

FUNCTIONING OF TRANSFER PRICING IN UKRAINE

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The essence of transfer pricing, its features, principles and principles of formation are investigated. Methods of transfer pricing in foreign countries are analyzed. The criteria for identifying controlled transactions and the list of persons considered interrelated. The methods of transfer pricing applied in Ukraine are considered. Emphasis is placed on increasing responsibility for violation of transfer pricing rules. Recommendations for improving the efficiency of transfer pricing regulation in Ukraine are substantiated.

Key words: transfer pricing, controlled transaction, related party, transfer pricing method, tax control.

The development of globalization and integration processes, international trade has led to the emergence of new tools for the redistribution of profits of enterprises – transfer pricing (TCU). TCU is based on the use of differences in tax regimes of different countries with the mutual consent of counterparties. The contract is executed in such a way that the counterparty with the high level of taxation declares losses or the minimum profit, and at the counterparty with the low tax rates - the maximum profit.

In the world, TCU issues became relevant with the moment of the emergence of transnational corporations and the development of international trade at the end of XX century. For Ukraine, TCU has developed with the development and formation of financial-industrial groups. Among the European countries, the Ukrainian mechanism of control of TCU is considered one of the weakest, and the problems of withdrawal of capital from Ukraine do not lose their relevance.

TCU issues were reflected in the scientific works of domestic and foreign scientists, in particular: Yu. Arkatova, T. Butenko, P. Dzhjuba, A. Kasych, O. Kanishchenko, O. Tereshchenko, F. Tkachyk, V. Sidenko, O. CHerevko and others. However, not all aspects of this pressing issue have been identified and substantiated, and many provisions require further refinement to improve the mechanism of regulation and operation of TCUs in Ukraine.

The purpose of the article is to study the main trends of transfer pricing in Ukraine in the context of globalization of the economy.

The tax laws of developed countries have long been used by the TCU as a mechanism for regulating tax obligations. For the first time, the concept of transfer pricing began to be considered in Australia in 1982. From Table 1 we can conclude that in some countries of the world TCC practice has been established for more than 15 years.

Table 1

Implementation of transfer pricing rules

Country	Year	Країна	Year
Australia	1982	United Kingdom	1999
USA	1994	Singapore	2006
Republic of Korea	1997	Norway	2008
New Zealand	1997	Cheap hotels in Hong Kong, China	2009
Denmark	1998	Malaysia	2012

Source: based on [2].

Most countries in TCU legislation use the OECD Guidelines set out in the OECD TCU Guidelines for Multinational Corporations and Tax Services.

French Tax Code exempts tax authorities from the obligation to prove the existence of dependence of agreements and appropriate control in the case of profit transfer by enterprises located in the territory of a foreign country with a preferential tax regime. At the same time, the law obliges companies to cooperate with tax authorities on documentation on transfer pricing.

Norway controls capital flows through increased tax controls by Norwegian corporations in other countries. Portugal, Spain, Argentina, Brazil provide additional grounds for initiating tax control of transfer prices subject to a transaction with a resident of the “tax haven”. In Australia and Canada, an additional reason is the violation of the arm's length principle.

In Ukraine, transfer pricing rules were put into effect on September 1, 2013. Since that time, they have undergone significant changes every year, which need to be taken into account when planning business transactions with foreign contractors. The basis for national legislation were the OECD Guidelines, the basic rules of which were implemented in Art. 39 of the Tax Code of Ukraine (CCU). The Laws of Ukraine and the CMU Resolutions also determine the issues of TCU regulation. However, despite the continuous improvement of TCU legislation, there are gaps that create the conditions for withdrawing capital from the country.

According to the State Tax Service of Ukraine as of 01.01.2019 the total amount of adjustments is 8.2 billion UAH, the profit tax over UAH 632 million has been added, losses have been reduced by 5.3 billion UAH, VAT has been added by 13.7 million UAH. [5]. These figures are striking, given that such tax revenues are largely generated by the taxpayers' negligence in relation to the TCU and the lack of a structured policy in this area..

The arm's length principle is the basic principle at TCU, according to which the taxpayer, participant of controlled transactions, determines the amount of taxable profit.

One of the important steps in analyzing the conditions for performing controlled operations is to correctly and fully define them. Timely and accurate detection of controlled transactions enables effective monitoring of the risks associated with TCUs.

The financial criteria for recognizing transactions are controlled:

- the annual income of the taxpayer from any activity, determined by accounting rules, for the corresponding tax (reporting) year exceeds UAH 150 million (excluding VAT);
- volume of business transactions (net of indirect taxes) with each counterparty, determined according to the accounting rules for the respective tax (reporting) year, exceeds UAH 10 million.

