

TRANSFER PRICING DOCUMENTATION REQUIRED ALSO FOR TRANSACTIONS WITH STATE TREASURY

We wish to alert you to a recently published judgement of the Supreme Administrative Court ("SAC") dated 8 March 2016 in case no. **II FSK 4000/13**. The court held that the transfer pricing documentation requirements under Article 9a CIT Act extend also to transactions with the State Treasury and transactions that are tax-neutral.

This judgement **repealed an earlier judgement** of the Provincial Administrative Court ("PAC") in Warsaw dated 28 August 2013 (case no. III SA/Wa 3335/12), **which was favourable for the taxpayer.**

The case involved a state-owned company which, pursuant to its strategy, entered into a series of group integration transactions with the State Treasury between 2009 and 2012. Among the transactions were contributions by State Treasury to the company of shares in other entities in exchange for newly issued shares in the company and purchases by the company from the State Treasury of shares in certain businesses.

The company requested a private tax ruling from the Finance Minister about whether those transactions had to be documented under Article 9a CIT Act, which applies to transfer pricing documentation. The company believed that it was not required to prepare such documentation because the transactions involved non-taxable exchanges of shares which did not affect the amount of tax payable for the year in which they occurred. The company further argued that the other party (State Treasury) is exempted from income tax.

The Finance Minister did not agree with the company but, on appeal, PAC did.

According to PAC, transfer pricing documentation must be prepared only for those transactions which affect taxable income. PAC said that such conclusion follows from Article 19.4 CIT Act, which describes rules of procedure for tax authorities in the case of absence of documentation and the need to assess income under Article 11 CIT Act where tax loss has been overstated or taxable income understated.

PAC also agreed with the company's contention that no understatement or overstatement of taxable income is possible with respect to the State Treasury which is exempt from income tax, so there is no need to prepare TP documentation.

PAC's taxpayer-friendly judgement was repealed by SAC. According to SAC, you cannot be allowed not to prepare the TP documentation required under Article 9a CIT Act merely because the other party to your transaction is the State Treasury. The court made a point of noting that, being a special kind of legal person, the State Treasury is a taxpayer for income tax purposes albeit it is exempt under Article 6.1.1 CIT Act. But that exemption does not mean that the State Treasury is not subject to the principles of market economy when exercising its functions. Thus, SAC's reasoning continued, the tax exemption does not waive the duty to prepare TP documentation. A tax exemption means nothing more than that a given entity is not burdened with tax, but CIT Act continues to apply to the transaction

and the parties involved.

In light of the discussed SAC case, taxpayers must prepare TP documentation both for transactions that affect their taxable income and for those that are tax-neutral. Admittedly, a failure to prepare the documentation in the latter case will not attract the 50% penalty tax rate, but it must be remembered that there is still the risk of liability under Fiscal Penal Code.

If this issue pertains to your business and you are interested in our assistance, please contact your WTS&SAJA consultant or our office.

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