ACTA UNIVERSITATIS AGRICULTURAE ET SILVICULTURAE MENDELIANAE BRUNENSIS

Volume LVIII 46 Number 6, 2010

TRANSFER PRICING AND THE CZECH TAX POLICY

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Received: August 10, 2010

Abstract

SOLILOVÁ, V., SOBOTKOVÁ, V.: *Transfer pricing and the Czech tax policy.* Acta univ. agric. et silvic. Mendel. Brun., 2010, LVIII, No. 6, pp. 465–472

The Czech Republic as a small open economy with an extensive network of the international tax treaties for the avoidance of the double taxation prevents from shifting the tax base of the associated enterprises to countries with preferential tax regime through transfer pricing rules. Transfer pricing as one of the important areas of international taxes determines how the profits of the multinational enterprises are split between the jurisdictions in which they operate and which countries get to tax those profits. This situation may affect the global budget of the multinational enterprises and the tax revenues of the jurisdictions.
This paper is focused on the transfer pricing rules used in the Czech Republic and makes recommendations for the Czech tax policy in this area based on the analysis of the transfer pricing rules in the EU Member States.

Czech tax policy, transfer pricing, arm's length principle, APA, OECD Transfer pricing guidelines, multinational enterprises

In the international tax area there are exist a lot of issues, but one them transfer pricing (hereinafter as TP) continues to be the most important international tax issue that many multinational enterprises (hereinafter as MNEs) face according to the Transfer pricing global survey by Ernst & Young during 2007–2008. As mentioned (G. Green, 2008) transfer price in the context of the tax legislation is the price at which one entity supplies something (goods, services, the right to use tangible or intangible assets, loans, guarantees and other financial transactions) to another associated[1] entity... This associated entity usually operates in different countries and the transactions are therefore cross-border. Sometimes associated entity engaged in cross-border transactions can avoid the income taxes of a country through their manipulation of TP and then this entity would pay little or no tax on their combined profits.

Therefore there is arm's lenght principle (hereinafter ALP). The authoritative statement of the arm's length principle is found in paragraph 1 of Article 9 of the OECD Model Treaty: "when conditions are made or imposed between two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly". Under this principle, associated entities must set transfer pricing for any inter-company transaction as if they were unrelated entities all other aspects of the relationship were unchanged. The OECD Model Treaty forms the basis of many bilateral tax treaties and elaborated upon in the OECD Transfer pricing Guide-

1 Associated entities should be defined to include two or more entities that are owned or controlled, directly or indirectly, by the same interests.

lines[2] (hereinafter OECD TP Guidelines) which provides guidance on the application of the arm's length principle to the pricing, for tax purposes, of cross-border transactions between associated enterprises.

This paper is focused on transfer pricing rules used in the Czech Republic which should prevent MNEs from shifting income/profits to associated entity organized in the country with preferential tax regime. In general, the governments should protect their own tax revenues throught using transfer pricing rules. The aim of the paper is make recommendations for the Czech tax policy in this area based on the analysis of the transfer pricing rules (approaches and mechanisms to avoid the transfer of profits to countries with preferential tax regime) in the EU Member States.

This paper is a part of the output of the research project of the Internal Grant Agency of the Faculty of business and economics of the Mendel University in Brno „Transfer pricing"– identification No. 18/2010.