The general principles for recognizing transactions controlled under applicable law are shown in fig. 1.

Criteria by which entities (legal entities) or legal entities and natural persons (entities) recognize as interrelated:

- AU / FD directly and / or indirectly owns the corporate rights of another AO of 20% or more;
- one and the same SE directly and / or indirectly owns corporate rights in each such SE of 20 percent or more;
- one and the same JU / FD decides on the appointment (election) of sole executive bodies of each such JU;
- one and the same JU / FD decides on the appointment (election) of 50% or more of the composition of the collegial executive body or supervisory board of each such legal entity;
- at least 50% of the composition of the collegial executive body and / or the supervisory board of each such JI is the same;
- one-person executive bodies of such organizations are appointed (elected) by the decision of the same person (the owner or his authorized body);
- the JU has the authority to appoint (elect) a sole executive body of such JU or to appoint (elect) 50% or more of its collegial executive body or supervisory board;
- the FOP shall exercise the authority of a sole executive body in such legal entity;
- the sum of all loans (borrowings), reverse financial assistance from the IO (FD) and / or loans (loans), return financial assistance from other FDs (FD), guaranteed by one FD (FD), exceeds the amount of equity more than 3.5 times (for financial institutions and leasing companies - more than 10 times). The amount of such loans (loans), returnable financial assistance and equity is defined as the arithmetic mean (at the beginning and end of the reporting period).

For individuals, it is: spouse, parents (including adoptive parents), children (adults / minors, including adopted), siblings, guardian, guardian, guardian or child.

As we mentioned above, the main methodological principle of TCU for tax purposes is the principle of market price, the so-called principle of "outstretched hand". The "arm's length" rule set out in the OECD Guidelines is the principle of taxing interdependent companies. According to the rule of the outstretched hand, the calculation of tax liabilities

is made on the basis of market prices under the agreements, between the interdependent taxpayers, as if the companies were independent (located "at arm's length") [8, p.149].

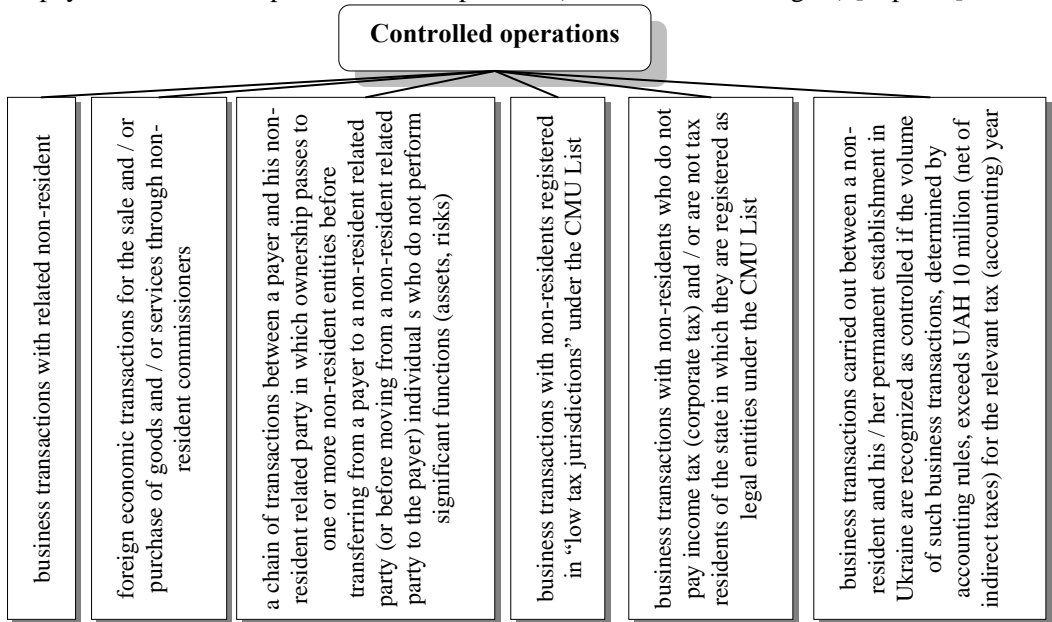


Fig. 1. Principles of definition of operations controlled

Source: based on [1].

