

Legal regulation of procedure for advance pricing agreements in Ukraine

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Abstract

Advance pricing agreements (APAs) are globally widespread as an instrument of providing the balance of interests between bona fide taxpayers and fiscal authorities. Ukraine has attempted to use such instrument since the introduction of the transfer pricing control. Nevertheless, no APA has yet been concluded in Ukraine. The authors use methods of comparative legal analysis, historical analysis and legal modelling to describe the evolution of the normative regulation of the procedure for APAs and reveal the factors which have impacted on the attractiveness of APAs for taxpayers. There are also a few propositions on improvement of the procedure for APAs in Ukraine, which are formulated on the basis of best practices of developed and developing countries. Proposed changes concern the opportunity to revise APAs, the introduction of special features in the procedure for APAs in case of their bi- or multilateral character and the alignment of the access to the procedure for APAs in Ukraine.

Keywords: transfer pricing; advance pricing agreements; taxpayers' rights; taxation; legal regulation; tax law.

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1. Introduction

Excess tax losses from transfer pricing in Ukraine determine the necessity to avoid them. The national legislator made the first step in 2010. The next one was made in 2013 when sufficient changes were introduced in the Tax Code of Ukraine. They obliged the taxpayers to follow the arm's length principle in controlled transactions with related persons. The calculations revealed that the loss from tax avoidance via transfer pricing amounts to UAH 20–25 billion per year at that time³. The permanent process of making changes in tax legislation has turned the application of arm's length principle into arduous and complex task both for fiscal authorities and taxpayers that generates a lot of long-term disputes with uncertain consequences. In this situation, advance pricing agreements (APAs) might help to avoid conflict between fiscal authorities and taxpayers in advance that is approved

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by positive practice in many countries, including the USA, Canada and Japan. For both the government and the taxpayers are better off if the wasteful, costly and protracted litigation associated with transfer pricing cases can be avoided by concluding APAs⁴. Successful world experience demonstrates that the national approach to legal regulation of procedure for APAs should include the best practices adapted in accordance to normative demands of certain countries. Ukraine is not an exception in this case that determines the need to characterise the legal regulation of procedure for APAs in Ukraine in order to define the ways for its improvement.

APAs and the legal regulation of the procedure for their conclusion have been analysed widely by many researchers since the world's first APA was concluded between the USA and Australia in 1991⁵. A lot has dedicated their works to description of the national approaches and practices for APAs. Among them are M. Markham with his fundamental analysis of APAs in the USA and Australia⁶, X. Fan with characteristic of Chinese approach to APAs⁷ and O.O. Avoseh who evaluates the APA procedure in the UK⁸. Nevertheless, the Ukrainian approach to regulation of the APAs has not been widely investigated. There are few works that limit the subject of research by certain issues such as legal nature of APA in Ukraine⁹ or benefits of APAs as an instrument of cooperation between fiscal authorities and taxpayers¹⁰. One of the important issues that has not been discussed previously is the Ukrainian features of the procedure for APAs in the context of the best world practices and the protection of taxpayers' rights.

The purpose of the article influences three main methods of research.

The first of them is comparative legal analysis. As it is stated by A.A. Malinovsky, its application includes a variety of methodological approaches such as comparison on macro or micro levels; doctrinal comparison; normative comparison; functional comparison etc. Among them is the most appropriate in our case comparison on micro level. This makes necessary the analysis of micro objects from the functional and systematic points of view. The list of micro objects includes legal norms (or their parts); articles of normative acts; legal institutes; branches of

⁴ McDaniel, Paul R., Hugh J. Ault & James R. Repetti, *Introduction to United States International Taxation*, fifth edition. The Hague: Kluwer Law International, 2005, p. 158.

⁵ Baker, Anuschka, Obuoforibo, Belema (eds.), *Transfer Pricing and Customs Valuation*, Amsterdam: IBFD, 2009, p. 56.

⁶ Markham, Michelle, *Advance Pricing Agreements: Past, Present and Future*. Alphen aan den Rijn: Kluwer law International, 2012. 388 p.