MATERIALS AND METHODS

The basic source of our research was the OECD TP Guidelines which was issued by the OECD in 1995 and its proposed revision of the chapter I–III[3]. The OECD TP Guidelines provide guidance on the application of the arm's length principle to the pricing, for tax purposes, of cross-border transactions between associated enterprises. Attention is focused on the nature of the dealing between MNEs and on whether the conditions thereof differ from the conditions that would be obtained in comparable uncontrolled transactions. The analysis of the controlled and uncontrolled transactions, which is referred to as a "comparability analysis"[4] is at the heart of the application of the ALP and is described on chapter III. As mentioned the OECD Guidelines (2010) the process of identifying potential comparables is one of the most critical aspects of the comparability analysis and it should be transparent, systematic and verifiable. In particular, the choice of selection criteria has a significant influence on the outcome of the analysis and should reflect the most meaningful economic characteristics of the transactions compared. OECD TP Guidelines also indicate various TP methods for determining the arm's length price on sales of tangible or intangible personal property. There are five prefered methods – the comparable uncontrolled price method (hereinafter as CUP), the resale price method (hereinafter as RPM) and the cost plus method (hereinafter as COST+) which are called as traditional transfer pricing methods and two last methods the profit-split method and the transactional net margin method (hereinafter as TNMM) which are called as transactional profit methods[5]. Of course OECD Guidelines describe also other methods to establish prices provided those prices satisfy the arm's lenght principle in accordance with OECD Guidelines. However taxpayers should maintain and be prepared to provide documentation regarding how its TP were established and explain why OECD-recognised methods were regarded as less appropriate or nonworkable in the circumstances of the case and of the reason why the selected other method was regarded as providing a better solution (OECD Guidelines, 2010).

These all mentioned methods can be used to establish whether the conditions imposed in the commercial or financial relations between associated enterprises are consistent with the ALP. OECD TP Guidelines of 1995 recommend applying the traditional transfer pricing methods, specifically CUP method, which is usually useless. And therefore in practice have been increasingly used the transactional profit methods namely TNMM method. The OECD had recognised the problem of the comparability and the change of the approach to TP methods and therefor OECD had proposed a revision of the OECD TP Guidelines. In the proposed revision had changed the status of the transactional profit methods called as last resort methods to classic methods without applying preferences between methods. Futher change had been made in the arm's length range in which should be possible to use the statistical tools for example the interquartile range. The proposed revision was approved by the OECD Council on 22 July 2010.

For taxpayers is very important maintain and be prepared to provide documentation regarding how their transfer prices were established and if transfer pricing policy is arm's lenght therefor further sources of our research were EU recommendations, especially the Code of Conduct on transfer pricing documentation for associated enterprises in the EU (hereinafter as EU TPD) and EC Arbitration Convention[6]. The purpose of the EU TPD is to standardize documentation that MNEs must provide to tax au-

2 OECD TP Guidelines – „Transfer pricing guidelines for multinational enterprises and tax administrations" which was issued by the OECD in 1995 and nowadays (on 22 July 2010) was approved its 2010 version which revised chapter I–III.

3 Revision of the chapter I–III. (comparability and profit methods) was result of seven-year project of the OECD which was opened in 2003.

4 For determining whether controlled and uncontrolled transactions or entities are comparable, 5 relevant comparability factors were defined: characteristics of products / servises, functional analysis, contractual terms, economics circumstances and business strategies. The functional analysis is necessary and the most important.

5 More about TP methods state KRATZER, C. (2008), ARNOLD, B. J., McINTYRE, M. J. (2002), OECD Guidelines (2010, chapter II.).

6 EC Arbitration Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises.

thorities and reducing the costs of complying with TP documentation rules of various member states. Each taxpayer should determine TP in accordance with the ALP based upon information reasonably available at the time of the determination. The information needed will vary depending upon the facts and circumstances of the case.

Because conflicts between countries over TP are commonplace, the European Council approved EC Arbitration Convention[7], the OECD supplemented its OECD TP Guidelines with an Annex containing Guidelines for conducting APAs[8] under the mutual agreement procedure and the Article 25 "Mutual agreement procedure" of the OECD Model Treaty was added to Section 5 regarding the arbitration process[9]. So last used sources were OECD Model Treaty, single guidelines of Ministery of Finance of each EU Member states or relevant legislation dealing with transfer pricing rules in EU Member states and particular OECD reports.

In this paper were used basic scientific methods such as analysis, synthesis, deduction, induction, description, comparison.

