

THE SCOPE OF THE APA PROGRAMME IN POLAND

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Intentions concerning introduction of Advanced Pricing Agreements (APA)

Goals to achieve:

- to attract investments into the country,
- to increase stability of operations,
- to provide taxpayers with an effective tool to reduce tax risks related to transfer pricing.

Alternative forms of avoidance and solving the TP dispute



APA: Advance Pricing Agreement



MAP: Mutual Agreement Procedure

What is it:

ex ante procedure- administrative decision from Minister of Finance on TP

ex post procedure – dispute resolution in case of double taxation

Advantages:

Risk elimination for possible TP adjustment

Avoidance of double taxation

PwC MAP network –gathering experience of former Competent Authorities of countries like USA, UK, PL, Denmark, etc.

General regulations

- In Poland the APA programme was brought into Polish tax system on 1st January 2006.
- The APA programme is implemented under domestic law – the Tax Code, Sec. IIA.
- The Minister of Finance is the competent authority.
- An advance pricing agreement - constitutes an **administrative formal decision**.
- The decision regarding the acceptability of a given method is issued on a taxpayer's request.

APA Statistics

	Unilateral (positive)	Bilateral	Multilateral
Signed	39	3	1
Pending	7	12	1

Types of APAs

- **unilateral** - in this category there are provided:
 - domestic APAs (involving only domestic related entities),
 - foreign APAs (involving domestic entity related to a foreign one or domestic entities related to the same foreign entity),
 - **bilateral**,
 - **multilateral**.
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- In case of a bilateral or a multilateral APA, relevant treaties are applied (art. 25 DTAs).

Administrative time limits for the procedure:

The Minister of Finance has the following time limits to issue a decision:

- **6 months** for an unilateral APA,
- **12 months** for a bilateral APA,
- **18 months** for a multilateral APA.

These time limits are not binding and may be prolonged under general rules provided for under the Tax Code.

The Minister of Finance may organize official discussions with the requesting party before the APA decision is issued.

Critical assumptions

- nature and object of the transaction,
- agreed transfer pricing method,
- price calculation,
- formula,
- circumstances necessary for application of the agreed pricing method,
- other assumptions for application of the pricing method.

Conclusion of the APA

The APA is concluded in the form of a formal administrative decision.

Types of decisions:

- positive,
- negative,
- discontinuance in the case of an application withdrawal.

The follow-up mechanism:

- submitting an annual report,
- a monitoring system of the APA performance.

Validity period of the APA is not longer than 5 years, however it may be extended for another 5 years.

Information involved in the decision

- names and addresses of entities to which the APA applies,
 - value of the transaction,
 - type and object of the transaction, as well as the duration of the APA,
 - description of the agreed transfer pricing method,
 - determination of conditions pertinent to the application,
 - the period for which the APA decision is binding.
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- In addition, the decision should include a factual and legal justification, as well as information regarding the appeal procedure.

Using the APA

In the case of:

- non fulfilment of the conditions stipulated in the APA decision, the Minister of Finance is entitled to cancel it,
- a change of market conditions that causes the agreed transfer pricing method to be obviously inadequate, the APA may be changed or revoked by the Minister of Finance prior to expiry of the APA.

Pre-filling procedure

- Pre-filling procedure is available:
 - in writing,
 - during pre-filling meetings.
- The taxpayer benefits from clarification of the information that is likely to be required and any specific elements likely to be pertinent to the processing of the formal APA request.
- The pre-filling meeting may prove to be vital for clarification of the purposefulness of submitting the request for the APA, the scope of indispensable data that shall be presented, the course and time in which the APA is expected to be issued.

Formal APA application

An APA request may be filed by a domestic entity,

- i.e. an entity having its seat or board of management in Poland,
- as well as a Polish permanent establishment of a foreign company.

Obligatory elements of the APA request:

- suggested method for determining transfer prices and in particular one of the methods defined in the Corporate Income Tax Act (methods which are in line with The OECD Transfer Pricing Guidelines),
- documents exerting an important influence on the transaction price.

Scope of APA

- Transaction
- Cost sharing agreement
- Due to roll-back tool – not only future transactions

Obligatory elements of the APA request

- suggested method for determining transfer prices and in particular one of the methods defined in the Corporate Income Tax Act (methods which are in line with The OECD Transfer Pricing Guidelines),
- description how the proposed method will be applied,
- documents vital to the transaction price/CCA,
- description of circumstances that may affect the determination of the transfer price/CCA result,
- the proposed term of the arrangements,
- list of related parties with which the transaction will be concluded.

The APA request is a starting point of the whole procedure.

Roll-back

- Since 1.01.2017
- Roll-back from the date of issuing application
- Potential area for discussion within MAP

Application fee

The filling fee amounts to 1% of the value of a transaction with the following limitations:

- for a domestic unilateral agreement (involving only domestic related entities) – no less than around 1.200 Euro and no more than 11.600 Euro;
 - for an unilateral agreement concerning foreign entities no less than 4.600 Euro and no more than 23.200 Euro;
 - for a foreign bilateral or multilateral agreement the fee amounts should be no less than 11.600 Euro and no more than 46.500 Euro.
- Renewal fees are half of the amount of the original filling fee.

APA team

- The APA team is of 8 specialists.
- The APA team is a part of the Tax Policy Department in The Ministry of Finance.
- The APA team is assigned to each case according to difficulties of the case.
- Usually 2-3 persons are assigned to a case (supervised by the Head of the Unit and the Deputy Director).
- External experts may be appointed.
- Legal, economic, valuation, accounting skills required.
- Fluent at least in one foreign language.

Already faced problems

Examples:

- Preference of transactional profit methods particularly TNMM, even for simple, not complex transactions,
- unreliable comparability analysis,
- growing number of PSM cases
- growing number of restructuring cases
- procedural issues: incompleteness of applications, misleading assumptions, omitting the opportunity of prefilling procedure.

Strengths and weaknesses of the APA

- The APA as a positive option-decrease tax risk to non
- Incentive for TA – avoidance of disputes,
- Positive comments in professional tax magazines,
- Possibility to clarify important and most sophisticated issues,
- Inconveniences concerning the level of application fee or the period for issuing the decision (too long),
- Too long process with regard to dynamic of the business
- Reasonable discussion with TA

Thank you for your attention!

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