⁷ Fan, Xinkui. *Difficulties in Pressing Forward APA in China*, „Asian Social Science”, 2008, Vol. 4(11), pp. 53-58.

⁸ Avoseh, Oluwaseun Olanrewaju, *An Empirical Evaluation of the Advance Pricing Agreement Process in the UK* (2014). PhD diss., University of Glasgow, 300 p.

⁹ Karmalita, Mariya Volodymyrivna, *Yurydychna pryroda dogovoriv pro poperednye uzgodzhennya tsinoutvorennya* [Legal Nature of Advance Pricing Agreements], „Porivnyalno-analitychne pravo” [„Comparative-Analytical Law”], 2017, Vol. 3, pp. 139-142.

¹⁰ Kasperovich, Julia Volodymyrivna, *Napryamy vdoskonalennya mekhanizmu transfertnogo tsinoutvorennya vidpovidno do rekomendacii OESR* [Directions of the Transfer Pricing Mechanism Improvement under the OECD Guidelines], „Strategichni priorityty” [„Strategic Priorities”], 2015, Vol. 3(36), pp. 86-96.

law; doctrinal definitions; judicial judgements. This approach makes it possible to understand factors and nature of common and different elements in micro objects that are in focus of research¹¹. As it follows, it has to help us to define the common elements and features on the legal regulation of the procedure for APAs in Ukraine and other countries.

The second one is historical analysis. As a method, it determines three main demands: 1) comparison (even analogy in some cases) as a standard logical operation in the process of research; 2) retrospective character of comparison (it has to be historical); 3) comparison concerns only legal matters. If researcher ignores any of these demands, the method of historical analysis will result in inappropriate conclusions¹². Following these requirements, the method of historical research is used in the description of the evolution of legal foundations for the conclusion of APAs in Ukraine and creates framework that gives the opportunity to explain the tendencies and inner logic of legislator in the process of improvement of the Tax Code of Ukraine.

The third method is legal modelling as it gives an opportunity to define future ways of activity or its possible organizational forms by analysis of similar legal elements and attempts of implementation of their positive features in the object of research¹³. The potential of this method should not be leaved aside in the context of our research. It helps to define possible variations of making legal regulation more effective in case of the procedure for APAs in Ukraine based on the best practices that are widespread in the world.

2. Evolution of legal regulation for APAs in Ukraine

As it is stated by R. Amann, the APA provides a safe harbour against unexpected transfer pricing allocations by allowing the taxpayer to obtain a preliminary agreement from its own competent authority setting forth the methodologies and critical assumptions as to the future events that both the taxpayer and fiscal authority would apply and use in allocating income earned in the relevant controlled transactions¹⁴.

Commonly, advantages of APAs are described in Chapter IV of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD TP Guidelines)¹⁵:

¹¹ Malinovsky, Aleksey Aleksandrovich, *Metodologiya sravnitel'nogo pravovedeniya [Methodology of Comparative Law]*, „Vestnik universiteta imeni O.E. Kutafina” [„Herald of University named after O.E. Kutafin”], 2016, Vol. 3, pp. 13, 15.

¹² Shigal, Denys Anatiliyovich, *Teoriya istoriko-pravovogo metodu [Theory of Comparative Historical and Legal Method]*, „Problemy zakonnosti” [„Issues of Legality”], 2013, Vol. 124, p. 34.

¹³ Manzhul, Iryna Viktorivna, *Vyznachennya metodiv piznannya v naukoviy literaturi [Definition of Research Methods in Doctrinal Sources]*, „Byuleten Ministerstva Justycii Ukrainy” [„Bulletin of the Ministry of Justice of Ukraine”], 2012, Vol. 11, p. 15.

¹⁴ Amann, Robert (ed.), *German Tax Guide*, The Hague: Kluwer Law International, 2001, p. 329.

¹⁵ *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, Paris: OECD Publishing, 2017, p. 219-220.