RESULTS AND DISCUSSION

The aim of this paper was based on an analysis of approaches and mechanisms to avoid the transfer of profits to countries with preferential tax regimes in the EU Member States to formulate recommendations for the Czech tax policy. The analysis showed that TP rules are similar in all EU Member States. As can be seen from summary Tab I. (Solilová, 2010) there are all EU Member States that apply the ALP. The explicit reference to the OECD TP Guidelines is not mentioned in domestic legislation of Greece, Slovenia, Latvia, Luxembourg, Poland and Slovenia. However, their TP legislation if it exist have generally adopted the ALP and methods provided by OECD TP Guidelines. All of EU Member States beside Austria[10] define of related persons or associated enterprises in domestic legislation which is usually corresponding with the provision of the Art. 9 OECD Model Treaty. Each of EU Member States applies the TP methods and relies on the general recommendation of the OECD TP Guidelines. Majority of EU Member States explicitly state the TP methods in their domestic legislation which to be used for determining arm's length prices. Other EU Member States explicitly provide the reference to the OECD TP Guidelines. Some of the EU Member States state both possibilities. All of EU Member States besides Italy apply at least general rules on TP documentation which have been published in administrative decrees and have relied on the recommendation of the OECD TP Guidelines and/or of the EU TPD. However, Italy's taxpayers that do keep adequate documentation and are able to justify their pricing arrangements as being arm's length during to any TP audits are in better position. Within general tax audits of legal persons, tax administrators focus also on the correct setting of transfer prices. However some of EU Member States are trying to separate transfer pricing audit from general tax audits of legal persons or at least impose specific TP penalties in this area (transfer pricing) e.g., only in the Slovak republic, Belgium and Spain there are special TP audits. In the Slovak republic and Belgium have been created a specialised group of staff to handle TP audits and the Spain's Corporate Income Tax Act only states the basic principles of a specific TP audit. Half of the EU Member States apply the specific TP penalties. Most fines are imposed for failure to comply with the ALP (in Greece, Lithuania, Bulgaria, the Netherlands) and for TP documentation (in Hungary, Romania, Slovenia). In practice is possible to obtain an opinion[11] from the tax authorities as a unilateral APA or as bilateral APAs on the basis of the Article 25 OECD Model Treaty in all EU Member States besides Latvia and Lithuania or there are provisions enabling taxpayers to negotiate APAs (unilateral, bilateral, multilateral) with the tax authorities in the legislation.

In the Czech Republic are TP rules at a similar level as in the others EU Member States. The ALP has been included in the Czech Income Tax Act, § 23/7 (hereinafter as ITA) since 1993, but its practical application and its compliance have been started until 2004 when the Ministry of Finance issued the first decree related to transfer pricing "D-258 Communication by the Ministry of Finance in respect of international standards application in taxation of transactions between associated enterprises – transfer pricing". Subsequently, the Ministry of Finance issued remaining 2 decrees ("D-292 Communication by the Ministry of Finance in respect of s. 38nc of Act no. 586/1992 Coll., on income taxes – binding consideration over the transfer pricing policy used in related party transactions" and "D-293 Communication by the Ministry of Finance in respect of the scope of transfer pricing documentation") which are based on the principles set out in the OECD TP Guidelines. However, the term "transfer price" is not even mentioned in the Czech ITA, there is mentioned only the term "negotiated price", in § 23/7 and § 38nc ITA regarding the definition of ALP, related persons (associated enterprices) and the binding consideration. The term "transfer pricing" can be found in the decrees of the Ministry of Finance that are concerned in remaining parts of the TP rules for

7 The Arbitration convention can be used only for transfer pricing disputes.
8 APAs are the advance pricing agreements which are used as a prevention of disputes in the transfer pricing areas.
9 The arbitration process under OECD Model Treaty can be used for all tax disputes.
10 In Austria there is no specific definition of related parties, there is general reference to Art. 9 OECD Model Treaty.
11 Some governments call it as a binding consideration.

