

Personal liability relating to new transfer pricing obligations

January 2017

In short

On 1st January 2017 a scope of the obligations concerning transfer pricing documentation ('TP tax documentation') has been increased. These new responsibilities include particularly the obligation to maintain TP tax documentation (starting from the documentation for 2016) and a declaration of fulfilment of the said obligation shall be filed together with the annual CIT-8 return. As a result of the amendments in question, as well as increased pressure from the tax administration on transfer pricing issues, starting this year, risk that the persons responsible for tax settlements of companies (including their Management Board members) will be exposed to personal liability, is more significant.

Scope of amendments

According to amended Article 9a of the Corporate Income Tax Act, which came into force on 1st January 2017, taxpayers who conduct specific transactions with related entities will be obliged to **prepare documentation for the previous and each subsequent fiscal year** without being called upon to do so by the authorities

Irrespective of the above, the **obligation to submit tax documentation within 7 days from the request** of the tax or fiscal control authorities remains valid.

Moreover, the taxpayers obliged to prepare TP tax documentation will also need to file a **declaration of preparation of such documentation, together with the annual CIT-8 return.**

If the fiscal year is the same as the calendar year, the first deadline for filing such declaration will be **31 March 2018.**

Intensified tax audits and penal fiscal proceedings

In 2016, we observed the implementation of a strategy announced by the Ministry of Finance aimed at conducting extensive audits focused on examining the correctness of transfer pricing procedures. Apart from quantitative changes, expanding the application of transfer pricing regulations onto new areas can also be seen.

In step with the tax audits, a trend is also discernible which consists of **initiating penal fiscal proceedings automatically after each tax audit uncovering irregularities** in settlements.

Penal fiscal liability

Due to the obligations (i) to maintain TP tax documentation without being called upon and (ii) to file a related declaration of fulfilment, as well as an increase in the number of penal fiscal proceedings being conducted, the risk of imposing personal liability (*i.a.* penal fiscal liability), will also increase.

The said risk rests on **persons who are personally responsible for fulfilling a company's tax obligations and not the company itself.** Most frequently, a Management Board member responsible for financial matters, Financial Director, Tax Manager or Chief Accountant is such a person.

The penal fiscal classification of acts relating to failure to

meet the obligations concerning transfer pricing documentation is unclear. Nor is there any well-established practice in this regard, especially because the regulations are, to a large extent, completely new.

However, we have to take into account that **failing to prepare tax documentation for a given year** (as well as preparing documentation which is incomplete or which contains incorrect information) may be treated as failing to submit the required tax information (or submitting untrue information). In the Penal Fiscal Code, such act is subject to a **fine which can be as high as PLN 6.4 million**.

The persons responsible for a company's tax reconciliations may also face such risk in the event of failing to file a **declaration of possession of tax documentation** or by filing a false declaration.

However, the sanction for **failing to submit tax documentation within 7 days upon the authority's request or submitting incorrect/incomplete documentation** will not be amended. In the event of failing to meet this obligation, the taxpayer may be liable, as mentioned above, for failing to submit the required tax information (or for submitting false information), as well as for obstructing the tax audit (if the taxpayer does have tax documentation which it subsequently fails to submit). In the Penal Fiscal Code, such act is subject to a **fine which could be as high as PLN 19.2 million**.

Further liability of Management Board members

Irrespective of the above, should an entity suffer a sanction in the form of the application of an increased, "penalty" tax rate due to

having no tax documentation (or having incorrect or incomplete documentation), Management Board members (or other persons responsible) may – should such proceedings be initiated by the authorized persons – suffer further-reaching consequences relating to overall civil liability for damage or the **liability of Management Board members** arising from the Commercial Companies Code.

They may also suffer penal sanctions. According to the Penal Code, any person who, as a result of failing in his/her duty, has caused damage to a company's economic interest (and the application of a "penalty" tax rate to a company which does not have, contrary to the obligation, tax documentation may be classified as such) may be considered to be acting to the company's detriment, which is subject to **imprisonment of as much as 10 years**.

Let's talk

In order to discuss the effect which the above issues may have on your business in more detail, please contact PwC specialists:

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