(1) APAs can assist taxpayers by eliminating uncertainty through enhancing the predictability of tax treatment in international transactions (para. 4.153);

(2) APAs can provide an opportunity for both tax administrations and taxpayers to consult and cooperate in a non-adversarial spirit and environment (para. 4.154);

(3) APAs may prevent costly and time-consuming examinations and litigation of major transfer pricing issues for taxpayers and fiscal administrations (para. 4.155);

(4) bi- and multilateral APAs substantially reduce or eliminate the possibility of juridical or economic double or non-taxation since all the relevant countries participate (para. 4.156);

(5) the disclosure and information aspects of an APA programme as well as the cooperative attitude under which an APA can be negotiated may assist tax administrations in gaining insight into complex international transactions undertaken by multinational enterprises (para. 4.157).

The introduction of APA programme is not intended to replace the traditional administrative or judicial mechanisms for resolving tax disputes on transfer pricing. It should contemplate it.

Despite the advantages of APAs, the process of finding the consensus between taxpayer and fiscal authority (or authorities in case of bi- or multilateral APAs) is not an easy task: 'In the middle of the process, every client has hated the process. No process has ever gone smoothly. But, at a certain point you are somehow able to resolve the case. In the end everyone has been happy with the results'¹⁶.

The introduction of transfer pricing rules was made with adoption of the Tax Code of Ukraine at the end of 2010. Clause 39.16 of Art. 39 contained the provision that large taxpayers had the right to initiate the procedure for APA. The same provision also proposed the definition of APA as an agreement between large taxpayer and fiscal authorities on the order of determination of prices (methods) in accordance with Art. 39 of the Tax Code of Ukraine and their application for the purposes of taxation during the term of validity of the agreement. It was also mentioned that the order of the conclusion of APA had to be adopted by the Cabinet of Ministers of Ukraine (CMU) (the work of the CMU was finished only in August of 2012).

The position of the legislator did not look well-grounded:

(1) any guarantees for the taxpayer were absent;

(2) any difference between unilateral and bi- or multilateral APAs was not provided;

(3) the list of necessary elements of APA or the request on procedure for APA was not included in clause 39.16 of Art. 39 of the Tax Code of Ukraine;

(4) the stages of procedure for APA were not described.

¹⁶ *Practical Experience with the OECD Transfer Pricing Guidelines*: Proceedings of IFA seminar, held in London, 1998 during the 52nd Congress of the IFA. The Hague: Kluwer Law International, 1999, p. 39.

The situation was changed a little with the adoption of the Law of Ukraine No. 408-VII of July 4, 2013 'On the changes of the Tax Code of Ukraine concerning transfer pricing'. It improved the legislative basis of procedure for APA but not sufficiently. There were some positive changes, as it followed from inclusion of the next information in Art. 39: (1) issues that might be the subject of negotiation between taxpayers and fiscal authorities in the context of procedure for APA; (2) difference between unilateral and bi- or multilateral APAs. Still, any certain guarantees for taxpayers or the description of stages of procedure for APAs were absent in the Tax Code of Ukraine, but it was stated that the provision of APAs had to be taken into account in the process of determination of the tax base.

The issue of consequences of conclusion of APA in the context of tax audit was cleared with the adoption of the Law of Ukraine No. 72-VIII of December 28, 2014 'On amendments to the Tax Code of Ukraine concerning improvement of tax control over transfer pricing'. Its provisions stated that fiscal authorities were not allowed to make any adjustments (fines, penalties) in case of compliance of taxpayer with the terms of APA. It also made the clarification that procedure for APAs had to be focused on the criteria for determination of conditions for future controlled transactions in accordance with the arm's length principle and for limited time.

Some technical changes were made at the end of 2016 (the Law of Ukraine No. 1797-VIII of December 21, 2016 'On amendments to the Tax Code of Ukraine concerning more favorable investment climate in Ukraine'). They were determined by the fact that the legislator had used incorrect language in case of APAs. It named APA as 'an agreement on advance determination of prices' (not pricing) in the Tax Code of Ukraine.