I: *Transfer pricing rules in EU Member States*

Member States	Arm's length principle	Reference to the OECD Guidelines	Statement of related parties	TP methods	TP Documentation	Specific TP audit procedures / penalties	APAs
Austria	yes	yes	reference to the art. 9 OECD Model Treaty	reference to the OECD Guidelines[12]	yes	no / no	reference to the OECD Model Treaty[13]
Belgium	yes	yes	yes	reference to the OECD Guidelines	yes	yes / no	yes
Bulgaria	yes	yes	yes	yes[14]	yes	no / yes	yes
Czech republic	yes	yes	yes	yes, reference to the OECD Guidelines[15]	yes	no / yes	yes
Denmark	yes	yes	yes	reference to the OECD Guidelines	yes	no / yes	yes
Estonia	yes	yes	yes	yes	yes	no / no	reference to the OECD Model Treaty
Finland	yes	yes	yes	reference to the OECD Guidelines	yes	no / yes	yes
France	yes	yes	yes	reference to the OECD Guidelines	yes	no / yes	yes
Germany	yes	yes	yes	yes, reference to the OECD Guidelines	yes	no / yes	reference to the OECD Model Treaty
Greece	yes	no	yes	yes	yes	no / yes	yes
Hungary	yes	yes	yes	yes	yes	no / yes	yes
Italy	yes	yes	yes	reference to the OECD Guidelines	yes	no / no	yes
Ireland[16]	yes	yes	yes	yes	yes	no / no	reference to the OECD Model Treaty
Latvia	yes	no	yes	yes	in process	no / no	in process
Lithuania	yes	yes	yes	yes	yes	no / yes	in process
Luxembourg	yes	no	yes	yes	yes	no / no	yes
The Netherlands	yes	yes	yes	yes, reference to the OECD Guidelines	yes	no / yes	yes
Poland	yes	no	yes	yes	yes	no / yes	yes
Portugal	yes	yes	yes	yes	yes	no / no	yes
Romania	yes	yes	yes	yes	yes	no / yes	yes
Slovak Republic	yes	yes	yes	yes	yes	yes / no	yes
Slovenia	yes	no	yes	yes	yes	no / yes	reference to the OECD Model treaty
Spain	yes	yes	yes	yes	yes	yes / no	yes
Sweden	yes	yes	yes	reference to the OECD Guidelines	yes	no / no	reference to the OECD Model Treaty
U.K.	yes	yes	yes	reference to the OECD Guidelines	yes	no	yes

Source: Solilová, 2010, amended.

example the practical application of the ALP by TP methods and TP documentation. So majority of the Czech TP rules are contained in the decrees of the Ministry of Finance, which are only recommendatory in nature and as we mentioned above, in most cases these decrees refer to the OECD TP Guidelines that is not a legally binding document according to the Czech law.

Our opinion is that the Czech TP rules are inadequate in this area[17], even if in the basic scale are similar to the TP rules in the others EU Member States. Major insufficiencies and their possible solutions are given below.

The first insufficiency is majority of TP rules in the form of the recommendations – in the Czech ITA you can found only the definitions of the ALP, related persons (§ 23/7) and a section with the binding consideration (§ 38nc) without further mention, how a taxpayer should determine its transfer price in accordance with the ALP. Furthermore, from the definitions of the related persons is not entirely clear what is meant by the term "to participate in the control of another person" whether it is meant "to control the voting rights or something more". So we would recommend explaining the meaning of the term "to participate in the control of another person".

