In late 2013, the regulatory framework of legislation of Ukraine in the field of transfer pricing was supplemented with two long-awaited documents.

The Cabinet of Ministers approved the Order of 25 December 2013 No.1042-p with the list of countries (territories), where income tax rates (corporate tax) are 5 or more percentage points lower than in Ukraine. This list includes 73 countries, including Luxembourg, Switzerland, Moldova, Georgia, Cyprus, and United Arab Emirates.

The Ministry of Revenue and Duties of Ukraine approved the Order of 22 November 2013 No.699 containing the first *Summarized Tax Advice on Transfer Pricing*, which provides answers to a wide range of questions tax payers may have.

"Among the most anticipated responses is the one that explains the procedure of calculating value thresholds and reporting for 2013. Because, for determination of the volume of controlled transactions, they should take into account values of all transactions separately for each counterpart during the calendar year, i.e. from 1 January till 31 December 2013" **Yaroslav Romanchuk,** managing partner of the **International Legal Center EUCON**, Vice-Chairman on legal, tax and customs issues of the ICC Ukraine, Chairman of the **Public Council at the Ministry of Revenue and Taxes** said. "And in the 2013 report, taxpayers should include the controlled transactions within the period from 1 September till 31 December 2013. If, for example, the total amount of transactions with a related party or a non-resident exceeds UAH 50 million (excluding VAT), but all the transactions occurred before 1 September 2013, they do not need to file a report," he added.

There is also an explanation as to which transactions other than sale/purchase of goods, works (services) should be considered for determination of the value criterion. These include amounts of credits, deposits, loans, interest on such credits, deposits, loans, amounts of repayable financial aid, the value of goods under commission agreements, surety agreements, agency agreements and other similar agreements, the sums of commission fees, the cost of investments. Mr. Romanchuk said that the volume of controlled transactions

should be calculated based on contractual prices, rather than the usual prices. If during the reporting period, a taxpayer conducted both sale and purchase transactions with the same counterpart, then the sum value should be calculated for such transactions. "If the goods are returned to the seller within the reporting period, the amount of the refund should be deducted when calculating the value criterion. If the goods are returned in the following calendar year, the refund is not included in the calculation and does not diminish the value of other transactions," the expert said. In other words, the supervisory authority does not consider the return of goods in future periods to be a transaction that should be included in the calculation of the value criterion.

Speaking about the question when the transaction is deemed controlled, the explanation reads that a controlled transaction is presented in the report with the date when ownership of the goods changes or the date of making a formal note or another instrument in accordance with the applicable legislation, which confirms the performance of works or delivery of services.

According to Yaroslav Romanchuk, that explanation provides a criterion only for commodity transactions and does not regulate, for example, when financial services transactions are recognized controlled, since such transactions do not have the date of ownership transfer. There is still the unanswered question of whether it implies that other transactions are not included in the report.

Several responses in the Summarized Advice cover penalties for violations in the sphere of transfer pricing. For example, the supervisory authority clearly expressed its position regarding the late reporting on controlled transactions. Since taxpayers who conducted controlled transactions in the reporting period are required to submit the report by 1 May of the following year, late filing of the report is deemed equivalent to the failure to report and entails sanctions in the amount of 5% of the total sums of the controlled transactions.

"During the classes in our School of Transfer Pricing, we repeatedly discussed the question whether sanctions would be imposed in the case of timely filing but failure to include any

particular transaction to the report", Mr. Romanchuk said. Now, the Ministry explains the liability of taxpayers for such violation. In this situation, they would apply a fine of 5% of the controlled transaction that misses in the filed report. But the expert emphasizes that if Article 120.3 of the *Tax Code* is not amended such penalty should be contested in court, since the Article currently provides that a fine is imposed exclusively for the failure to report. And a report that is filed with errors cannot be deemed not filed.

As to the penalties that are imposed for self-adjusting tax liability by taxpayers, the Ministry confirms that independent adjustments entail a fine of 3% for corrections through the clarifying calculation, and 5% for corrections through the current tax return. In addition, the amount of outstanding tax will be charged a fee for each day of delay at the rate of 120% per annum of the rate of the National Bank of Ukraine. Penalties will not apply if the self-adjustment is reflected in the tax return for the current reporting period, which is filed by the taxpayer before the tax return deadline that is established by the *Tax Code*.

In addition, the Ministry reminds that during the first year of the new legislation on transfer pricing (from 1 September 2013 till 1 September 2014), fines for violations equal UAH 1 for each violation. This applies to understatement of tax liability that is independently identified by the taxpayers or based on the audit of the Ministry of Revenue and Taxes.

Taxpayers may independently adjust tax liability in view of the limitation period provided for in the *Tax Code*. Yaroslav Romanchuk said that if such adjustment is not made during the reported calendar year, taxpayers do not lose the right to make adjustments in future periods.

There is a separate question about the form of the certificate that will verify the non-resident's corporate tax rate in the country where the taxpayer is a resident. The Ministry indicates that the form of such certificate is not provided for by the Code, but it should be issued by the competent authority of such country (e.g. by a tax agency or the Ministry of Finance) and duly legalized and translated according to the legislation of Ukraine.

According to Mr. Romanchuk, the Summarized Tax Advice also explains the mechanism of determining indirect ownership of corporate rights, explains what rates are considered basis rates for transactions to be deemed controlled, provides a list of special tax regimes, and provides answers to some other questions. "In the School of Transfer Pricing, we allocate additional time to discuss such issues in detail, which enables our students to be sure of their information security as to the most recent legislative changes and trends," he added.