settle the case by issuing a pertinent decision. To issue the pertinent decision, the tax authority will establish the case facts, collect evidence and make the most appropriate tax assessment. In most cases, tax proceedings are initiated by the tax authority when the tax audit reveals taxpayer irregularities.

Tax proceedings should be settled without undue delay. When evidentiary hearings are required, limits are longer and are set at a month or, in particularly complicated cases, two months from the day proceedings begin. In practice, these limits are not adhered to and tax authorities extend them according to the case's complexity.

Tax proceedings are a two-instance procedure. The first ends with a decision that may be subject to appeal by the taxpayer. The taxpayer's appeal must be submitted within 14 days of the date of the delivery of the initial decision. In the event of an appeal, the upper instance examines the whole case anew and settles the case with a further decision.

Appellate proceedings should be settled at the latest within two months of the submission of the appeal and, in cases where a trial was conducted, at the latest within three months. These time limits are often extended by the tax authorities.

The decision of the upper instance is final and enforceable. However, this decision still may be challenged by lodging a complaint with the voivodeship administrative court (see Section VII).

iii Customs and fiscal audit

The customs and fiscal audit was introduced into the Polish tax system as of 1 March 2017, and it replaced the fiscal audit procedure. The tax authorities that may initiate such an audit are customs and fiscal offices. The audit is initiated only *ex officio* on the basis of authorisation to carry it out. To resolve the matter that led to the authorisation being issued, the taxpayer may correct its tax returns within 14 days of receiving the authorisation. After that date, corrections made before the end of the customs and fiscal audit have no legal effect.

Customs and fiscal audit cases should be settled without undue delay, but not later than within three months of being started. As in other investigative procedures, the tax authorities may also extend the length of the investigation in these cases.

The customs and fiscal audit ends with the delivery of the audit's findings. Similarly to the tax audit, the taxpayer has the right to correct its tax settlements and tax returns within 14 days of the audit's delivery. If irregularities were indicated during the audit and the taxpayer did not correct its tax settlements and tax returns, the audit investigation transforms into tax proceedings. The tax proceedings are then continued by customs and fiscal offices in line with the scheme described in Section VI.ii.

VII LITIGATION

i Procedure

Transfer pricing cases may be the subject of a dispute before administrative courts only when the taxpayer lodges a complaint against the tax authority's decision. The complaint must fulfil formal requirements (e.g., be submitted within 30 days of the delivery of the decision via the tax authority that issued the decision). When a complaint is lodged, the administrative authority is under an obligation to turn it over to the court with the relevant files and to prepare a response within 30 days of the date the complaint was submitted. It must be emphasised that the complaint process is not particularly formalised since the only requirement is for a letter in a court proceeding.

In examining the tax authority's decision, the court's main task is to check whether the decision was taken in accordance with the law, both in terms of substantive and procedural provisions. Although the court rules within the limits of the case, it is not bound by the claims or statements made in the complaint or the legal grounds raised by the party (i.e., a taxpayer or a tax authority). Consequently, the court independently assesses the correctness of the decision. What is important is that the procedure before the administrative courts does not provide extensive evidentiary proceedings. Although the regulations of the Act on Proceedings before Administrative Courts[12] allow evidence to be taken from documents, in practice, courts reject parties' applications to submit evidence. This includes expert witness evidence.

The administrative courts may dismiss the complaint or overturn a decision fully or partially.

The administrative court's decision may be appealed to the Supreme Administrative Court, whose judgment is final. A cassation appeal is lodged via the court that issued the judgment, within 30 days of the date of judgment and the delivery of its justification. The cassation appeal may only be based on strictly defined grounds, namely a violation of substantive law – on account of an erroneous interpretation or incorrect application of law, or the breach of procedural regulations where the breach could have seriously affected the outcome of a particular case. It is also more formalised than a complaint to the administrative court (e.g., the cassation appeal has to be prepared and submitted by professional proxy (advocate, attorney at law or tax adviser)).

As a rule, a case before the administrative court should be completed as soon as possible. However, the reality is slightly different as the waiting time for the first hearing can take up to 18 months.[13] A taxpayer lodging a complaint at the voivodeship administrative court in Warsaw or Krakow will likely wait for approximately one year before the case is considered. A backlog of cases in the Supreme Administrative Court (as it is the only upper administrative court in Poland) causes long delays in obtaining a hearing date, up to 18 months.[14]

ii Recent cases

As of 1 January 2019, transfer pricing regulations have changed significantly. For this reason, the new regulations have not yet been subject to extensive juridical interpretation. Nevertheless, recent judgments may continue to be relevant.

12 Act of 30 August 2002.

13 Sławomir Łuczak, Karolina Gotfryd, *The Tax Disputes and Litigation Review*, Fifth Edition (Law Business Research), Poland, Section III.