The second insufficiency is the absence of an adequate description of the TP methods that have to be used for determining transfer price in accordance with the ALP – TP methods are partially described in the decree no D-258. However a taxpayer who bears the burden of proof and must prove the tax authority that his transfer price is being arm's length should have a support in the law that is meant, that in the Czech ITA should be stated what TP methods are suitable for determining transfer price and how these TP methods apply. The correct choice of TP method depends on the type of a transaction, the availability of comparable data and with it related comparative and functional analysis. Tax authorities recommend applying the CUP method, which is usually useless. And therefore in practice have been increasingly used the transactional profit methods namely TNMM method that should have only required financial statements to determine the arm's length range. The OECD has recognised the problem of the comparability and the change of the approach to TP methods and therefor approved revision of the OECD Guidelines on 22 July 2010 as a result of seven-year project. However, in the Czech TP rules have not been discovered any changes yet and therefor we would recommend updating information included in them.

The third insufficiency is the absence of legal obligation to create the TP documentation – at present, there is indirect obligation (in § 31/9 Administrative Tax Act) where a taxpayer has to prove the tax authority all facts stated in his tax return for example his transfer price, but only few taxpayers aware of this indirect obligation. However if the tax authority is asked for the binding consideration of the agreed price according to § 38nc ITA there is the direct obligation to create TP documentation.

The Ministry of Finance issued the decree D-293 as its recommendation that includes required information to create TP documentation. But, it is only a decision of the taxpayer in what form the TP documentation submitts in relation to its own judgment, the complexity of the transaction and recommendations included in decree D-293. However, the TP documentation is the most appropriate tool to prove that the TP are arm's lenght, therefor it would be desirable to impose a legal duty to continuously record the relevant documents relating to the transaction and applied TP method. Further it would be desirable to impose the legal obligation to create the TP documentation only to large taxpayers with the option to submit the consolidated TP documentation for similar transactions and in other case[18] it would be voluntary with the option of the simplified form of the TP documentation. Of course we agree with it that it is not possible to exactly define which information has to include the TP documentation, because every transaction is unique and has own specifics.

The fourth insufficiency is referencing to the not legally binding document, the OECD TP Guidelines, according the Czech law – in the event of the litigation it is not duty of the judge to investigate the dispute with regard to the principles and recommendations contained in the OECD TP Guidelines. This situation does not create certain tax and legal environment for the taxpayers so it would be desirable to state a direct link to this document in

12 „reference to the OECD Guidelines" means that the country does not explicitly state the TP methods in its domestic legislation and only refers to the OECD Guidelines.
13 „reference to the OECD Model Treaty" means that country has no regulations about APAs and APAs are pursued on the basis of Art 25 of the OECD Model Treaty.
14 „yes" means that the country explicitly states the TP methods in its domestich legislation.
15 „yes, reference to the OECD Guidelines" means that the country explicitly states the TP methods in its domestic legislation and plus refers to the OECD Guidelines in them.
16 Ireland has introduced new TP legislation which will come into effect for accounting periods commencing on or after 1. 1. 2011. This new TP legislation provide higher certainty in relation to MNEs transactions because new ALP is now more applicable.
17 View relies on the results of the dissertation on *Transfer pricing of multinational enterprises* (Solilová, 2010).
18 for example small and medium enterprises

the Czech ITA or directly establish this document as legally binding.

The fifth insufficiency is the absence of APA procedure – there is only the binding consideration of the agreed price according to § 38nc in the ITA that could be considered as a unilateral APA. Unfortunately this binding consideration does not provide all benefits such as the full-fledged APA procedure because it is in fact a unilateral act by the tax authority without the possibility of mutual discussions. Futher it can not be appealed against the issued binding consideration and the total length of this procedure takes approximately 10–18 months. Despite of it the binding consideration allows the taxpayers to reduce uncertainty in the determination of the transfer prices in the case of the positive approval by the tax authority. In this area we would recommend the full implementation of the APA procedure, including the possibility of concluding bilateral or multilateral APA. Moreover, the introduction of the pre-APA meetings[19] in which the tax authorities would help clarify the taxpayer the APA proceduru and its request, any discrepancies in the TP method and requirements for the submission of TP documentation so that the submitted applications were dealt with quickly and not rejected on procedural ground. Further we would recommend extending the duration of the APA and the binding consideration of current 3 to 5 years because there is not possibility to prolong approved APAs if there are no changes in the circumstances of the case and not increasing its administrative fee.

