

TAX ALERT

August 2021

ANTI-TAX HAVEN REGULATIONS

AMENDMENTS TO THE TRANSFER PRICING REGULATIONS



2021

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Member of the National Chamber of Tax Advisors
Member of the Netherlands-Polish Chamber of Commerce
Member of the Polish-Swiss Chamber of Commerce

New rules

On the 1st of January 2021 became effective regulations of the Act of 28th of November 2020 (Dz. U. z 2020 r. poz. 2123) which changed the legal rules with regard to preparing the transfer pricing documentation. They introduced so called “anti-tax haven regulations”.

As a reminder: The duty to prepare a local transfer pricing documentation applies in principle to controlled transactions of a homogeneous nature whose value (after applicable reductions) exceeds in a tax year the following documentation thresholds (art. 11k sec. 2 of the Act of 15th February 1992 on the Corporate Income Tax, Dz. U. z 2020 r., poz. 1406, hereinafter as: CIT Act and art. 23w sec. 2 of the 26th of July 1991 on the Personal Income Tax, Dz. U. z 2020 r. poz. 1426, hereinafter as: PIT Act):

- PLN 10 m – in the case of a commodity transaction,
- PLN 10 m – in the case of a financial transaction,
- PLN 2 m – in the case of a service transaction;
- PLN 2 m – in the case of any other transaction than mentioned in 1-3

Documentation of transactions with entities from tax havens

At the beginning of the current year special documentation thresholds were introduced for transactions with the entities from so called “tax havens” (a territory or a state which uses harmful tax competition) and pursuant to that the taxpayers are obliged to prepare transfer pricing documentation with the significantly lower thresholds as above mentioned. The tightening of the documentation thresholds has in view keeping of the due diligence in the scope of correctness’ verification connected with the settlements of accounts of the other transaction party with a subject located in a tax haven, making difficult the profit’s allocation to tax havens and ensuring of the equal conditions of competition.

According to the new regulations the transactions with tax havens which are subject of the documentation duty should be considered in the context of the following matters:

- direct controlled transactions (the term of the controlled transaction encompasses in principle any activities of various character and purpose which are undertaken by taxpayers with a related entity): an entity in Poland enters into a contract with an entity which has its place of residence, seat or management on a territory or in a state which uses harmful tax competition). For such transactions the documentation threshold, independent of the type of transaction, amounts in one tax/accounting year 100 000 PLN (art. 11k sec. 2a CIT Act and art. 23w sec. 2a PIT Act) and
 - direct – other than controlled transaction (an entity from Poland enters into a contract with an entity with its place of residence, seat or management on a territory or in a state which uses harmful tax competition). For such transactions the documentation threshold, independent of the type of transaction, amounts in one tax/accounting year 100 000 PLN (art. 11o sec. 1 CIT Act and art. 23za sec. 1 PIT Act) and
 - indirect – controlled or other than controlled transaction (an entity from Poland does an indirect payment to a tax haven /beneficial owner's place of residence, seat or management on a territory or in a state which uses harmful tax competition). For such transactions the documentation threshold, independent of the type of transaction, amounts in one tax/accounting year 500 000 PLN (art. 11o sec. 1a CIT Act and art. 23za sec. 1a PIT Act). 500 000 PLN is about 108 980 EUR (middle exchange rate of the National Bank of Poland from 20.08.2021)
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Verification, if beneficial
owner is a so called tax
haven entity

In the first two of the discussed cases identification of the contractor that has a seat in a “tax haven” should not be difficult. Helpful in this field can be even the concluded contracts. Controversies can appear in the case of so called indirect cash flow and identifying of a beneficial owner of receivables.

Legal rules which regulate new duties of taxpayers require identifying who is a beneficial owner of receivables.