14 ibid.

Transfer pricing documentation

Judgment of the Voivodeship Administrative Court in Wroclaw, Ref No. I SA/Wr 861/19, 9 January 2020

This case regarded the exemption from local TP documentation applying to transactions between related entities being Polish tax residents, which did not incur tax loss. There are two sources of revenues, and accordingly two sources of potential tax loss (from capital gains and from other sources). The question was whether the exemption may still apply when tax loss is incurred in only one of these sources. According to the judgment, conditions of exemption are met only when there is no tax loss in both sources of revenues.

Judgment of the Voivodeship Administrative Court in Wroclaw, Ref No. I SA/Wr 900/19, 6 February 2020

New TP regulations introduced in 2019 oblige taxpayers to prepare local TP documentation for controlled transactions of a homogeneous nature, the value of which exceeds set thresholds. Such value, according to the Court, is determined irrespective of the number of accounting documents, made or received payments and affiliated entities with which the controlled transaction is concluded. In the case a credit or a loan is a controlled transaction, the value corresponds to the capital amount and not the interest amount.

Judgment of the Voivodeship Administrative Court in Szczecin, Ref No. I SA/Sz 904/17, 15 December 2017

This case concerned a question of how a controlled transaction of a homogeneous nature should be understood, especially how to treat two separate lease agreements concerning two distinct production halls. The Court accepted the view of the tax authority that such agreements constitute one transaction of a homogenous nature. In fact, the value of those agreements should be calculated together to determine whether they exceed TP documentation thresholds.

Judgment of the Supreme Administrative Court, Ref No. II FSK 4000/13, 8 March 2016

This case regarded the obligation to prepare transfer pricing documentation for transactions between related treasury companies. The transactions concerned shares and stock contributions to the related company. The Supreme Administrative Court stated that the transfer pricing regulations and resulting taxpayer's obligations also apply to transactions involving the transfer of goods, money and other things of value, regardless of whether an economic operation triggers any income tax to be paid. Therefore, transfer pricing documentation is also required in the case of tax-neutral transactions.

Transfer pricing assessment

Judgment of the Voivodeship Administrative Court in Warsaw, Ref No. III SA/Wa 2116/18, 5 September 2019

This case concerns a taxpayer who financed an investment in a shopping centre through a loan granted by a related entity. The interest rate was questioned by the tax authority, taking into account, for example, the average level of bank loan interest granted to an unspecified debtor. The Court ruled that the price established by a taxpayer may be questioned by the tax authorities only if a proper comparability analysis is carried out by the tax authorities. The comparability analysis should take into account all factors resulting from Ministry of Finance regulation, as well as include successive, logical stages. The Court pointed out that the tax authority had not carried out such an analysis, as it had not taken into account risks incurred in connection with the purchase of a shopping centre, the specifics of a given property and its nature and economic potential.

Judgment of the Voivodeship Administrative Court in Warsaw, Ref No. III SA/Wa 504/18, 13 February 2019

This case concerned a taxpayer that received a true-up adjustment of the expenses related to intra-group services (increasing the incurred expenses). The Court accepted the view of the tax authorities that such a true-up adjustment is not a tax deductible cost, regardless of the circumstances. The practical consequence is that whatever transfer pricing method is used by a taxpayer, it may not be based on year-end adjustments.

Judgment of the Supreme Administrative Court, Ref No. II FSK 1665/16, 20 June 2018

In this case the Supreme Administrative Court confirmed that the comparability analysis carried out by the tax office may not be based on information that is not publicly available. In the past, the tax authorities often used confidential information obtained in tax proceedings as evidence against the transfer pricing method applied by another taxpayer.

Judgment of the Voivodeship Administrative Court in Białystok, Ref No. I SA/Bk 978/16, 1 February 2017

The Voivodeship Administrative Court agreed with the tax authority on the correct application of the income assessment procedure because of the non-arm's-length pricing of the transaction. The following facts weighed against the taxpayer's pricing: sales of finished products concluded below the costs of their production (as a result of the increase in raw material prices); uneven distribution of risks between the parties; and payments made over an extended payment period.

VIII SECONDARY ADJUSTMENT AND PENALTIES

Tax penalties

Income corrections

If tax authorities state that the terms and conditions of transaction or other event between related parties differ from those between independent entities, they determine the taxpayer's income and the income tax due. Income tax at a rate of 19 per cent is charged on the difference between the income declared by the taxpayer and specified by the tax authorities.

Additional sanctions

If income tax is reassessed, the tax authorities apply an additional sanction in a range of between 10 per cent and 30 per cent of the reassessed income or loss.