The sixth insufficiency is the absence of the specific penalties – there are no specific penalties in the area of the TP in the Czech tax law. So the absence of penalty for not complying the ALP and little likelihood of a tax audit focused on TP allow giving little importance to this issue and using deformed TP to reduce the tax liability or creating TP documentation after the call the tax authority to be submitted. We would recommend introducing a specific tax rate or high fines for not compliance with the TP rules. The specific tax rate would be imposed on the difference between the arm's lenght price and the agreed price of the associated enterprises plus common interest. To increase the number of tax audits performed would help set up a special team or a department, which would focus exclusively on the TP issues, as well as training more workers, financial officers and recruit experts. It would be desirable to create experts from students focusing their studies on the tax area.

The seventh insufficiency is the absence a new fifth paragraph of Article 25 in the Tax Treaties – the fifth paragraph includes the possibility of the arbitration unless the tax dispute is resolved within 2 years. Since the Mutual agreement procedure (Article 25 of the Tax Treaty) is more flexible thank to the possibility of the arbitration process and moreover, the tax dispute is solved without the procedural space, we believe that the Ministry of Finance will involve the new fifth paragraph of the Article 25 into the Tax Treaties. The possible reason why the Ministy of Finance has not done it yet is it that the ratification process is lengthy and all opened ratification's processes have been started prior to the revision of the OECD Model Treaty, which includes the new fifth paragraph. We have hoped that the new Tax Treaties will involve the possibility of the arbitration process.

When the tax authority increased the tax base of the Czech taxpayer because the agreed price is not complied with the ALP i.e. the increasing on the difference between the arm's lenght price and the agreed price of the associated enterprises including interest, there are 4 ways to solve this tax dispute.

The first possibility is applying the Czech legal means when it is necessary to appeal against the procedure of the tax authority to the local tax authority. If the tax authority is not able to rule on the appeal, submit it to the Board the authority that is a competent local Tax Directorate. In the event that the Tax Directorate rejects the appeal, ie, the confirming of the original decision of the tax authority, a taxpayer has the option to appeal against the decision of the Tax Directorate in the form of the lawsuit to the district court. If the district court's decision will be negative (rejecting the lawsuit), the taxpayer has the last option to appeal against the decision of the district court to the Supreme Administrative Court. However, an international double taxation arises often in the international tax disputes, which is necessary to eliminate corresponding adjusting the tax base in the country, where the transferred profits were initially taxed.

If the tax authority disagreed with the corresponding adjustment of the tax base, the taxpayer has **the second option** in the form of applying the Article 25 in the Tax Treaty, Mutual Agreement Procedure. The tax authority will be asked to corresponding adjusting the tax base on the basis of this Article 25, since the profits that were taxed in that State were being additionally taxed in the other country on the basis of the transfer pricing adjustments. If the tax authorities of the both countries fail to solve this tax dispute within two years, the taxpayer is entitled under the Article 25 section 5 of the Tax Treaty to refer the case to an arbitration, which guarantees reaching the mutual agreement in this tax dispute within 3 years. Unfortunately, there has not been yet the Tax Treaty, in which has been included a new fifth paragraph in the Article 25.

Taxpayer has **the last third option** in the form of applying the EU Arbitration Convention, which concerns only the tax dispute in the TP area in within EU Member States. The EU Arbitration Con-

19 In Poland, the tax authorities have very good experiencies with pre-APA meetings.

vention also guarantees resolving the tax dispute and reaching the mutual agreement within 3 years.

