

May 28, 2020

## Anti-BEPS Law has entered into force

Law No.466-XI "On Amendments to the Tax Code of Ukraine Aimed at Improving the Administration of Taxes, and Eliminate Technical and Logical Inconsistencies in the Tax Legislation" (the "Anti-BEPS Law"), which was adopted by the Verkhovna Rada of Ukraine on January 16, 2020, entered into full force and effect on May 23, 2020, after being signed by the President of Ukraine and officially published.

The Anti-BEPS Law is primarily aimed at preventing the shifting of profit from Ukraine to low-tax jurisdictions and restricts unjustified application of tax benefits under international double taxation treaties. Furthermore, the Anti-BEPS Law establishes new tax reporting procedures, procedures for taxation of non-residents in Ukraine, and introduces significant changes to tax administration.

Please see below for the key changes introduced by the Anti-BEPS Law:

### 1. Controlled foreign companies (CFC)

#### **What is a CFC and to whom will it apply?**

A CFC shall mean (1) any legal person registered in a foreign country/territory, or (2) any foreign entity without the status of a legal person (partnerships, trusts, funds, foundations, etc.) controlled by an individual or a legal person resident in Ukraine.

A foreign legal person or entity shall be deemed to be a controlled foreign company in Ukraine if an individual or a legal person resident in Ukraine (directly or indirectly):

- Possesses a more than 50% shareholding in the foreign legal person (entity); or
- Possesses a more than 10% (25% until 2022 inclusive) shareholding in the foreign legal person (entity), provided several individuals and/or legal persons resident in Ukraine jointly hold at least a 50% shareholding in that foreign legal person; or
- Independently or jointly with other related parties resident in Ukraine exercises actual control over the foreign legal person (entity), i.e. is capable of exerting significant or decisive influence on the decisions passed by such a foreign legal person (entity) with respect to concluding transactions, assets and profits management, termination of activities, regardless of how such influence is registered from a legal point of view.

#### **What are the key requirements?**

## Reporting

Individuals resident in Ukraine who own or control a CFC shall submit a CFC report to the tax authority together with an annual declaration on the property status and income, and legal persons resident in Ukraine that own or control a CFC shall submit a CFC report together with a corporate income tax return for the relevant calendar year. A CFC report must be accompanied by copies of the CFC financial statements that confirm the amount of profit earned by the CFC in the reporting (tax) period.

Persons that have acquired ownership of, or control over, a CFC shall be obliged to notify the tax authority within 60 days of any direct or indirect acquisition of a shareholding or establishment/formation or acquisition of property rights to a shareholding (income), or any termination, liquidation, alienation of a shareholding in a foreign legal entity or the commencement /termination of actual control over the CFC.

## Taxation

Profits earned by a CFC shall be included into aggregate taxable income of a Ukrainian resident and be subject to taxation in Ukraine:

- 18% personal income tax plus 1.5% military tax, if a CFC is controlled by an individual resident in Ukraine;
- 18% corporate tax, if a CFC is controlled by a legal entity resident in Ukraine.

If a CFC has distributed its profits to its controlling person resident in Ukraine in the form of dividends, such CFC's profits shall not be included into aggregate taxable income.

The Anti-BEPS Law also provides for a number of cases where profits earned by a CFC will be exempt from taxation in Ukraine.

### **When do CFC rules take effect?**

CFC rules take effect as from January 1, 2021. In 2022 it will be necessary to file the first report and to pay taxes.

## 2. Principal purpose test for applying benefits under tax treaties

### **To whom will it apply?**

1. Legal entities resident in Ukraine and permanent establishments of non-residents in Ukraine that carry out foreign economic transactions with non-residents;
2. Legal entities resident in Ukraine and permanent establishments of non-residents in Ukraine that distribute passive incomes from Ukrainian sources to non-residents and apply tax benefits under relevant tax treaties.

### **What are the key requirements?**

A Ukrainian resident legal entity or a permanent establishment of a non-resident in Ukraine shall correspondingly adjust (increase or decrease) the pre-tax financial result for transactions with a non-resident, if:

- The principal purpose or one of the principal purposes of such a transaction and/or its result is tax minimization and/or erosion of the taxable base and profit shifting;
- In comparable conditions a taxpayer would not be willing to buy/sell similar works/services, intangible assets, etc. from/to unrelated parties.

