Transfer Pricing Alert

2022

Tax
Law
Audit
Advisory
Accounting

tpa

Transfer pricing and transactions involving a beneficial owner from a tax haven

As of January 1, 2021, regulations for so-called indirect tax haven transactions are in effect. These apply to transactions where a receivable is transferred to a 'beneficial owner' who is domiciled, established or managed in a tax haven.

The lawmakers imposed a documentation obligation on taxpayers, applicable to indirect tax haven transactions with a value exceeding PLN 500,000. This means that it will be necessary to include them in local transfer pricing documentation (local file) for 2021 and subsequent tax years, if such an obligation has been identified.

The deadline for preparing documentation for the 2021 tax year, and, consequently, for filing transfer pricing information (TPR), is September 30, 2022.

Taxpayers concerned about meeting their new transfer pricing obligations should take action now. This is primarily due to the fact that indirect tax haven transactions are associated with a statutory requirement for the taxpayer to exercise due diligence in identifying the circumstances giving rise to the obligation to prepare documentation. Developing an appropriate procedure and implementing it can be a time-consuming task.

The table below discusses selected relevant information about the indirect tax haven transactions.

THE ESSENCE OF REGULATIONS ON INDIRECT TAX HAVEN TRANSACTIONS	Pursuant to Article 11o of the CIT Act[1] an obligation to prepare a local file arises for transactions with value exceeding 500,000 PLN in a tax year, if the beneficial owner of receivables resulting from such transactions has a residence, seat or management board in a tax haven (list of tax havens: https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20190000600). From the taxpayer's perspective, **only expense transactions** may be subject to potential documentation obligations, as only such transactions may result in a transfer of receivables. Importantly, the obligation to prepare a local file arises **regardless of whether the other party to the transaction is a related or unrelated entity to the taxpayer**. **The beneficial owner also need not be a party to the transaction with the taxpayer.** This is because the documentation obligation will also arise if the entity with which the taxpayer concluded the transaction transfers the related receivable to the tax haven entity that is the beneficial owner.
DEFINITION OF THE 'BENEFICIAL OWNER'	The definition of a 'beneficial owner' can be found in Article 4a point 29 of the CIT Act. According to the said provision, a 'beneficial owner' is an entity that meets all the following conditions:

[1] Corresponding regulations are also found in the PIT Act.

	■ receives the receivable for its own benefit, including deciding for itself what to do with the receivable, and assumes the economic risk associated with the loss of the receivable or a portion thereof; ■ is not an intermediary, agent, trustee or other entity obliged to transfer all or part of the receivable to another entity; ■ is actually established in the country of residence, if the receivables are obtained in connection with the conducted business activity. It is worth noting that the 'beneficial owner' defined in the CIT Act **is not the same** as the 'real beneficiary' defined in the Act on Combating Money Laundering and Financing of Terrorism.
PRESUMPTION MANDATING THAT THE 'BENEFICIAL OWNER' IS TO BE ASSUMED TO BE A TAX-HAVEN- BASED ENTITY	For the purpose of determining the obligation to prepare local transfer pricing documentation for indirect haven transactions, the lawmakers introduced a **presumption** that the 'beneficial owner' has a residence, seat or management board in the tax haven **if the other party to a transaction entered into by the taxpayer performs settlements with an entity with a seat or management board in the tax haven during the tax year or fiscal year**. **What does the said presumption mean for taxpayers in practice?** The obligation to prepare local transfer pricing documentation may also cover certain transactions with unrelated entities outside tax havens, e.g. a commodity transaction concluded in 2021 with an unrelated German counterparty worth PLN 750,000, if the German counterparty made in that year a payment to an entity from a tax haven worth more than PLN 500,000.
OBLIGATION OF DUE DILIGENCE	**It is the taxpayer's responsibility to establish the circumstances giving rise to the presumption, as well as who the beneficial owner is. When identifying them, the taxpayer is required to exercise due diligence.** It seems that the best way to satisfy the above requirement is to create an appropriate internal procedure to verify the 'beneficial owner' of the receivables transferred by the taxpayer or to confirm that the taxpayer's counterparties (suppliers) do not settle with entities from tax havens. The draft transfer pricing tax explanations of December 21, 2021 (Obligation to prepare local transfer pricing documentation for the so-called indirect haven transactions referred to in Article 11o Paragraphs 1a and 1b of the CIT Act and Article 23za Paragraphs 1a and 1b of the PIT Act) published by the Ministry of Finance (MF) may be helpful for taxpayers in developing an appropriate procedure. The MF indicates that due diligence is defined as "the actions that a taxpayer can reasonably and justifiably be expected to take in a particular case." **It also follows from the MF draft explanations that if the taxpayer exercising due diligence finds that:** ■ **The beneficial owner is not a tax-haven-based entity, or** ■ **the other party to the transaction did not settle with the tax-haven-based entity in the tax year (relevant for the taxpayer),** **they will not be required to prepare local transfer pricing documentation for indirect tax haven transactions.**

The actions evidencing due diligence identified by the MF include: the taxpayer obtaining a statement from the other party to the transaction indicating that it is the 'beneficial owner' in the transaction.

However, it is worth pointing out that the taxpayer's counterparty has no legal obligation to provide such a statement. There may also be situations where the reliability of a statement made by a counterparty raises doubts for the taxpayer. This has also been noted by the MF. Consequently, the verification procedure will not always end at the stage of obtaining the statement from the counterparty.

As can be seen, the obligation introduced by the lawmakers may therefore lead to many practical difficulties and the need to develop appropriate (sometimes relatively extensive) procedures that have to be properly implemented by taxpayers.

This document was prepared for informational purposes only and is of a general nature. Every time before taking actions on the basis of the presented information, we recommend obtaining a binding opinion of TPA Poland experts.

CONTACT

Joanna Kubińska

Associate Partner, Head of Transfer Pricing

+ 48 502 184 882

joanna.kubinska@tpa-group.pl

TPA is a leading international consulting group, offering comprehensive business advisory services in 12 countries of Central and Southeastern Europe.

In Poland, TPA is one of the largest consulting companies. We provide international corporations and large domestic companies with effective business solutions in terms of tax advisory, accounting and payroll outsourcing, real estate advisory and personnel consulting, as well as audit and business advisory services under the **Baker Tilly TPA** brand. Legal services, provided under the **Baker Tilly Legal Poland** brand, have been a natural addition to our interdisciplinary services.

TPA Poland, Baker Tilly TPA, and Baker Tilly Legal Poland are the exclusive representatives of **Baker Tilly International** in Poland – one of the largest global networks of independent consulting companies.

As a member of Baker Tilly International, we combine the advantages of integrated, interdisciplinary "one-stop-shop" services with local expertise and global reach of the advisory group.

www.tpa-group.pl | www.bakertilly.pl