

POLAND

TRANSFER PRICING PROFILE

From January 1, 2019, new regulations regarding transfer pricing came into force in Poland. New, separate chapter on transfer pricing was added in the CIT law and in the PIT law. Below we present the summary of the new regulations in the key areas, together with the regulations which were binding until the end of 2018.

One of the key changes is that the new regulations are directly binding for both taxpayers and tax authorities.

1. Reference to the Arm's Length Principle

Regulations binding until December 31, 2018

Article 11 of the CIT Law (similar regulations in article 25 PIT Law)

Clause 1

If:

an income tax payer having its seat (board of management) or place of residence within the territory of the Republic of Poland, hereinafter referred to as a "domestic entity", participates directly or indirectly in the management or control of an enterprise located abroad or has a share in its capital; or

2) a natural or legal person residing or having its seat (board of management) abroad, hereinafter referred to as a "foreign entity", participates directly or indirectly in the management or control of a domestic entity or has a share in its capital; or

3) the same legal persons or natural persons at the same time participate directly or indirectly in the management or control of a domestic entity and a foreign entity or have shares in their capitals – **and if, as a result of such relations, there are agreed or imposed conditions substantially different from those which would be agreed between independent entities and, as a result thereof, such entity does not disclose any income or discloses the income smaller than might be expected, if such relations did not exist – the income of a given entity and the tax due shall be assessed without taking into account the conditions resulting from such relations.**

Clause 8a

Regulations from clause 1-3 are applied when assessing the part of the income of the taxpayer, who is mentioned in article 3 clause 2 [non-resident], carrying on activities through a permanent establishment situated on the Polish territory, liable to be attributed to the permanent establishment.

Regulations binding from January 1, 2019

New regulations: Article 11c of the CIT Law and article 23o PIT Law

Key points:

- Related companies are obliged to set the transfer prices on arm's length basis,
- When the conditions applied between related parties differ from the conditions that would be set between unrelated companies, the tax authorities will assess taxable income to adjust it to the arm's length level,
- Tax authorities recognize actual controlled transaction based on the actual course and circumstances of the controlled transaction as well as the behaviour of the parties,
- Non-recognition of the controlled transaction by the tax authorities is explicitly and directly allowed.

2. Reference to the OECD Transfer Pricing Guidelines

Regulations binding until December 31, 2018

Reference in Article 11 Clause 9 of the CIT law (similar regulations in article 25 PIT Law):

“Ordinance of Minister of Finance of 10 September, 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”

“Ordinance of Minister of Finance of 17 June, 2013 amending the Ordinance 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”

- has to take into account OECD Guidelines.

Regulations binding from January 1, 2019

There is no direct reference in the new regulations to the OECD Guidelines. However, the regulations are in line with the Guidelines, in particular in the following areas:

- Non-recognition of the controlled transaction,
- Safe harbour on low value-adding services,
- Content of the local file and the master file,
- Introducing the other transfer pricing method to be used for verification of the arm’s length character of the transfer prices.

3. Definition of related parties

Regulations binding until December 31, 2018

Related parties in international relations

Article 11 of the CIT law (similar regulations in article 25 PIT Law)

Clause 1

1) an income tax payer having its seat (board of management) or place of residence within the territory of the Republic of Poland, hereinafter referred to as a “domestic entity”, participates directly or indirectly in the management or control of an enterprise located abroad or has a share in its capital; or

2) a natural or legal person residing or having its seat (board of management) abroad, hereinafter referred to as a “foreign entity”, participates directly or indirectly in the management or control of a domestic entity or has a share in its capital; or

3) the same legal persons or natural persons at the same time participate directly or indirectly in the management or control of a domestic entity and a foreign entity or have shares in their capitals.

Related parties in domestic relations

Art. 11 of the CIT law (similar regulations in article 25 PIT Law)

Clause 4

1) a domestic entity participates, whether directly or indirectly, in the management of another domestic entity or its control or holds a share in the capital of another domestic entity

2) the same legal or natural persons participate at the same time, whether directly or indirectly, in the management of domestic entities or their control or hold a share in the capital of these entities.

Clause 5

The provisions of clause 4 also apply to the relations of family nature or those resulting from employment relationships or property relations between domestic entities or persons performing managerial, inspecting or supervisory duties with these entities or where any person combines managerial, supervisory or inspecting duties performed with such entities.

Clause 6

The family relation referred to in clause 5 shall be meant marriage and consanguinity or affinity (relationship by marriage) up to the second degree.