An application of tax benefits provided for by tax treaties can be denied to a legal entity resident in Ukraine or a permanent establishment of a non-resident in Ukraine, if obtaining those benefits or application of a lower tax rate

was the principal or primary purpose of the relevant business transaction between a non-resident and a resident of Ukraine.

#### **When does it take effect?**

Starting from May 23, 2020.

### **3. Taxation of capital gains derived by non-residents from alienation of shares or corporate rights**

#### **To whom will it apply?**

Non-resident legal entities and individuals that directly or indirectly alienate shares, participation interests, corporate or other similar rights in Ukrainian legal entities.

#### **What are the key requirements?**

Ukraine has introduced taxation of capital gains derived from alienation of shares, participation interests, and corporate or other similar rights in a foreign legal entity:

1. If these shares, participation interests, corporate or other similar rights in a foreign legal entity derived at least 50% of their value from shares, participation interests in a Ukrainian legal entity directly or indirectly held by that foreign legal entity; AND
2. If at any time during the 365 days preceding the alienation, these shares or participation interests in a Ukrainian entity derived at least 50% of their value from immovable property situated in Ukraine and owned by such a Ukrainian entity or leased by it under a long-term lease agreement.

#### **When does it take effect?**

Starting from July 1, 2020.

### **4. Taxation of constructive dividends**

#### **To whom will it apply?**

Legal entities resident in Ukraine and permanent establishments of non-residents that effect any payments to related non-resident parties.

#### **What are the key requirements?**

It is established that the following payments shall be deemed to be "dividends" and subject to taxation in Ukraine as dividends:

- Cash or non-cash payment made by a legal entity to the benefit of its founder and/or participant(s) in connection with the distribution of net profits (any portion thereof);
- Gains in the form of payments for securities (corporate rights) paid to a non-resident within the framework of controlled transactions in excess of the amount that corresponds to the arm's length principle;
- The cost of goods (works, services) purchased from a non-resident within the framework of controlled transactions in excess of the amount that corresponds to the arm's length principle;
- The understated cost of goods (works, services) sold to a non-resident within the framework of controlled transactions as compared to the arm's length cost;
- Payment (cash or non-cash) made by a legal entity to the benefit of its founder and/or participant not resident in

Ukraine in connection with the decrease of the charter capital, buyout of shares or withdrawal of a participant.

#### **When does it take effect?**

Starting from January 1, 2021.

## **5. Expanded criteria for recognition of a non-resident's permanent establishment in Ukraine**

#### **To whom will it apply?**

Representative offices of non-residents (non-profit) in Ukraine, foreign companies carrying out transactions in Ukraine without registration of a permanent establishment and foreign companies intending to register a representative office in Ukraine.

#### **What are the key requirements?**

- The qualification period for recognition of a construction site, construction, assembly or installation facility, etc. or related supervisory activities as a permanent establishment has been extended from six to 12 months;
- The term for the provision of consulting services, which does not result in setting up of a permanent establishment, is limited to 183 days;
- The case where a permanent establishment is set up under an agreement (between a resident and a non-resident) or another transaction if the persons actually have and routinely exercise their powers has been specified;
- The criteria for setting up a permanent establishment in case of carrying out activities through "dependent" and "independent" agents, etc. have been clarified.

#### **When does it take effect?**

Starting from May 23, 2020.

## **6. Amendments to transfer pricing rules**

#### **To whom will they apply?**

International groups of companies and legal entities resident in Ukraine that carry out controlled transactions with non-residents.

#### **What are the key requirements?**

- The definition of an international group of companies for transfer pricing purposes (two or more legal persons or entities without the status of a legal person that are tax residents of different countries and are related to each other by ownership or control criteria).
- The criteria of related parties have been clarified, i.e. in particular where a legal person directly and/or indirectly (through related parties) holds at least 25% of corporate rights in another legal person.
- A three-level model for filing reports on controlled operations carried out by Ukrainian residents belonging to international groups of companies has been introduced:

1. A report on controlled transactions;
2. A request for the master file can be received by a company if the total consolidated income of an international

group of companies amounts to €50 million or more;

3. A country-by-country report shall be filed by a company if the total consolidated income of an international group of companies amounts to €750 million.

Such reporting will be subject to automatic exchange of tax and financial information after the conclusion of relevant international agreements.

#### **When do they take effect?**

Changes to the three-level reporting system shall take effect as from January 1, 2021.

Reports on the participation in an international group of companies shall be first submitted in 2021 for the year of 2020.

