

Ukraine



New changes in Ukrainian transfer pricing rules in 2019

As of 1 January 2019 the Tax Code of Ukraine has been supplemented with new provisions in Article 39, which sets forth TP rules for Ukrainian entities. Some of these rules in fact represent the implementation of TP-related BEPS Actions into Ukrainian tax law. The most important changes are as follows:

The substance-over-form principle

Since 2019 the substance-over-form principle has been introduced into TP rules. This means that from now on taxpayers/tax authorities must analyse the functions performed by the parties of controlled transactions based on:

- 1) Concluded agreements
- 2) Accounting data
- 3) Actual actions of the parties and the circumstances of transactions

Should actual actions of the parties and their non-documented agreements differ from those declared in the contract, actual actions and conditions shall prevail.



If transactions are actually performed but not arranged by any documents and not reflected in the accounting data of the taxpayer or its counterparty, such transactions may still be subject to TP rules if the tax authority finds evidence of the actual conduct of these transactions.

We understand that such new rules are in line with the recommendations of BEPS Actions 8–10. These rules should encourage actual agreements between parties to be examined, to determine their actual contributions to transactions and the non-recognition of transactions which make no commercial sense to be authorised.

New criteria for the selection of the tested party

The Tax Code of Ukraine provides that when a taxpayer opts to apply the TP method, based on comparison of profitability, the taxpayer should also select the tested party, namely the party to the transaction whose profit margin would be analysed according to the TP Method. The rules stipulate that a taxpayer shall select the party for whom the TP method with the most accurate results should be applied, and for whom the most reliable comparable transactions can be found. A new criterion for selecting the tested party was added in 2019: the party for which the most comprehensive financial information and accounting data is available must be selected. The wording of this rule may be interpreted in the way that it can usually be met only by parties to transactions with residence in Ukraine. Hence, this rule may significantly limit the possibility to choose a non-resident of Ukraine as a tested party. In turn, this could bring a massive change in general approach to TP analysis of large numbers of transactions where a non-resident party was usually tested.

Controlled transactions with involvement of "unrelated" intermediaries

The Tax Code of Ukraine provides that transactions between a Ukrainian entity and its related non-resident shall fall under TP control even if an intermediary is placed between such entities, provided that such an intermediary does not perform significant functions and does not use significant assets and/or does not bear significant risks. Starting from 2019, the rule will be applied not only to transactions between related parties but also between Ukrainian entities and special kinds of non-resident entities registered in "low tax" jurisdictions according to the list adopted by the Cabinet of Ministers of Ukraine (CMU), and with non-resident entities with special legal form included in another list adopted by the CMU.

Ivan Shynkarenko
i.shynkarenko@wts.ua

Kateryna Utiralo
k.utiralo@wts.ua

Glossary

APA	Advance Pricing Agreement	OECD	Organization of Economic Cooperation and Development
BEPS	Base Erosion and Profit Shifting		
CbC	Country by Country	OECD Guide-lines	OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations
CbCR	Country by Country Reporting		
CIT	Corporate Income Tax		
EBIT	Earnings before Interest and Tax	OECD MTC	Model Tax Convention on Income and on Capital
MCAA	Multilateral Competent Authority Agreement on Automatic Exchange of Information	PE	Permanent Establishment
		TP	Transfer Pricing
MNE	Multinational Enterprise	VAT	Value Added Tax
		WHT	Withholding Tax

Contact/Editors**Australia**

Craig Silverwood – MinterEllison
Sian Jackson-Findlay – MinterEllison
Kip Harding – Red Consulting
 craig.silverwood@minterellison.com
 T +61386082474
MinterEllison
 525 Collins Street
 Melbourne 3000
 www.minterellison.com/people/
 craig-silverwood

Austria

Mag. Martin Hummer
 martin.hummer@icon.at
 T +43 69412 9894
ICON Wirtschaftstreuhand GmbH
 Stahlstraße 14
 4020 Linz
 www.icon.at

Egypt

Ashraf Hanna Mikhail
 ashrafhanna@wts-egypt.com
 T +20 1222160269
WTS Egypt
 20. ElGehad Street
 Lebanon Square. Mohandessin
 12655, Giza
 www.wts-egypt.com

Hungary

Tamás Gyányi
 tamas.gyanyi@wtsklient.hu
 T +36 1 887 3736
WTS Klient Tax Advisory Ltd.
 Stefánia út 101-103.
 H-1143, Budapest
 https://wtsklient.hu/en