General rules applying to related parties in both international and domestic relations

Art. 11 of the CIT law (similar regulations in article 25 PIT Law)

Clause 5a

Holding a share in the capital of another entity referred to in clause 1 and 4 shall mean a situation where an entity, whether directly or indirectly, holds a share of **at least 5 per cent** in another entity's capital.

Clause 5b

While determining the size of a direct share held by an entity in another entity's capital, a principle shall apply whereby if an entity holds a certain share in the capital of another entity, and the latter holds the same share in the capital of yet another entity, then the former entity holds an indirect share of the same size in the capital of this yet another entity; if these sizes differ, the indirect share shall be deemed to be of the smaller size.

Clause 8

Provisions of clause 4 shall **not apply to** performance made by companies which constitute **a tax capital group**.

Application of arm's length principle to transactions concluded with tax haven entities

Clause 4a

In cases when domestic entity concludes transactions with entity having the place of residence, seat or board of management within a territory of or in a country pursuing harmful tax competition, and conditions agreed in those transactions are substantially different from those which would be agreed between independent entities and, as a result thereof, such entity does not disclose any income or discloses the income smaller than might be expected - the income of a given entity shall be assessed using methods indicated in clause 2 and 3 or article 14 shall be applied accordingly.

Regulations binding from January 1, 2019

New regulations: Article 11a of the CIT Law and article 23m of the PIT Law

Related entities are:

- a) entities, where one entity exercises significant influence over at least one other entity,
- b) entities over which significant influence is exercised by:
 - the same other entity or
 - a spouse or a relative up to the second degree of a natural person exercising significant influence over at least one entity,
- c) an entity without legal personality (e.g. partnership) and its partners,
- d) taxpayer and its permanent establishment.

Significant influence is defined as:

- a) holding directly or indirectly at least 25%:
 - shares in capital or;
 - voting rights in control, constituting or managing authorities, or
 - shares or participation rights in profits or assets or their expectative, including participation units and investment certificates, or
- b) the actual ability of a natural person to influence the key business decisions by a legal person or an entity without legal personality, or
- c) family relations, i.e. marriage and consanguinity or affinity (relationship by marriage) up to the second degree.

The same regulations apply for domestic and foreign related entities.

The regulations also contain the description on how to calculate the indirect share in another company for transfer pricing purposes.

Moreover, if there are relationships between entities that are not established or maintained for justified economic reasons, including those aimed at manipulating the ownership structure or

creating circular ownership structures, entities between which such relationships occur are considered as related entities.

With respect to certain transactions with unrelated entities having its residence in tax havens, transfer pricing regulations will apply.

4. Transfer pricing methods

Regulations binding until December 31, 2018

Art. 11 of the CIT law (similar regulations in article 25 PIT Law)
Clause 2

- 1) a comparable uncontrolled price;
- 2) a resale price method;
- 3) a reasonable margin ("cost plus") method.

If application of the methods above is impossible, the transactional profit methods shall be applied (transactional net margin method and profit split method).

Regulations binding from January 1, 2019

New regulations: Article 11d of the CIT Law and article 23p of the PIT Law)

Still, five OECD transfer pricing methods (CUP, resale margin, cost plus, TNMM and profit split) will be applicable. However, where it is not possible to apply any of the five methods another method should be used, including valuation techniques, which is most appropriate under the circumstances. The key criterion for application of the method will be its appropriateness under the circumstances and the tax authorities shall accept the method chosen by the taxpayer, unless another method is clearly more appropriate for the controlled transaction.

5. Transfer pricing documentation requirements

Regulations binding until December 31, 2018

The transfer pricing documentation requirements were introduced in Poland as of January 1, 2001. From January 1, 2017 there were adjusted to meet the 3-tier OECD standard.

Regulations binding from January 1, 2019

New regulations: Art. 11k, 11l, 11m of the CIT Law and 23w, 23x, 23y of the PIT Law

Local transfer pricing documentation

Related entities are obliged to prepare local transfer pricing documentation on annual basis for uniform controlled transactions which exceeded the following thresholds:

- 1) PLN 10,000,000 for a transaction involving tangible goods or assets;
- 2) PLN 10,000,000 for a financial transaction;
- 3) PLN 2,000,000 for a service transaction;
- 4) PLN 2,000,000 for other transaction than specified above.

Moreover, entities concluding certain agreements or making payments to unrelated entities in tax havens, are also obliged to prepare local transfer pricing documentation, when value of such agreements or payments exceed PLN 100,000.