All other changes have taken effect on May 23, 2020.

## **7. The concept of a "beneficial owner" for the purposes of application of tax treaties has been clarified**

#### **To whom will it apply?**

Legal entities resident in Ukraine and permanent establishments of non-residents that make any payments to non-residents.

#### **What are the key requirements?**

A beneficial owner of income for the purposes of application of a reduced tax rate under a tax treaty to dividends, interest, royalty, fees, etc. derived by a non-resident from Ukrainian sources shall be a person who:

- has the right to receive such income; and
- has the right to actually dispose of such income.

A person who is an agent, nominal holder (nominal owner) or performs only intermediary functions with respect to such income shall not be a beneficial owner of the income, which is shown by the following signs:

- Such a person does not have sufficient powers or has no right to use and dispose of such income; and/or
- Such a person transfers all or major part of the income to another person;
- Such a person neither uses significant assets, nor bears significant risks related to such a transfer; and/or
- Such a person does not have adequate resources (qualified personnel, fixed assets in possession or use, sufficient equity amount), etc.

In order to apply a tax benefit under a tax treaty, a non-resident shall prove that they are the beneficial owner of such income. Otherwise, a Ukrainian resident that pays income from Ukrainian sources cannot apply tax benefits.

#### **When does it take effect?**

Starting from May 23, 2020.

## **8. Recognition of a foreign company as a resident of Ukraine**

#### **To whom will it apply?**

Foreign companies that are directly or indirectly owned or controlled by residents of Ukraine, and decisions on the activities and management of such companies are made in Ukraine.

### **What are the key requirements?**

A foreign company that is registered in a foreign jurisdiction, but having the place of effective management in Ukraine, has the right to independently recognize itself as a tax resident of Ukraine and to be registered with the tax authorities of Ukraine.

A foreign company that has received the status of a resident taxpayer shall not be a CFC.

### **When does it take effect?**

Starting from January 1, 2021.

## **9. Tax administration**

### **To whom will it apply?**

Legal entities and individuals resident in Ukraine, permanent establishments of non-residents in Ukraine and non-residents of Ukraine –in respect of income originating from Ukraine, in cases expressly provided for by the Tax Code of Ukraine.

### **What are the major changes?**

- An obligation of an income taxpayer to publish annual financial statements and annual consolidated financial statements, together with the auditor's report and the relevant tax return according to the tax return filing procedure, has been introduced;
- The procedure for providing individual tax consultations has been clarified, in particular consultations can be provided orally and in paper and electronic form. Individual tax consultation provided in paper or electronic form shall be subject to registration in the unified register of individual tax consultations;
- The procedure for filing complaints has been clarified – a taxpayer has the right to file a complaint, together with a request for renewal of the missed deadline set for filing a complaint according to the administrative procedure along with copies of the supporting documents, within six months from the date of expiry of the deadline;
- The procedure for registration of non-residents for tax purposes has been introduced, in particular, in cases of acquisition of immovable property or proprietary rights to such property in Ukraine, or in the case of opening accounts with Ukrainian banks;
- The procedure for audits of non-residents has been introduced, in particular, in cases of obtaining information indicating that a non-resident carries out business activities through a permanent establishment in Ukraine without being registered as a taxpayer;
- The grounds for conducting unscheduled audits of taxpayers have been clarified, specifically, in connection with the consideration of objections to the audit report prepared by the standing commission of the controlling authority for consideration of objections and explanations to audit reports. The composition of the commission and its operating procedures shall be approved by order of the head of the controlling authority;
- The procedure for mutual agreement between a taxpayer and controlling bodies under double taxation treaties has been introduced. It applies if, as a result of actions or decisions of the controlling authority of Ukraine, such a taxpayer is subject to taxation that does not comply with the provisions of an international treaty;
- The requirements for holding taxpayers and their representatives liable have been specified, including the presence

of "guilt" of the taxpayer and the intention not to fulfill tax obligations "seemingly and deliberately";

- The procedure for liability of controlling authorities to taxpayers and the procedure for compensation for damage caused by unlawful decisions, actions or omissions of controlling authorities have been introduced;
- The amount of penalties for violation of the procedures for registration, reporting, including as regards transfer pricing and CFC has been increased.

### **When do they take effect?**

Some changes have taken effect as from May 23, 2020.

Most of the changes will take effect as from January 1, 2021.

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