The last changes were presented with the adoption of the Law of Ukraine No. 2245-VIII of December 7, 2017 'On amendments to the Tax Code of Ukraine and some legislative acts of Ukraine for providing the balance of budget revenues in 2018'. Its provisions detailed the procedure for APA in different aspects:

- (1) the possibility of roll-back was clearly formulated for APAs;
- (2) the definitions of bi- and multilateral APAs were clarified;
- (3) the list of terms that has to be detailed and cleared via the adoption of the order of procedure for APAs by the CMU;
- (4) non-compliance with the requirements of the APA might be followed with its cancellation;
- (5) the date of cancellation of the APA was defined as the same date with the conclusion of the APA in case of the cancellation before the expiration of the term of APA;
- (6) the possibility of renewal of APA was introduced in case of bona fide activity of respective taxpayer and the absence of material changes in criteria for the determination of conditions of controlled transactions;
- (7) the right of making changes to the provisions of APA was granted to its parties in case of amendments to the tax legislation (it must be added that double taxation treaties of Ukraine are also covered by the term tax legislation);

(8) the absence of agreement on changes between the parties of the APA was formulated as a reason for its cancellation;

(9) guarantees on the stability of rules of APAs were clarified in the provision of Art. 39.

As it seems, the evolution of legislative demands in the context of the procedure for APAs has been continuous from the moment of the adoption of the Tax Code of Ukraine. It might be explained with a few reasons. Firstly, Ukraine does not have well-settled experience of regulation of transfer pricing. It means that the normative basis of such regulation is adapted in accordance with the needs of its developing practice. Secondly, the campaign of anti-BEPS has impacted on the evolution of procedures for APAs. For example, some elements of the minimum standards of global anti-BEPS campaign (Action 14) clearly mention the procedure for APAs: (1) jurisdictions should implement bilateral APA programs; (2) jurisdictions with bilateral APA programs should provide for the roll-back of APAs in appropriate cases; (3) jurisdictions' published guidance on mutual agreement procedure should provide guidance on APAs. These changes in approaches require the next amendments in national regulation of transfer pricing in the part of procedure for APAs.

The situation of permanent improvement of normative regulation is also confirmed by the fact of amendments to the order on conclusion of APAs, approved by the CMU. Its early versions were introduced in 2012 (the order of the CMU No. 787 of August 22, 2012) and 2013 (the order of the CMU No. 764 of October 17, 2013) but the absence of information on some key elements of procedure for APAs determined weakness of its provisions from procedural point of view. There was no information on the guarantees of confidentiality for taxpayer, on the possibility for renewal of APAs, on the results of cancellation of APAs, on the imposition of penalties and fines etc. As a result, their provisions have been never applied in practice. Understanding of deficiencies forced the Ukrainian government to replace the orders of 2012 and 2013.

The new order on procedure for APA was presented in 2015 (the order of the CMU No. 504 of July 17, 2015 with subsequent changes). Unlike the old versions, the normative basis of procedure for APAs was sufficiently improved:

(1) the rights of fiscal authorities were clearly defined in the procedure for APAs, including the right to request the information from taxpayer during the consideration of its application for APA;

(2) the taxpayer was obliged to prepare annual report on its compliance with conditions of APA;

(3) the procedure for APA had to be ended in case of existence of certain grounds, the list of which was included in the order;

(4) the agreed term of validity of APAs was limited only to three years.

The adoption of the Law of Ukraine No. 2245-VIII of December 7, 2017 was followed by the amendments in the order on procedure for APAs.

