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New Transfer Pricing Regulations in Belarus

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Belarus is about to introduce new transfer pricing regulations which will, amongst other things, introduce a new system of control of transactions and roll out notification requirements for taxpayers. The following article considers the changes in detail.

I. Introduction

Traditionally the Tax Code of the Republic of Belarus (hereinafter referred to as the “Tax Code”) is subject to a substantial review and modification once a year. Presently, several drafts of the law amending the Tax Code for 2016 (hereinafter referred to as the “Law”) have been made public. The latest draft is dated October 26, 2015 and provides for significant changes in the transfer pricing regulations, to take effect from January 1, 2016.

The transfer pricing regulations were introduced for the first time to the Belarusian tax legislation in 2012 and initially covered only transactions on the sale of real estate and sale of goods to foreign legal entities and/or individuals within the framework of foreign trade activity by Belarusian residents. Since then, the scope of transfer pricing regulation has gradually enlarged and in 2015 it additionally covers sale and acquisition of services/works to/from foreign legal entities and/or individuals within the framework of foreign trade activity of Belarusian residents. The price level threshold applicable to foreign trade transactions has also significantly decreased starting from 20 billion Belarusian rubles in 2012 to 1 billion Belarusian rubles (approx. 51,861 euros¹) in 2015. New approaches and thresholds for the transfer pricing regulations shall be in place after the introduction of the new Law.

Generally, the new amendments are designed for combating tax evasion and shifting the Belarusian taxation framework towards the OECD standards commonly accepted across Europe.

II. Transactions to be Controlled Since January 1, 2016

The four main groups of transactions to be controlled are:

- transactions connected with real estate, housing bonds, ownership rights in shared construction objects;
- transactions connected with related parties or off-shore residents and concluded in the course of foreign trade activity;
- transactions connected with related parties or off-shore residents and concluded in the course of foreign trade activity via a chain of transactions with an intermediary/unrelated party;
- transactions with Belarusian residents enjoying a special regime which grants them an exemption from corporate income tax (hereinafter referred to as the “CIT”) payments (residents of High Technologies Park (hereinafter referred to as the “HTP”, Great Stone, free economic zone (hereinafter referred to as the “FEZ”) etc.).

A. Real Estate, Housing Bonds and Ownership Rights in Shared Construction Objects

The transactions covering real estate are subject to transfer pricing control regardless of whether they are concluded with foreign residents or not. The sole thing that matters is the transaction price, which is subject to control if it deviates 20% or more from the market price. The transactions of issuers using housing bonds which they have issued themselves are not subject to transfer pricing control.

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B. Foreign Trade Activity

Transactions with related parties or offshore residents are subject to transfer pricing control when the price of a transaction (or the sum of transactions with one person) on the acquisition of goods, works, services exceeds 200 million rubles (approx. 10,372 euros), net of indirect taxes.

Such transactions are also subject to transfer pricing control if they are concluded via an intermediary—a third party that is unrelated to the parties to the transaction via an aggregate of transactions. However, in this case there are special requirements applicable to the intermediary involved in the aggregate of transactions. Such intermediary shall not:

- perform any additional functions in this aggregate of transactions, except for organizing the realization (resale) of goods, works, services by one party to its related party;
- use any assets for organizing the realization (resale) of goods, works, services by one party to its related party.

C. Belarusian Residents Exempted from CIT Payment

This provision is a new introduction for the Belarusian tax regime.² Transactions concluded with Belarusian residents are subject to control by the tax authorities, if these Belarusian residents are related to the taxpayer and they are exempted from CIT, as they are referred to as “special categories of taxpayers and/or apply special regimes of taxation and/or carry out activity on the territories defined by Belarus law”, e.g. High Technologies Park, Great Stone, FEZs.

Amidst general rules on the transactions to be subject to transfer pricing control, there are specific cases when transactions are considered to be controlled ones. Thus, transactions on the acquisition/sale of goods, services, works in the course of foreign trade activity of an entity which has acquired/sold the goods at the list established by the President, are subject to transfer pricing control. To date, no such list has been established.