VAT obligations correction

The tax authorities have the right to determine the VAT taxable amount and VAT due if the remuneration established between associated enterprises does not satisfy the arm's-length principle, but only in the following cases:

a where the remuneration is lower than the market value and the customer of the goods or services does not enjoy a full right to reduce the input VAT;
b where remuneration is lower than the market value and a person supplying goods or services does not enjoy a full right to reduce the input tax amount, and a supply of goods or services is exempt from VAT; or
c where remuneration is higher than the market value and a person supplying goods or services does not enjoy a full right to reduce input VAT.

Interest on tax arrears

The taxpayer also has to pay penalty interest on tax arrears. As from 1 January 2017, the interest rate for tax arrears incurred is 8 per cent. It must also be underlined that the interest rate may be applied at a higher 12 per cent rate when VAT arrears have their source via understating a tax liability, or overstating a tax overpayment or a refund amount that was subsequently discovered by the tax authority during a tax investigation.

Fiscal penal liability

If a taxpayer fails to comply with tax obligations, it may result in fiscal penal liability. According to the Fiscal Penal Code,[15] only individuals may bear fiscal penal liability even if a tax obligation is imposed on a legal entity. Therefore, the liability for fiscal offences rests with an individual who, under the provisions of law, a decision of the relevant authority, an agreement or actual execution, conducts the economic and, in particular, financial affairs of the legal person. Furthermore, a fiscal offence is committed only by an individual to whom guilt may be attributed in the course of an act; however, this does include the awareness of the misconduct along with acceptance thereof. From this perspective, the risk of fiscal penal liability rests in particular with the management board's members and finance or tax director. Non-compliance with transfer pricing regulations may cover several criminal acts, for example, failure to disclose the object of taxation or tax base, tax fraud, obstruction of a tax audit or a customs and fiscal audit, and accounting procedure infringements.

Committing a fiscal criminal act may result in the imposition of a pecuniary fine or even imprisonment. In practice, imprisonment is a theoretical possibility rather than a likely prospect, except in cases of very serious economic crime; however, criminal courts very often hand out pecuniary fines, which may be of an amount up to the equivalent of 720 daily wage rates. In 2020, one daily wage rate may vary from approximately 87 zlotys to 35,000 zlotys. Therefore, the potential maximum fine may be approximately 25 million zlotys (again, in practice, the criminal courts impose much lower fines).

IX BROADER TAXATION ISSUES

i Double taxation

All double taxation treaties (DTTs) concluded by Poland provide the possibility to evoke the mutual agreements procedure (MAP). The MAP was implemented into Polish domestic law in the Minister of Finance's Regulations.[16]

15 Act dated 10 September 1999.

16 ibid., 5.

According to those rules, a person may present its case to the Minister of Finance to start the MAP under the Convention of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises or on the basis of a DTT with Poland. The MAP procedure may be used when formal requirements are met and within the limit of a three-year term. This term is counted from the date of the delivery to the taxpayer or its related party of the tax audit protocol or tax decision that leads or may lead to double taxation. Polish regulations provide that the MAP is required to be finalised within two years. Moreover, there is also the possibility of a trilateral MAP. The MAP cannot be used as a premise to suspend an ongoing tax proceeding. However, when the MAP has been successfully finalised, it may constitute a premise to revision.

ii Consequential impact for other taxes

VAT

See Sections I.ii and VIII.i, 'VAT obligations correction'.

Import and customs duties

The customs aspect of transfer pricing remains unnoticed – at least in Poland – both by doctrine and the customs and tax authorities. However, there are binding customs system regulations covering transfer pricing (e.g., the Union Customs Code, which defines the obligations and duties in this matter).

X OUTLOOK AND CONCLUSIONS

Since 2015, the main policy aim of the Minister of Finance has been to 'seal the tax system'. New tools and tax obligations have been introduced to fulfil this goal. One such tool is the extension of transfer pricing obligations and their effective enforcement by tax authorities. The number of tax investigations focusing on these matters has increased in recent years.[17] These investigations are not only being performed more often, but are also more likely to result in the imposition of tax liabilities. We believe this trend will continue over the coming years, until the frequency of investigations reaches the levels seen internationally. The newly introduced MDR regime should also help the tax authorities to better identify problem areas and make the inspections more effective.

On the other hand, the Minister of Finance is also seeking to help taxpayers deal with their compliance obligations. The Minister regularly organises public consultations and TP forums during which both current regulations and future legislation are thoroughly discussed with taxpayers. Recently, as a result of such discussions, official guidelines concerning benchmarking analyses have been published, giving considerable support for taxpayers. As regards the most recent international developments (Inclusive Framework Pillar One and Two), the approach of the Minister of Finance is rather reserved. The tax authorities await the final conclusions reached by the OECD forum.

17 www.podatkiwbiznesie.pl/tp-kontrole-us-cen-transferowych-w-2016-r.

Appendix 1

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