Taking into account the changeability of the normative basis of procedure for APAs in Ukraine, it is grounded to suppose the need of taxpayers to protect

themselves with APAs. For example, V. I. Korotun mentions that APAs are among the most efficient instruments of regulation of transfer pricing. He admits that taxpayer could minimize its tax risks and 'get the consultation' about transfer pricing issues from the fiscal authorities in the process of consideration of its application on APA¹⁷. Wider list of benefits is proposed by M. O. Mishin for taxpayers in case of conclusion of APAs in Ukraine¹⁸:

- (1) reduction of the tax uncertainty and tax risks;
- (2) prevention of costs in the context of tax examinations of controlled transactions;
- (3) possibility to resolve the most complex cases of transfer pricing;
- (4) formation of comfortable atmosphere of cooperation between taxpayer and fiscal authorities.

Nevertheless, there is information about only one attempt of taxpayer to initiate the procedure for APA in Ukraine. It was made in 2017 and its result hasn't been known yet. In our opinion, there are many reasons of such limited enthusiasm of taxpayers in the conclusion of APAs. Among these are:

- (1) the efficiency of tax control of transfer pricing is limited as it follows from the results of the State Fiscal Service of Ukraine (SFSU). On the basis of information for 2014-2018 it was initiated 56 audits of taxpayers and completed only 34 as of March of 2018¹⁹;

- (2) there is low level of trust to the fiscal authorities in Ukraine (the results of ACC Corruption Perception Survey 2017 demonstrate that fiscal authorities are among the most corrupted state institutions in Ukraine²⁰);

- (3) taxpayers do not have the right to request the APA on an anonymous basis even on the pre-filing stage of the procedure;

- (4) there is no clear indication on the confidentiality of information that is received by fiscal authorities in the procedure for APAs;

- (5) fiscal authorities are not provided with appropriate number of specialists in transfer pricing. The assessments of K. M. Karpushin from KPMG show that

¹⁷ Korotun, Volodymyr Ivanovych, *Kontrol za transfertnym tsinoutvorenyam v Ukraini: problemy stanovlennya ta perspektivy rozvytku* [Transfer Pricing Control in Ukraine: Problems of Formation and Perspectives of Development], „Investytsii: praktyka ta dosvid” [„Investments: Practice and Experience”], 2016, Vol. 24, p. 44.

¹⁸ Mishin, Mykola Oleksandrovich. *Poperednye uzgodzhennya tsin* [Advance Determination of Prices in Controlled Transactions]. „Visnyk: ofitsiino pro podatky” [„Herald: Officially About Taxes”]. 2015, No. 31 (August 15), available at: <http://www.visnuk.com.ua/ua/pubs/id/8685> (accessed April 1, 2019).

¹⁹ State Fiscal Service of Ukraine. *Platnyky podatkov podaly 2,7 tys. zvitiv pro kontrolovani operatsii* [Taxpayers Prepared 2700 Reports on Controlled Transactions]. Available at: <http://sfs.gov.ua/media-tsentri/novini/332750.html> (accessed April 1, 2019).

²⁰ Dolynchuk, Svitlana, *Krok vpered ta dva nazad: yak biznes spryimaє borotbu z koruptsiyeyu v Ukraini* [One Step Forward and Two Steps Back: How Business Perceive Fighting with Corruption in Ukraine], „Mind” 2018, January 30. Available at: <https://mind.ua/publications/20181055-krok-vpered-i-dva-nazad-yak-biznes-spryimaє-borotbu-z-korupciyeyu-v-ukrayini> (accessed April 1, 2019).

around ten people work on transfer pricing in the SFSU and that number should be increased to roughly fifty²¹.

3. Propositions for improvement of legal regulation for APAs in Ukraine

Despite the fact that the aforementioned issues have different nature, the focus is on legal ones because they could be mitigated with legal instruments.

On the basis of positive world experience there is an opportunity to formulate propositions that might improve approaches to legal regulation of procedure for APAs in Ukraine.