Transfer pricing rules are also applicable to the transactions made by a major taxpayer under Belarus law with one entity (or) individual, which amount to 10 billion rubles (approx. 518,618 euros) and more.

III. Excluded Transactions

Regardless of the above, the following transactions are not subject to transfer pricing regulations:

- transactions for which the price is established by the international treaties of the Republic of Belarus;
- banking operations defined by the Bank Code of the Republic of Belarus;
- transactions with securities and derivatives circulated on the organized securities market.

IV. Methods for Defining the Market Price

After amendment, the Tax Code will provide for the following transfer pricing methods:

- comparable uncontrolled price method;
- resale price method;

- cost plus method;
- comparable profits method;
- profit split method.

The profit split method is new for Belarusian tax legislation, being the method of last resort. Introduction of this method is yet another step towards the implementation of OECD-approved transfer pricing rules.

The profit split method encompasses the comparison of the actual distribution of the overall profit between parties to the transaction as against the distribution of the overall profit that would be expected in transactions between unrelated parties.

V. Transfer Pricing Documentation

According to the Law, the taxpayer will be required to notify the tax authority of controlled transactions. The notification will include submitting:

- information on the controlled transactions in electronic form to a special portal administered by the Ministry of Taxes and Duties; and
- confirmation of the economic rationale of the transaction price and/or documentation confirming the economic rationale of the transaction price.

The Law does not provide for any deadline for the information on controlled transactions to be submitted to the tax authority. In Russia, taxpayers are required to submit information on controlled transactions in a calendar year no later than May 20 and the documentation may be requested by the tax authorities after June 1 of the year following the calendar year in which the controlled transactions were executed.³

The Law does specify a deadline for the confirmation of the economic rationale of the transaction price and/or appropriate documentation to be submitted to the tax authority. Such term depends on the type of a tax audit carried out in respect of the taxpayer and usually determined in the notification/order sent by the tax authority to the taxpayer. If an in-house audit is carried out, the term cannot be less than 10 working days from the date the notification was sent. If the on-site audit is carried out, the term cannot be less than 5 working days from the date the order was sent.

In Russia taxpayers are required to file documentation with the tax authorities within 30 days after receiving the corresponding request.⁴

There is no statutory established template of the documentation confirming economic rationale currently established by Belarus law. The Law just lists the data to be indicated in such documentation in a way that can be submitted in a free form.

Such data include e.g.:

- description of the economic activity of the taxpayer and functions performed in the transaction being considered;
- information on the field of taxpayer's activity (tendencies, peculiarities of development);
- information on the party to the transaction;
- information on the prices of the identical (homogeneous) goods/works/services, including the one posted on the web, the link to the corresponding site or a screen shot of the page would suffice;

- information on the interdependence between the taxpayer and party to the transaction and information on its activity, reputation, financial status;
- description of the transaction subject, including the Trade Nomenclature of the Foreign trade Activity.

The level of detail and complexity of documentation submitted to the tax authority shall be adequate to the level of the transaction complexity.

Compared to the order of submitting transfer pricing documentation in Belarus, it is completely different, e.g. in neighbouring Poland, as it is largely dictated by BEPS Action Plan implementation within the OECD framework. According to the Act amending the Corporate Income Tax Act, the Personal Income Tax Act as well as some other Acts (hereinafter referred to as the “Act”)⁵ the following three-tier structure of transfer pricing mandatory documentation applies:

- Local File (domestic documentation) for taxpayers with turnover for above 2 million euros;
- Master File (central documentation) for taxpayers with turnover for above 20 million euros, including description of the group’s capital structure, transfer pricing policy and significant intangible assets utilized by it;
- Country-by-Country for domestic entities with consolidated turnover above 750 million euros—a report that provides information concerning the amount of revenue earned and tax paid by location, also activities and places of business for dependent entities and permanent establishments within the group.

It seems that such a system could be also implemented in Belarus. The division used might simplify both the taxpayers’ lives, as there should be no need to evaluate in each case the level of detail and complexity of the transfer pricing documentation to be submitted, and tax authority tasks when enforcing the transfer pricing regulations. Of course, amendments to the thresholds would be required, so as to make them economically reasonable for Belarus realities.