The last possibility is rather the preventive nature. The taxpayer can reach the APA, which should prevent tax disputes in the TP area. However, the Czech Republic has not a full-fledged APA procedure, only the binding consideration of the agreed price according to § 38nc in the ITA, that could be considered as a unilateral APA, i.e. as a unilateral act by the tax authority without the possibility of mutual discussions.

CONCLUSION

The Czech Republic as a small open economy with an extensive network of the international tax treaties for the avoidance of the double taxation prevents from shifting the tax base of the associated enterprises to countries with preferential tax regime through TP rules. The most accepted international transfer pricing rule is the arm's length principle. On the based of this principle the taxpayers should appreciate the transactions between related persons/associated enterprises with the price which would have been agreed between unrelated parties in free market conditions.

The aim of this paper was made recommendations for the Czech tax policy in the TP area based on the analysis of the TP rules in the EU Member States. TP rules usually include the arm's length principle, the definition of the related persons, applying recommendations of the OECD Guidelines, the transfer pricing methods, TP Documentation, the specific TP audit or specific penalties and applying APAs i.e. the approaches and mechanisms to avoid the transfer of profits to countries with preferential tax regime.

In the Czech Republic are TP rules at a similar level as in the others EU Member States. The ALP has been included in § 23/7 of the ITA since 1993, but its practical application and its compliance have been started until 2004 when the Ministry of Finance issued the first decree related to transfer pricing No. D-258 and subsequently, another 2 decrees No. D-292 and D-293 which are based on the principles set out in the OECD TP Guidelines. So, the majority of the Czech TP rules are contained in the decrees of the Ministry of Finance, only the ALP (§ 23/7) and the binding consideration (§ 38nc) are included in the ITA.

On the basis of our research we can say that the Czech TP rules are inadequate in this area, even if they are similar to the TP rules in the others EU Member States in the basic scale. And therefor we make these recommendations for the Czech tax policy: explain the meaning of the term "to participate in the control of another person" in the definition of the related person (§ 23/7 ITA); state the adequate description of the TP methods, which are suitable for determining transfer price and how these TP methods apply; impose the legal obligation to create the TP documentation only to large taxpayers with the option to submit the consolidated TP documentation for similar transactions; set a direct link to the OECD Guidelines in the Czech ITA; implement the full APA procedure, including the possibility of concluding bilateral or multilateral APA and the introduction of the pre-APA meetings; set up a special team or a department, which would focus exclusively on the TP issues and impose the specific tax rate for not compliance with the TP rules; include the new fifth paragraph of Article 25 into the Tax Treaties as a possibility of the arbitration.

In the case of the tax dispute has the Czech taxpayer following options either to appeal against the procedure of the tax authority or applies the Article 25/5 of the Tax Treaty and the EU Arbitration Convention. The taxpayers are conscious of seriousness of the TP issue, because imposed penalties or TP adjustments could be so substantial with result in adverse effect on the company's performance and survival.

SOUHRN

Převodní ceny a česká daňová politika

Česká republika jako malá otevřená ekonomika s rozsáhlou sítí mezinárodních daňových smluv o zamezení dvojího zdanění zabraňuje přesunům daňových základů sdružených podniků (spojených osob) do zemí s preferenčním zdaněním skrze pravidla převodních cen. Nejvíce mezinárodně akceptovaným pravidlem převodních cen je princip tržního odstupu. Na základě tohoto principu by měl daňový poplatník ocenit transakce mezi spojenými osobami takovou cenou, která by byla použita v rámci nezávislých osob za tržních podmínek.

Cílem tohoto příspěvku bylo na základě analýzy pravidel převodních cen v jednotlivých členských státech EU navrhnout doporučení pro českou daňovou politiku v této oblasti. Pravidla převodních cen obvykle zahrnují princip tržního odstupu, definici spojených osob, aplikaci doporučení ze Směrnice OECD, metody ke stanovení převodních cen, tvorbu dokumentace převodních cen, specifickou daňovou kontrolu zaměřenou na převodní ceny nebo specifické pokuty a aplikaci předběžných cenových dohod, tj. přístupy a mechanismy k zabránění přesunů zisků do zemí s preferenčním daňovým režimem.