The CCU defines the conditions under which business transactions are recognized as "outstretched":

- - if the prices (mark-ups) for goods (works, services) are subject to state regulation in accordance with the law, the price is considered to be in accordance with the principle of "outstretched hand", if it is set in accordance with the rules of such regulation. This provision does not apply where the minimum (maximum) selling price or indicative price is set. In this case, the arm's length operation price shall be determined in accordance with this Article, but may not be less than the minimum price (mark-up) or indicative price and greater than the maximum price (mark-up);
- - if the valuation is required during the operation, the value of the valuation object is the basis for eligibility for tax purposes;
- - in the case of an auction (public auction), the obligation of which is required by law, the conditions that have emerged from the result of such auction (public auction), are recognized as conforming to the principle of "arm's length";
- - if the sale (alienation) of goods, including property pledged by the borrower for the purpose of securing the creditor's claims, is compulsorily enforced by law, the conditions formed during such sale are recognized to be in accordance with the "arm's length" principle [1].

Functional analysis and specific TCU methods should be performed to identify comparable transactions and determine the level of market prices. According to Arkatova Yu.V., the most advanced in theory and intensively used by companies in different countries of the world are approaches to determining transfer prices on a cost basis, on a market basis and in the negotiation process (table 2). About half of enterprises are oriented at setting transfer prices for their own costs. This is due to the lack of competitive external markets for many of the intermediate products that are the objects of TCU [2, p. 14].

Table 2

Use of TCU methods in foreign countries, %

TCU method	Країна					
	USA	Australia	Canada	Japan	India	India United Kingdom
Based on market prices	30	46	34	34	47	41
Cost-based	50	45	46	46	53	29
Based on negotiations	18	9	18	19	-	24
Other methods	2	-	2	1	-	6

Source: made on the basis of [2].

The national legislation provides that the eligibility of a controlled operation of the “arm's length” principle is performed by one of five methods: comparative uncontrolled price, resale price, “cost plus”, net profit, profit sharing.

Many controversies arise between taxpayers and supervisory authorities through sources of pricing information, due to the lack of detailed justification for the taxpayer's use to calculate the profitability (price range) of financial data over several years and the non-use of indicators of the controlled transaction period.

Among the sources of information used by the controlling authorities to determine the eligibility of the “arm's length” controlled operation are the following: information received under international agreements; databases for searching comparable legal entities (“Amadeus”, “Ruslana”); open state registers; publications in official media; data from the analytical and information agency “APK-Inform”; commercial publications; price inquiries of State Enterprise “Derzhzovnishinform”, State Enterprise “Ukrpromzovnis-Expertise”; prices formed as a result of public auctions (tenders), tenders, stock quotes; market research; requests; surveys of employees of the enterprise, etc..

PKU defines a list of profitability indicators that can be used to establish compliance with the terms of the arm's length controlled operation (in particular, gross profitability, cost-effectiveness, asset return, return on equity, profitability of operating expenses, net profitability).

Profitability figures are calculated separately for each year on the basis of financial data (for example, from the base “Amadeus”, “Ruslana”). However, if the appropriate rate of return on a controlled transaction is outside the market range, the taxpayer is obliged to adjust the tax base independently according to the market range.

There are a number of tools that companies can use to adjust their financial performance (profitability metrics) (table 3.).

Table 3

Ways to adjust your profitability

Non-refundable financial assistance	
Characteristic	These are the funds transferred to the taxpayer in accordance with donation contracts, other similar contracts, or without the conclusion of such contracts; the amount of debt of one taxpayer to another taxpayer that is not collected after the statute of limitations has expired
Benefits	From the point of view of Ukrainian legislation, there are no restrictions on the amount of financial aid provided
Disadvantages	The financial assistance agreement must be made in accordance with the law, indicating a clear link between the financial assistance provided / received and the controlled operation. Otherwise, there is a risk that income in the form of a grant will not be taken into account when calculating profitability in a controlled transaction
Debt forgiveness	
Characteristic	This instrument provides for full or partial forgiveness of the debt by the creditor. Yes, the obligation is terminated as a result of the release (forgiveness of debt) by the creditor of the debtor from his obligations, if it does not violate the rights of third parties to the property of the lender
Benefits	This option is the simplest in terms of paperwork. The potential impact of debt forgiveness on the results of a controlled transaction is not limited to goods (services) sold in the reporting period.
Disadvantages	Debt forgiveness is limited by the amount payable and is only possible if there is a close correlation between the controlled transaction and the amount of forgiven debt. Otherwise, there is a risk that the debt forgiveness income will not be taken into account when calculating the profitability of a controlled operation as being unrelated to the controlled operation or the operating activity as a whole.
Credit notes	
Characteristic	Adjusting prices by issuing a credit note is a fairly common tool that allows you to reduce the cost of purchased goods - items of controlled transactions. Credit notes typically relate directly to controlled transactions and have a direct impact on the calculation of profitability
Benefits	One of the benefits of using credit notes is to reduce payables, which in turn reduces the outflows of companies and reduces the impact of changes in foreign exchange rates. Legislative use of credit notes is not regulated, but they are widespread in practice
Disadvantages	Credit note adjustments are limited in time by the time the contract is fully executed
Bonuses / discounts / bonuses / other rewards	
Characteristic	The terms of the distribution agreements may provide the provider with incentive and / or incentive payments (eg bonuses, discounts, bonuses, other types of incentives)