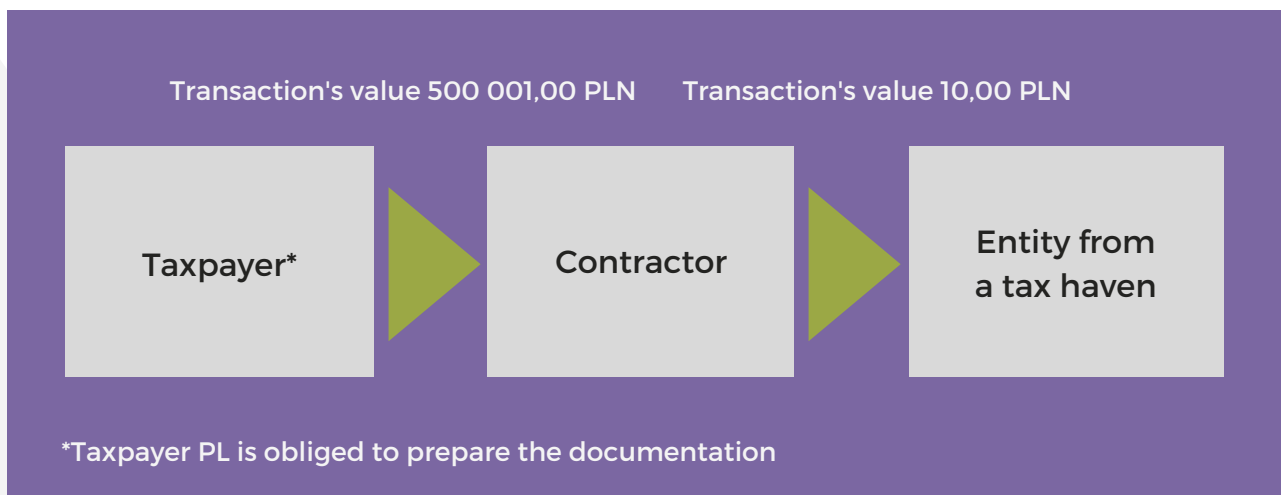
According to art. 11o sec. 1b CIT Act/ art. 23za sec. 1b PIT Act shall be presumed that a beneficial owner has place of residence, seat or management on a territory on in a state which uses harmful tax competition if the other party of the transaction (our contractor) does in a fiscal year or an accounting year settlements of accounts with entities having their seat or management on a territory or in a state which uses harmful tax competition.

During identifying those circumstances taxpayers or companies which is not a legal entity are obliged to act with due diligence.

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The presumption, that the beneficial owner is a tax haven entity, is to apply if the other side of the transaction (our contractor) has any settlements of accounts with an entity from a tax haven.

As 'settlement of accounts' should be understood any form of regulating of receivables, among others: regulating of receivables with monies (payment with money), payments in kind (transfer of another property or provision of services) or in the way of compensation of reciprocal receivables and obligations.



To rebut the presumption it is necessary to demonstrate a contrary circumstance, namely the fact that the beneficial owner is not a tax haven entity. It is to assume that if taxpayers do not rebut the presumption that the beneficial owner is a tax haven entity (it does no transactions with entities from tax havens), they are obliged to prepare the transfer pricing documentation every single time when a transaction with a contractor is above the limit of 500 000 PLN (it applies to the controlled and not-controlled transactions)

Due diligence

It should be emphasized that the regulation of art. 11o sec. 1b CIT Act requires that the taxpayer should act with due diligence in verifying if the beneficial owner is a tax haven entity.

As acting with due diligence should be understood keeping a standard of undertaking of activities which should appropriate verify, if the other party of the transaction (our contractor) does no settlements of accounts with entities from tax havens.

The tax clarifications within the scope of the transfer pricing “Presumption and due diligence” (pl. „Domniemanie oraz należyta staranność”) of 2nd of March 2021 show that for acting with due diligence in transactions with related and not-related parties, independent of their place of residence, it is sufficient to receive a statement of knowledge from the other transaction’s party which shows that the other transaction’s party does within the taxpayer’s tax year no settlements of accounts with a tax haven entity. The statement of knowledge should be received ex post, namely after the end of the taxpayer’s accounting year.

