

SUMMARY OF LEGAL CHANGES FOR INVESTMENT FUND COMPANIES ("TFI") AND THEIR INVESTMENT FUNDS IN THE CONTEXT OF TRANSFER PRICING (TP) REGULATIONS IN FORCE AS OF 1 JANUARY 2019

CAN INVESTMENT FUNDS BE SUBJECT TO TRANSFER PRICING REQUIREMENTS?

1

New transfer pricing regulations extended scope of „association” to **participation units** and **investment certificates**. Moreover, legislator defined very wide range of entities covered by TP obligations, to include organizational units without legal personality (*jednostki organizacyjne bez osobowości prawnej*).

In consequence, as of 2019 Investment funds are, as a rule, subject to TP obligations.

Our position is also directly confirmed by the justification of the Minister of Finance ("MF") for the legal draft of changes to TP provisions:

"Due to the frequent use of close-end investment funds (FIZ/FIZAN) structures for tax optimization, the tax administration must have a tool to analyze transactions in such structures - transfer pricing documentation is undoubtedly such a tool".

WILL THE VALUE OF REVENUES OR COSTS HAVE IMPACT ON THE FUND'S TP OBLIGATION?

2

On the contrary to the rules which were in force until the end of 2018, value of income or costs of the entity in a given tax year does not affect TP's obligations.

In order to identify TP documentation obligations it is necessary to correctly determine the value of homogeneous **transactions with associated parties**.

CAN THE HOLDER OF PARTICIPATION UNITS OR INVESTMENT CERTIFICATES BE REGARDED AS ASSOCIATED PARTY?

3

According to the current regulations, a holder of **at least 25% of participation units or investment certificates** may be considered, directly or indirectly, as an associated entity to the investment fund.

Thus, a participant of a investment fund or TFI, possessing directly or indirectly, at least 25% of participation units or investment certificates in a fiscal year should be considered an affiliate of that fund or TFI for TP purposes.

As a consequence, transactions exceeding TP documentation thresholds between an investment fund and a participant of the fund or TFI meeting 25% share threshold are subject to TP documentantion.

CAN TFI BE CONSIDERED ASSOCIATED PARTY OF INVESTMENT FUND, WITHOUT POSSESSING OF 25% CERTIFICATES OR PARTICIPATION UNITS?

In accordance with article 4 of the Act on investment funds, TFI creates an investment fund, **manages it and represents the fund outside.**

Transfer pricing regulations recognize association if one of the entity has at least 25% of rights in the management or constitutive bodies of another entity.

Thus, it should be considered that even in the case when the TFI is not associated with investment fund by capital (25% of units or certificates), the TFI may be considered associated with the fund due to "management connection".

WILL THE INVESTMENT FUNDS HAVE THE RIGHT TO USE THE EXEMPTION FROM THE TP OBLIGATION ?

The new regulations provide for several exemptions from the documentation obligation (Article 11n of the CIT Act). From the perspective of investment fund's activity, the most common should be exemption for transactions between domestic entities who do not incur a tax loss and are not exempt from CIT based on subjective exemption or Special Economic Zone exemption.

It should be noted that in the case of open investment funds (FIO), this exemption will not apply. FIO, as such generally benefit from the subjective exemption referred to in Article 6.1.10 of the CIT Act.

In the case of **FIZ, FIZAN** and **FIZ NS**, in our opinion there are no reasons to refuse to apply the exemption.

WHAT ARE THE TP DOCUMENTATION THRESHOLDS STARTING FROM 2019?

Entities prepare a local file for transactions with associated party if in a given fiscal year their value net of VAT (calculated separately for groups of transactions of homogeneous nature) exceeds:

- **PLN 100,000** in case of transactions with entities from tax havens,
- **PLN 10,000,000** for tangible and financial transactions,
- **PLN 2 000 000** for service and other transactions.

In the case of transactions concerning participation funds or investment certificates, in our opinion the transaction should be classified as another type of transaction. Then the documentation threshold is PLN 2,000,000.

7
WHICH DOCUMENTS SHOULD BE PREPARED BY AFFILIATED PARTY IN CASE OF EXCEEDING THE TP THRESHOLDS IN TRANSACTIONS WITH RELATED PARTIES?

- **A Local File** for each above-threshold transaction, including
- **Benchmarking analysis** (unless the entity benefits from a safe harbour simplification)
- An electronically sent statement on the completeness of TP documentation and markability of all transactions with affiliated parties
- **TP-R** information submitted electronically to the Head of the National Fiscal Administration (includes both documented and exempt transactions).

8
WHEN ABOVE MENTIONED DOCUMENTS SHOULD BE PREPARED ?

The Local File documentation and benchmarking analysis should be prepared by the end of the **9th month** after the end of the fiscal year.

The same deadline is foreseen, for sending electronically a statement on completeness of TP documentation and arm's length nature of all transactions with affiliated parties, as well as TP-R information.

9
WHO SHOULD SUBMIT AND SIGN THE TP STATEMENT AND SEND TPR INFORMATION ON BEHALF OF INVESTMENT FUND ?

The statement in accordance with the CIT Act should be signed by the head of the entity within the meaning of the Accounting Act. However, if it is not possible to determine this person or if several people meet the unit's head criterion, the statement must be signed by each of the person which represents the entity.

According to the definition from Accounting Act , there is no indication of investment fund's head of unit. Therefore, due to the representative nature of the TFI, in our opinion the statement should be signed by **all members of the management board of the TFI**, excluding proxies and commercial proxies.

In the case of TP-R information, the information should also be sent by the TFI.

10
WHAT ARE THE CONSEQUENCES OF FAILURE TO COMPLY WITH TP DOCUMENTATION OBLIGATIONS?

In case of failure to submit a TP statement, TP-R information, or to prepare TP documentation as well as to providing false information, fines from Polish Penal Fiscal Code would apply for **board members of TFI**.

In addition, failure to ensure the marketability of the transaction may result change of tax base (estimation) and the imposition of an additional **tax liability of 10%, 20% and 30%** of the underestimated tax base, respectively.