The value of the uniform controlled transaction is calculated for all the accounting documents, payments and related entities – when uniform character is maintained. The controlled transaction is considered uniform when the following criteria are met:

- Transaction is homogenous in its economic aspects,
- The comparability criteria are similar,

- The same transfer pricing method can be applied,
- Other important aspects of the controlled transaction are similar.

The value of the controlled transaction is calculated based on:

- 1) the value of capital - in the case of loans and credit;
- 2) face value - in the case of bond issue;
- 3) guarantee sum - in the case of a surety or guarantee;
- 4) the value of assigned revenues or costs - in the case of assigning income (loss) to a foreign plant;
- 5) the value appropriate for a given controlled transaction - in the case of other transactions.

Local transfer pricing documentation should contain the following key elements:

- 1) description of the related entity;
- 2) description of the controlled transaction, including the functional analysis;
- 3) transfer pricing analysis, containing:
 - the benchmarking analysis (analysis of comparable unrelated parties / transactions data) or
 - conformity analysis, when benchmarking analysis cannot be duly prepared.
- 4) financial information.

Certain exemptions from the obligation to prepare local transfer pricing documentation were introduced, including:

- transactions between two profitable Polish related entities, not using certain other tax exemptions,
- transactions, value of which is totally and permanently non-tax revenue or non-deductible cost,
- controlled transactions between entities, where relationship is a result of the presence of the State or municipality in both entities,
- allocation of income to the Polish permanent establishment, when, based on the double tax treaty or other similar agreement, such income may be taxed only in the state other than Republic of Poland.

Related entities, obliged to prepare local transfer pricing documentation, are also obliged to submit the statement to the tax office, in which they confirm that (i) the controlled transactions were concluded on arm's length conditions and (ii) local transfer pricing documentation was prepared. The authorities may use that information to assess the risk of understating the taxable income and to carry out statistical or economic analyses

Group transfer pricing documentation (masterfile)

Related entities which:

- financial statements are consolidated and
- obliged to prepare local transfer pricing documentation and
- being members of the capital group, which:
 - prepares consolidated financial statement and
 - its consolidated revenue in the previous financial year exceeded PLN 200,000,000,are obliged to additionally present the group documentation (masterfile) within 12 months from the end of their financial year. The masterfile prepared in English (e.g. by another group entity) is sufficient, however related entity might be requested by the tax authorities to have it translated into Polish.

The content of masterfile is in line with the OECD standard and includes:

- 1) description of the capital group;
- 2) description of capital group's key intangibles;
- 3) description of capital group's key financial transactions;
- 4) financial and tax information for this capital group.

Deadlines for preparation of the transfer pricing documentation

The deadline for preparation of the complete local file and submitting the statement and TP-R form is 9 months after the end of a financial (or tax) year.

Additionally, the deadline for preparing a master file is extended to 12 months after the end of a tax year.

Although the new regulations are binding as of January 1, 2019, under certain conditions the taxpayers may prepare the transfer pricing documentation for their intragroup transactions concluded in 2018 on the basis of this new regulations. In such a case, the new regulations are applicable to all intragroup transactions concluded by the taxpayer (no cherry-picking is possible).

6. Specific transfer pricing audit procedures and / or specific transfer pricing penalties

Regulations binding until December 31, 2018

Article 19 of the CIT Law

Clause 4

If tax authorities or fiscal control authorities determine, under Article 11, taxpayer's income in an amount higher (loss in an amount lower) than the amount declared by the taxpayer in relation to the transactions referred to in Article 9a and the taxpayer does not produce to such authorities the tax documentation required by these provisions – the difference between the income declared by the taxpayer and that assessed by these authorities shall be subject to taxation at a rate of 50 per cent.

Remark: should the penal tax rate of 50% be applied, no additional interest on tax due (which would be a normal procedure) are applied.

Regulations binding from January 1, 2019

In the case of transfer pricing assessment, the difference between the income declared by the taxpayer and the one assessed by the tax authorities will be subject to additional taxation at a rate of 10 per cent (on the top of standard 19% corporate income tax rate). In some more severe cases the penalty might be increased up to 30 percent (e.g. lack of TP documentation or significant amount of additional income assessed).