To sum up to rebut the presumption and to avoid preparing of the transfer pricing documentation taxpayers are obliged to get from your contractor in the transactions which exceed the amount of 500 000 PLN the statement of knowledge, that the contractor does not any settlements of accounts with entities from tax havens. Otherwise the taxpayers should prepare every single time in the case of the transaction exceeding the above mentioned amount to prepare the local transfer pricing documentation.

Sanctions for missing local transfer pricing documentation

For the taxpayers are provided high financial fines for not-submitting of the form TPR and declaration of preparing the local transfer pricing documentation, submitting the documents after the deadline or attestation of an untruth in the documents.

A taxpayer who does not fulfill the documentation obligation can be fined with so called additional tax obligation which amount 20% of the taxation base – it applies to the transaction in which the tax documentation were

Countries and territories
which use harmful tax
competition

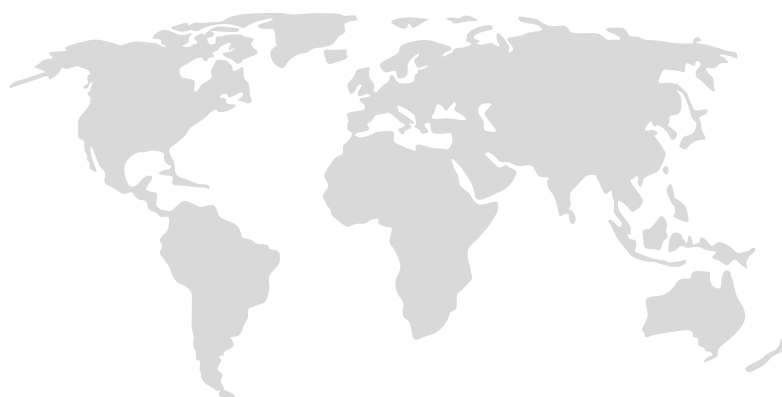
not submitted (art. 58c §1 point 3 of the Act of 29th of August 1997 - Tax Ordinance, Dz. U. z 2020 r. poz. 1325, hereinafter referred as: Tax Ordinance).

Moreover, the Polish law system provides rules to sanction the infringements in a penal-fiscal way.

According to art. 56c and 80e of the Act of 10th of September 1999 - Penal Fiscal Code (Dz. U. z 2021 r., poz.408) a taxpayer can be fined with 720 daily rates for not-submitting, submitting the documentation after the deadline or attestation the information which are not a real state of affairs in the declaration of preparing the transfer pricing documentation and TPR. Thus the maximal penal-fiscal sanction for not submitting the documentation amounts 27 199 678,00 PLN.

It is necessary to emphasize that a natural person, who is responsible for a fiscal offence or a fiscal crime, cannot be fined with the additional tax obligation for the same deed art. 58e Tax Ordinance).

Furthermore we would kindly inform you that you can find the complete list of the countries which use the harmful tax competition on the next page.



1. Principality of Andorra
2. Anguilla - British overseas territory
3. Antigua and Barbuda
4. Saint-Maarten, Curaçao - countries from the Kingdom of the Netherlands
5. Kingdom of Bahrain
6. British Virgin Islands - British overseas territory
7. Cooka Islands - free association with New Zealand
8. Dominican Republic
9. Grenada
10. Sark - British overseas territory
11. Hongkong - Special Administrative Region of the People's Republic of China
12. Republic of Liberia
13. Makau - Special Administrative Region of the People's Republic of China
14. Republic of Maldives
15. Republic of the Marshall Islands
16. Republic of Mauritius
17. Principality of Monaco
18. Republic of Nauru
19. Niue - free association with New Zealand
20. Republic of Panama
21. Independent State of Samoa
22. Republic of Seychelles
23. Saint Lucia
24. Kingdom of Tonga
25. United States Virgin Islands
26. Republic of Vanuatu

How can we help you

We would kindly ask you for an information if you are interested in receiving our support in connection with the new documentation duties which result from the so called anti-tax haven regulations

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