1. Introduction of opportunity to revise the terms of APAs in case of changes in critical assumptions.

One of the most difficult issues is to determine reliable critical assumptions in the procedure for APAs. At the same time, they are not under the full control of taxpayer and could change in the context of objective factors. It would not be fair to cancel or revoke the APA if the activity of taxpayer was not the reason of objective changes followed with failure to meet the terms or conditions of APA. As it is stated in the OECD TP Guidelines on the similar issues in case of APA on the basis of mutual agreement procedure, APA and any domestic regulation 'should ... require the taxpayer to notify the affected tax administrations of any changes. If, after evaluation by the tax administrations, it is established that there has been a material change in conditions noted in a critical assumption the APA may be revised to reflect the change' (para. 83 of Annex II to Chapter IV of the OECD TP Guidelines)²².

The proposed approach is widely used in many countries. For example, the APA may be revised in Canada if it established (para. 93, Information Circular 94-4R of March 16, 2001 International Transfer Pricing: Advance Pricing Arrangements (APAs)):

- there has been a failure to meet a critical assumption;
- there has been a change in law, including a provision of double taxation treaty, that modifies the Canadian federal income tax treatment of any matter covered by the APA;
- there has been a material change in circumstances;
- the participating foreign tax administration's APA is not consistent with the APA or has been revised, cancelled, or revoked.

The Ukrainian legislator allows to change the terms and conditions of APA only in case of amendments in tax legislation (including double taxation treaties). The APA will be cancelled if its parties fail to conclude a revised APA (para. 39.6.3.2, clause 39.6 of Art. 39 of the Tax Code of Ukraine). From the point of view of taxpayers, it seems that so strictly limited possibility of revising the APA is not an attractive feature of the legal regulation of procedure for APAs. What has to be added is that a modern Ukrainian economy does not demonstrate sufficient positive

²¹ Kupfer, Matthew, *Ukraine Makes Shift to Global Standards on Transfer Pricing to Plug \$2 Billion Leak*, „KyivPost”, 2018. Vol. 23(20), p. 6.

²² OECD, *supra* note 15, p. 499.

growth on stable basis, so it is really difficult to be sure in market conditions. As a result, the position of the legislator should not be so strict. The opportunity should be proposed to the taxpayer to initiate the process of revising of the APA in cases where its need is determined by the objective factors.

2. Introduction of special features in the legal regulation of the procedure for bi- and multilateral APAs that reflect intergovernmental nature of mutual agreement procedure on the basis of double taxation treaties.

The Tax Code of Ukraine defines the difference of bi- and multilateral APAs from unilateral APAs (Art. 39). It is based on the fact that the bi- or multilateral APAs could not be concluded without the prior mutual agreement between competent authorities of countries that are parties of double taxation treaty. These types of APAs are more attractive for taxpayers, because unilateral APAs do not achieve the goal of certainty and elimination of double taxation, since tax jurisdictions affected by the transactions covered by the APA are not bound by it and may deem its arrangements to be inconsistent with their own transfer pricing rules²³. The OECD TP Guidelines also encourages bi- and multilateral APAs and recommend that 'wherever possible, an APA should be concluded on bilateral or multilateral basis between competent authorities through the mutual agreement procedure' (para. 4.173)²⁴.

The problem derives from the absence of clarity on the legal regulation of mutual agreement procedure in Ukraine. All double taxation treaties of Ukraine include the provision on mutual agreement procedure. Nevertheless, there is no legal regulation of mutual agreement procedure on domestic level. This situation makes uncertain the answers on the questions about the procedural rights of taxpayer in the context of mutual agreement procedure or the legal status of mutual agreement concluded between the competent authorities on the basis of the provisions of double taxation treaties. Taking into account the importance of the results of mutual agreement between competent authorities in the process for APAs, there is a necessity to fill the gap in the legal regulation of mutual agreement procedure in Ukraine.

As an example of appropriate approach in the context of taxpayers' rights during the mutual agreement procedure, it might be referred to Germany where taxpayers are responsible for contributing to the mutual agreement procedure by disclosure of its circumstances, description and, if necessary, provision of its documentary substantiation. At the same time, they may submit applications, comment on the facts and points of law relevant to mutual agreement and have itself represented by an agent (para. 3.3.1 of Memorandum on international mutual agreement and arbitration procedures in the field of taxation, approved by the Letter of Federal Ministry of Finance of Germany No. IV B6-B1300-340/06 of July 13, 2006).