7. Information for Small and Medium Enterprises on TP

Information relevant for SMEs in tackling transfer pricing matters is available on the JTPF webpage at: http://ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/forum/index_en.htm#achievements

8. Information on dispute resolution

Competent Authority	Mr Artur Gostomski Director of the Department for Large Business tel. +48 22 694 45 64, fax. +48 22 694 49 87 e-mail artur.gostomski@mf.gov.pl
	Mr Konrad Szpadzik [contact person] Deputy Director of the Department for Large Business tel. +48 22 694 48 87, fax. +48 22 694 49 87 e-mail konrad.szpadzik@mf.gov.pl
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12 Świętokrzyska Str.
 00-912 Warsaw

Organization	Department for Large Business, Ministry of Finance (National Revenue Administration branch)
Scope of MAP & MAP APA	- As the general rule, MAP is used to solve the double taxation cases related to the particular taxpayer. - If there is a need, MAP may be also used for interpretation or application of tax treaties, however such cases are not very common.
Domestic guidelines & administrative arrangements	N/A
Time for filing	N/A
Form of request	N/A
Documentation requirement	No special requirement.
User fees	N/A
Tax collection / penalty / interest	N/A
Other dispute resolution mechanisms	The EU Arbitration Convention.
Government Website	http://www.mf.gov.pl

Dispute resolution under the Arbitration Convention does not need to be initiated and may be suspended if one of the enterprises involved is subject to a 'serious penalty' for the transactions giving rise to the profit adjustment (Article 8).

Unilateral Declaration of Poland on Article 8 of the Arbitration Convention (*Official Journal C 160, 30/06/2005, p. 11-22*)

"The term "serious penalty" means penalty of fine, penalty of imprisonment or both of them imposed jointly, or penalty of deprivation of liberty for culpable infringement of tax law provisions by a taxpayer."

Unilateral Declaration of Poland on Article 7 of the Arbitration Convention (*Official Journal C 160, 30/06/2005, p. 11*).

Poland declares that will apply Article 7(3).

9. Relevant regulations on Advance Pricing Arrangements

Section IIA of the Tax Code

10. Links to relevant government websites

Information on APA procedure (Polish version) - Section IIA:
<http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU19971370926/U/D19970926Lj.pdf>

General information about APA and application fee (Polish version):
<https://www.podatki.gov.pl/ceny-transferowe/procedury-map-i-apa-statystyki/uprzednie-porozumienia-cenowe-apa/>

11. Other relevant information

Transfer pricing reporting

For the financial years starting after 31 December 2018, related entities obliged to prepare either local or group transfer pricing documentation, will also need to prepare the transfer pricing information (TP-R form). The information shall cover the controlled transactions subject to local transfer pricing documentation and controlled transaction between two Polish entities, subject to documentation exemption. The information will contain information on the transactions value, transfer pricing method used, level of transfer prices as well as details of transfer pricing analysis. The transfer pricing information will be in electronic format only and will need to be submitted within 9 months from the end of financial year.

Safe harbours

Low value-adding services

In the case of low value-adding services, the tax authorities shall refrain from transfer pricing assessment when the following conditions are met:

- the scope of services is in line with the list of low value-adding services and these services:
 - are of supportive nature;
 - do not constitute the key economic activity of the group;
 - are provided mainly to related parties (only 2% of revenue from provision of services to unrelated entities is allowed);
 - are not subject to further resale by service recipient (except of re-invoicing);
- remuneration for the services is calculated based on costs increased with a mark-up;
- service provider is not a resident in the country or territory applying harmful tax practices;
- service recipient is able to provide detailed calculation of the service fee;
- mark-up on costs does not exceed 5% of the cost base (in the case of service recipient) or is at minimum 5% (in the case of service provider).

The list of low value-adding services is generally in line with the list provided by the OECD and EU Joint Transfer Pricing Forum.

Loans

The regulation is designed to exclude small and simple loans from the obligation to prepare a benchmarking analysis, which is costly and time consuming, while the potential transfer pricing assessment is doubtful and insignificant.

The following conditions should be met to benefit from the safe harbour:

- the total capital of related party loans will not exceed PLN 20,000,000 during the tax year (limit calculated separately for loans granted and received);
- loan in question was granted for a period not longer than 5 years,
- the lender is not a resident in the country or territory applying harmful tax practices;
- there are no other payments resulting from the loan (e.g. commissions, bonuses or other fees) than interest.

When the conditions above are met and the interest on the loan on the day the loan was granted is in line with the rate published periodically by the Minister of Finance, the tax authorities will refrain from transfer pricing assessment on such loan and the taxpayer will be relieved from preparing a benchmarking analysis.