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Overview of Russian Transfer Pricing Rules

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New rules: Main characteristics

- A new piece of Russian transfer pricing legislation came into force starting from 2012

- New TP dramatically changed the old legislation (so called article 40 of the Russian Tax Code) and made current TP rules very close to OECD standards

- What has changed:
  - New criteria for dependent persons
  - Changed list of controlled transactions
  - New TP methods together with their application guidelines
  - Symmetric adjustments
  - TP documentation and Advance Pricing Agreements
  - Special tax control features

Related Parties

- Main tests:
  - Participation test (direct / indirect) – 25 % and more (art. 105 p. 2 sb. 1 – 3, 10)
  - Power to elect test – 50 % and more of elective body (art. 105 p. 2 sb. 4 – 5)
  - Governance test (art. 105 p. 2 sb. 6 – 8)
  - Subordination test (art. 105 p. 2 sb. 10)
  - Relatives test (art. 105 p. 2 sb. 11)
- Self disclosure option (art. 105 p. 6) – in case no formal criteria exists
- Recognized dependency (art. 105 p. 7) – a court may find that parties are related even if parties do not meet formal criteria. Preconditions: 1) deal is not at arm's length and 2) one party have factual ability to influence other party's business decisions

Controlled transactions (1)

- Domestic transactions between related parties, if meet any from the following criteria:
  - Incomes from transaction exceed 1 Billion RUR (3 Billion RUR for 2012 / 2 Billion RUR for 2013)
  - Party to the transaction pays mineral extraction tax at an interest rate + income under transaction should exceed 60 Mio RUR
  - Party to the transaction applies special tax regimes: single agricultural tax, single tax on imputed income + income under transaction should exceed 100 Mio RUR
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  - Party to the transaction is exempt from corporate profit tax or enjoys CPT at 0 rate + income under transaction should exceed 60 Mio RUR
  - Party to the transaction is a resident of special economic zone + income under transaction should exceed 60 Mio RUR (applies starting from 2014)

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Controlled transactions (2)

- All foreign transactions between related parties, irrespective of other deal parameters
- Transaction between unrelated parties:
  - If carried out through an intermediary with no functions, assets and risks
  - Cross border transactions in respect to commodities of world stock-trading, specifically crude oil or derivatives thereof; ferrous and non-ferrous materials; mineral fertilizers; precious metals and stones (income under transaction should exceed 60 Mio RUR)
  - If a party to a transaction is a resident of a jurisdiction included in the Russian Ministry of Finance black list

Controlled transactions (3)

- Practice change: application irrespective of the transactions' subject
  - Loan obligation
  - IP rights and royalties
  - Shares and other property right (claims)

- TP rules do not apply to stocks and financial instruments due to existence of special rules which apply irrespective of parties dependency – expecting for future changes

Notification on Controlled transactions

- Obligation to notify tax authorities on controlled transactions
- Content of notification:

  - subject of transaction and codes thereof (TN VED, OKP, OKVED);

  - country of origin;

  - shipping and delivery address as well as delivery basis;

  - parties of transaction;

  - amount of income received;

  - quantity and price for unit;

- Submission of notifications – till May 20th (November 20th for 2012 transactions)
- Income thresholds for 2012 (100 Mio RUR) and 2013 (80 Mio RUR)

TP Methods

- Methods:
  - Comparable price transaction (old) – priority method
  - Resale Price (old) – priority for distribution subsidiaries or related parties
  - Cost Plus (old)
  - Transactional net margin method (new)
  - Profit split (new)
  - Or Independent appraisal
- No safe harbor 20 % corridor (price interval / margin interval)

Source of Information

- Old concept of official information does not apply
- New concept – only publicly available information
- Source priority
    1) Local and foreign exchanges; custom statistics; official information from state and municipal authorities; information and rating agencies; taxpayers' transactions
    2) Public editions and information systems; officially available financial and statistic reporting; appraisal reports and any other information used in accordance with section 14.3. of the Russian Tax Code (TP methods)
- Tax secrecy information – wrong source for TP purposes
- Court has right to consider any other TP relevant facts – avoidance of priority rules

TP Documentation

- Obligation to submit TP documentation upon request of tax authorities in order to support transfer prices
- TP documentation may be requested (claimed) from taxpayer not earlier than June 1st of the following tax year
- Do not apply if:
  - APA is concluded;
  - Regulated prices;
  - Transactions with shares and other financial instruments

TP Control

- Cameral type of inspection
- Limitation period: Starts not later than 2 years from notification of CT
- Depth: standard 3 years
- No both side inspections
- Duration: 6 months; maximum extension 21 months
- Special Liability: 40 % from the amount of underpaid tax
  - Not applicable for 2012- 2013
  - 20 % for 2014 – 2016

Symmetry adjustments

- Tax base adjustments for both parties of controlled transaction
- Available:
  - Only upon execution of TA resolution
  - Only under a special notification from TA
  - The amount of adjustment is undisputable unless TA resolution is challenged

Advance Pricing Agreements

- Available only for major taxpayers
- Protects from tax accruals
- Protects from legislative changes
- APA deals with:
  - type of transactions under control;
  - methods;
  - sources of information;
  - documents exchange
- Maximum duration period – 3 years
- Termination for cause (taxpayers' breach) may be challenged in court

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