²³ Amann, Robert (ed.), *op. cit.*, 2001, p. 331.

²⁴ OECD, *supra* note 15, p. 225.

3. *The opportunity to conclude the APA should be available to all persons that are under requirement to-comply with the requirements of the arm's length principle.*

The OECD TP Guidelines states that „an APA program cannot be used by all taxpayers because the procedure can be expensive and time-consuming and small taxpayers generally may not be able to afford it. This is especially true if independent experts are involved. APAs may therefore assist only in resolving comparatively large transfer pricing cases. In addition, the resource implications of an APA program may limit the number of requests a tax administration can entertain” (para. 4.169)²⁵. The Ukrainian legislator gives an opportunity to conclude the APA only large taxpayers, based on the recommendations of the OECD TP Guidelines and limited resources of the fiscal authorities.

According to the Tax Code of Ukraine, large taxpayer is a legal person or a permanent establishment of non-resident with a turnover in the past four quarters equivalent to EUR 50 million or the sum of all taxes, duties and payments to the national budget amounting to more than EUR 1 million, if without customs payments the sum is more than EUR 500,000 (para. 14.1.24, clause 14.1 of Art. 39). At the same time, transaction with related person is recognized as controlled if it meets two requirements:

- the annual income of the taxpayer from any type of activity exceeds UAH 154 million;
- the total amount of cross-border transactions of the taxpayer with a single counterparty-non-resident of Ukraine – exceeds UAH 10 million.

It is obvious that there is a number of taxpayers whose operations are recognized as controlled but that are not allowed to conclude the APA. In our opinion, implementation of the recommendations of the OECD creates a situation of potential contradiction in requirements of the Tax Code of Ukraine. The principle of equality of taxpayers prohibits any tax discrimination (para. 4.1.2, clause 4.1 of Art. 4). At the same time, only large taxpayers have a right to take part in the procedure for APA. The experience of developed economies demonstrates the opportunity to choose less contradictory approach by the Ukrainian legislator. For example, Canada uses the Small Business APA Program. Its key elements can be summarized as follows (para. 1, Information Circular 94-4R (Special Release) of March 18, 2005 'Advance Pricing Arrangements for Small Businesses'):

- taxpayers must have gross revenues of less than CAD 50 million or a proposed covered transaction of less than CAD 10 million to be considered for the Program;
- the Program will only cover transactions of tangible goods (which have not been bundled with non-routine intangibles) and routine services;
- site visits will not be performed. The only material the fiscal authorities require the taxpayers to submit is a functional analysis;

²⁵ *Idem*, p. 224.

- only requests for a unilateral APA, without rollback, will be accepted into the Program;
- annual reporting under the Program will be limited to stating, in writing, whether the critical assumptions have or have not been breached.

The Canadian approach allows to mitigate the potential contradiction in provisions of tax legislation in the context of the demands of the principle of equality and the limitation of the circle of taxpayers that are allowed to take part in the procedure for APAs.

4. Conclusions

APAs might be the instrument to find the balance of interests between *bona fide* taxpayers and fiscal authorities, especially in the context of tax uncertainty created by the active development of normative regulation of transfer pricing under the anti-BEPS campaign. Nevertheless, the Ukrainian experience shows that the attractiveness of APAs depends on the efficiency of transfer pricing control and the level of trust between fiscal authorities and taxpayers.

Better normative regulation is a vital pre-condition for the success of the procedure for APAs in Ukraine. There are a few propositions that might make APAs more attractive for taxpayers in Ukraine:

- (1) introduction of opportunity to revise the conditions of APA in case of changes in critical assumptions;
- (2) introduction of special features in the legal regulation of the procedure for bi- and multilateral APAs that reflect intergovernmental nature of mutual agreement procedure on the basis of double taxation treaties;
- (3) the opportunity to conclude the APA should be available to all taxpayers that are under requirement to comply with the demands of the arm's length principle.

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