VI. Burning Issues

The new regulations aim at bringing Belarus’ tax regime to a new level which aligns more closely with the OECD standards. At the same time, we can see certain implications that might arise when taxpayers implement the new regulations on transfer pricing.

Firstly, additional clarification may be required for the order of application of transfer pricing rules e.g. for transactions which may cover both real estate and offshore residents, real estate and related Belarusian tax residents, real estate and a major taxpayer,⁶ therefore may possibly fall within all groups of transactions outlined above and pose a significant conflict in deciding which of the rules shall supersede which, and when.

Secondly, from a state budget perspective, the threshold established (20%) for real estate transactions seems to be rather high and may lead to significant amounts of unpaid CIT. It may, therefore, be decreased in the future, and not in the taxpayers’ favor. At the same time, certain countries are narrowing the scope of application of transfer pricing regula-

tions, making it more taxpayer friendly, e.g. Poland has recently amended its transfer pricing regulations and increased the threshold for a party to be found a related one in the controlled transactions, therefore certain transactions will simply fall out of the transfer pricing regulations. According to the Act a party shall be considered a related one if the capital relationship between the parties considered amounts to 25 percent or more.⁷

Thirdly, there is no fixed deadline for reporting on the controlled transactions to the tax authority when no tax audit is carried out. It is unclear what will be considered a late reporting and whether there will be any accompanying sanctions as a result e.g. becoming the subject of an audit or paying a fine.

The big question is the very process of assessing how effectively the economic rationale shall be justified by the taxpayer for the transaction in question. Currently, the practice of transfer pricing control is very scarce and possibly new regulations may open the door to numerous cases of taxpayers appealing against the tax authorities’ decisions regarding tax base adjustments and the resulting demand for payment of additional taxes.

Furthermore, in our view, it would be reasonable to allow Belarusian taxpayers to adjust the tax base on their own, if they come to a conclusion that the transaction price does not correspond to the market one. In Russia taxpayers are allowed to make adjustments to the tax base in accordance with the chosen transfer pricing method, i.e. to do self-initiated adjustment of the tax base. Their right to self-adjustment is limited to not leading to a reduction in tax liabilities.⁸

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NOTES

¹ Hereinafter as of the National Bank of the Republic of Belarus rate EUR 1 = BYR 19 282 effective on 30 November 2015.

² However, it is already implemented in even stricter form in neighbouring Russia, where the controlled transactions cover inter alia transactions between all domestic related parties with an annual income higher than 1 billion Russian rubles. (Subpara. 1 para. 2 art. 105.14 of the Tax Code of the Russian Federation. For more details please see <http://nalog.garant.ru/fns/nk/22/> (available in Russian only))

³ Para. 2,3 art. 105.16 of the Tax Code of the Russian Federation. For more information please see <http://nalog.garant.ru/fns/nk/22/> (available in Russian only).

⁴ Para. 6 art. 105.17 of the Tax Code of the Russian Federation. For more information please see <http://nalog.garant.ru/fns/nk/23/> (available in Russian only).

⁵ For more information please see http://orka.sejm.gov.pl/proc7.nsf/ustawy/3697_u.htm (available in Polish only).

⁶ A taxpayer which is named in the List of Major Taxpayers established by the Ministry of Taxes and Duties. The criteria for taxpayers to be named in such a List are the annual income (shall be no less than 1 trillion Belarusian rubles or approx. 50,433,730 euros) and either the aggregate amount of taxes paid to the budget for the preceding year (shall be no less than 75 billion Belarusian rubles or approx. 3,889,638 euros) or the difference between the amount of tax credits and the aggregate amount of value added tax paid to the budget for the preceding year (shall be no less than 75 billion Belarusian rubles or approx. 3,889,638 euros).

⁷ Para. 3 of the Act. For more information please see http://orka.sejm.gov.pl/proc7.nsf/ustawy/3697_u.htm (available in Polish only).

⁸ Para. 6 art. 105.3 of the Tax Code of the Russian Federation. For more information please see http://nalog.garant.ru/fns/nk/20/#block_105036 (available in Russian only).