V České republice jsou pravidla převodních cen na obdobné úrovni jako u ostatních členských států EU. Princip tržního odstupu je od roku 1993 obsažen v zákoně o dani z příjmů, ale jeho praktická aplikace a dodržování začala až od roku 2004, kdy Ministerstvo financí ČR vydalo první pokyn D-258 a následně další dva pokyny D-292 a D-293, které vycházejí z principů obsažených ve Směrnici OECD. Takže většina českých pravidel převodních cen je obsažena v pokynech Ministerstva financí ČR, pouze princip tržního odstupu (§ 23/7) a závazné posouzení (§ 38nc) jsou uvedeny v zákoně o dani z příjmů.
Na základě našeho výzkumu můžeme říci, že česká pravidla převodních cen nejsou dostatečná, i přesto, že ve svém základním rozsahu jsou obdobná k pravidlům převodních cen v jednotlivých členských státech EU. Proto navrhujeme tato doporučení pro českou daňovou politiku: vysvětlit význam termínu "podílet se na vedení a kontrole na jiné osobě" v definici spojených osob (§ 23/7 v ZDP); uvést adekvátní popis TP metod, které jsou vhodné pro určení převodních cen a jak tyto metody aplikovat; uložení zákonné povinnosti vytvářet dokumentaci převodních cen pouze pro velké daňové poplatníky s možností předkládat konsolidovanou dokumentaci pro shodné/obdobné transakce; uvést přímý odkaz na Směrnici OECD v českém ZDP; zavést plnohodnotnou APA proceduru včetně možnosti uzavření dvoustranných a vícestranných předběžných cenových dohod a zavedení tzv. předběžných APA schůzek; založení speciálního týmu nebo oddělení, které se zaměří na problematiku převodních cen a uložení speciální daňové sazby za nedodržení principu tržního odstupu; zahrnutí do článku 25 Smluv o zamezení dvojího zdanění nový pátý paragraf, jako možnost arbitráže.
Český daňový poplatník má v případě daňového sporu v oblasti převodních cen následující možnosti: může podat odvolání proti rozhodnutní daňového správce, aplikovat článek 25/5 Smluv o zamezení dvojího zdanění či EU Arbitrážní Úmluvu. Daňoví poplatníci jsou si vědomi závažnosti problematiky převodních cen, protože uložené pokuty nebo úprava převodních cen může být velkého rozsahu a mít tak negativní vliv na chod společnosti.

česká daňová politika, převodní ceny, princip tržního odstupu, APA, Směrnice OECD o převodních cenách, nadnárodní společnosti

REFERENCES

ARNOLD, B. J., McINTYRE, M. J., 2002: *International Tax Primer Second Edition.* London: Kluwer Law International, 186 p. ISBN 90-411-8898-3.

GREEN, G., 2008: *Transfer pricing manual*. London: BNA International Inc., 446 p. ISBN 978-0-906524-14-5.

KRATZER, C., 2008: *Transfer pricing methods.* In: GREEN, G. *Transfer pricing manual.* London: BNA International Inc., 446 p. ISBN 978-906524-14-5.

OECD Model Tax Convention on Income and on Capital, 2008: Paris: OECD, ISBN 978-92-64-04818-8.

SOLILOVÁ, V., 2010: Transfer pricing rules in EU member states. *Acta univ. agric. et silvic. Mendel. Brunen.*, LVIII, 3: 243–250. ISSN 1211-8516.

SOLILOVÁ, V., 2010: *Transfer pricing nadnárodních společností*. Dissertation. Brno: Mendelu, 194 p.

Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, 1995: Paris: OECD, 263 p. ISBN 978-92-64-07527-6.

Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, 2010: Paris: OECD, 375 p. ISBN 9264090339.

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