Continuation of table 3

Benefits	The provision of incentive and incentive payments is not limited to the amount of the “principal” controlled transaction, and the use of this instrument is the amount of payables
Disadvantages	Motivational payments are treated by the tax authorities as payment for marketing services, in connection with which the transaction is subject to VAT

Source: based on [3; 6].

Annual changes and additions to the legislation indicate that careful attention is paid to TCU rules and recognition of control in this area is extremely important. In the near future, a transfer pricing audit department may be created within the State Fiscal Service, the main expectation of which will be the increase in budget revenues. The number of checks and requests for documentation will increase, so the monitoring of the risks of the TCU must be carried out at enterprises on an ongoing basis.

Typical mistakes of taxpayers in complying with TCU rules are failure to submit a report or breach of its submission deadline, violation of the requirements of the TCU report or documentation, misunderstanding of pricing methods, lack of a structured approach to detect controlled transactions, lack of internal human resources for TCU lack of effective communication and dialogue with regulatory authorities. Any such mistake may in the future go back to the taxpayer, since the limitation period for transfer pricing is 7 years.

Thus, given the high penalties for not submitting or reporting late on a Controlled Operations Report, or not including a controlled operation in an already submitted Report, or failing to request documentation from a TCU, it is advisable for businesses to develop and build an internal effective TCU methodology that would include necessary documentation, pricing policy definition, constant risk monitoring, preparation of TCU document templates, internal control of TCU.

Therefore, a well-established system of management and financial accounting at Ukrainian enterprises is needed to effectively operate the TCU and reduce future risks for business entities in terms of being able to fall under significant penalties within tight tax controls.

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ФУНКЦІОНУВАННЯ ТРАНСФЕРТНОГО ЦІНОУТВОРЕННЯ В УКРАЇНІ

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Досліджено сутність трансфертного ціноутворення, його особливості, принципи та засади формування. Проаналізовано методи трансфертного ціноутворення у зарубіжних країнах. Систематизовано критерії визначення операцій контрольованими, а також перелік осіб, які вважаються взаємопов'язаними. Розглянуто методи трансфертного ціноутворення, які застосовуються в Україні. Акцентовано увагу на підвищенні відповідальності за порушення правил трансфертного ціноутворення. Обґрунтовано рекомендації щодо підвищення ефективності регулювання трансфертного ціноутворення в Україні.

Типовими помилками платників податку при дотриманні правил ТЦУ є неподання звіту чи порушення строків його подання, порушення вимог до звіту чи документації з ТЦУ, неправильне розуміння методів щодо встановлення ціни, відсутність структурованого підходу до виявлення контрольованих операцій, відсутність внутрішнього кадрового ресурсу для контролю за ТЦУ, відсутність ефективної комунікації-діалогу з контролюючими органами. Кожна така помилка в майбутньому може повернутися до платника податку, адже строк позовної давності щодо питань трансфертного ціноутворення становить 7 років.

Таким чином, з огляду на високі штрафні санкції за неподання чи невчасне подання Звіту про контрольовані операції, або невключення контрольованої операції до уже поданого Звіту, чи неподання на запит документації з ТЦУ, підприємствам доцільно розробити і вибудувати внутрішню ефективну методологію ТЦУ, яка б включала підготовку необхідної документації, визначення політики ціноутворення, постійний моніторинг ризиків, підготовку шаблонів документів ТЦУ, внутрішній контроль за ТЦУ. Отже, з метою ефективного функціонування ТЦУ і зменшення майбутніх ризиків для суб'єктів господарювання в частині можливості потрапити під значні штрафні санкції в межах жорсткого податкового контролю, необхідна добре налагоджена система управлінського і фінансового обліку на підприємствах України.

Ключові слова: трансфертне ціноутворення, контрольована операція, пов'язана особа, метод трансфертного ціноутворення, податковий контроль.