



IMPROVING TRANSFER PRICING IN UKRAINE USING AMERICAN EXPERIENCE

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ABSTRACT

There is a need for additional research on the theory and practice of transfer pricing in Ukraine due to its rapid impact on the country's economy. The United States has the best experience in applying transfer pricing principles. Therefore, it is expedient to carry out research and theoretical systematization of problems of transfer pricing regulation on the basis of international and Ukrainian arbitration practices, aimed at identifying issues that need to be improved. This study aims to analyze and compare the experience of transfer pricing regulation to adapt best foreign practices. The comparison and sampling methods were used in the course of the research. The analytical study based on current regulatory and judicial practice and examples of tax dispute resolution in the United States and Ukraine. The results showed that the Ukrainian normative judicial practice is in the stages of establishment and needs further research. Analysis of statistical information shows that tax disputes in Ukraine focus on "technical errors" and the withdrawal of capital



to countries with low tax jurisdiction. In contrast, the United States, whose tax disputes focus on intra-corporate transactions. The research is based on the requirements of the fundamental documents of the Organization for Economic Cooperation and Development (OECD) and by the United Nations Tax Committee (UN), International Accounting Standards Board (IASB), Generally Accepted Accounting Principles (GAAP), as well as on statistical data obtained in the process of analysis of tax authority reporting.

Keywords: Transfer Price; Transfer Pricing; Arm's Length Standard; Related Parties; Arbitration Practices; Controlled Operations; Regulation of Transfer Pricing; Multinational Companies; Implementation of Transfer Pricing

1. INTRODUCTION

As globalization broadening, foreign direct investment (FDI) enterprises start to increase their international investment and trade, transfer pricing (TP) becomes developed with varieties of methods (Agarwal, 2016). Under this context, many governments from developed and developing countries pay keen attention to have control over transfer pricing in FDI enterprises (Akpojevwa, 2014).

Looking back studies conducted over the past years, the studies of TP for tax avoidance carried out by FDI enterprises have always been highlighted at relevant conferences and meetings around the world, including the Summit of G8, G20 or global forums on tax issues of OECD. In several developed countries, the governments have implemented several methods including tariff and non-tariff barriers to deal with these phenomena, which have brought significant results. Specifically, the G20 member countries passed the BEPS package of “base erosion and profit shifting” with 15 action plans since 2015. The so call BEPS package aims at developing solutions to prevent and to minimize the profit shifting, tax avoidance of multinational corporations.

OECD transfer pricing documents are guided in their activities not only by member states of this organization, but also by individual states that are not members of the OECD, including Ukraine. The study of transfer pricing activities and documents of the above organizations on such issues should be considered together (because such documents are of a recommendatory nature) (table 1).

Table 1: Documents that establish and explain the methodology, procedure, procedures and features of regulation and control of transfer pricing at the global level

The organization that develops the document	Documents governing transfer pricing
Organization for Economic Cooperation and Development	1. OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, Paris, 22 July 2010; 2. Model Tax Convention on Income and on Capital: Condensed Version, OECD, Paris, 22 July 2010; Model Tax Convention on Income and on Capital: Full Version (as it read on 22 July 2010). OECD (2012), Paris; 3. OECD Transfer Pricing Legislation — A Suggested Approach, Paris, June 2011;
European Union (since 2002 EU Joint Transfer Pricing Forum)	1. Convention on the Elimination of Double Taxation in Connection with the Adjustment of Profits Between Associated Enterprises, 90/436/ECC, Brussels, 23 July 1990; 2. Code of Conduct on transfer pricing documentation for associated enterprises in the European Union (EU TPD), 9738/06, Brussels, 21 June 2006; 3. Code of conduct for the effective implementation of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, 2006/C 176/02, Brussels, 28 July 2006; 4. Guidelines for Advance Pricing Agreements within the EU. COM(2007) 71 final {SEC(2007) 246}, EU, Brussels, 26/02/2007; 5. JTPF Report: Guidelines on Low Value Adding Intra-group Services, JTPF/020/REV3/2009/EN, Brussels, February 2010;
United Nations	1. United Nations Practical Manual on Transfer Pricing for Developing Countries, ST/ESA/347, United Nations, New York, 05/2013; 2. United Nations Model Double Taxation Convention between Developed and Developing Countries, ST/ESA/340, United Nations, New York, 2011/2013; 3. United Nations Handbook on Selected Issues in Administration of Double Tax Treaties for Developing Countries, United Nations, New York, 06/2013.

Source: own generalization

KPMG (2011) recognizes the current directions of development of world practice in regulation and control of transfer pricing for tax purposes:

- streamlining and explaining the rules of transfer pricing in order to consider specific areas of activity in which the current rules have led to undesirable results;
- formulation and coordination of general requirements for documentation of controlled transactions;
- development of materials on risk assessment of transfer pricing and recommendations on avoidance of such risks with further development of mechanisms for effective resolution of disputes on transfer pricing;
- accumulation of materials, their analysis and explanation of schemes for the provision / use of intangible assets and the transfer / receipt of rights to such assets (intellectual property), as well as schemes for the provision / use of goods and services in digital format; inclusion of the results of such work in the transfer pricing rules and providing explanations on the use of such new rules;

- accumulation of materials, their analysis and explanation of aggressive tax planning schemes and their analytical processing (in terms of schemes using transfer pricing);
- development of initiatives on mandatory disclosure and exchange of information, forms of joint supervision over compliance with the conditions of such disclosure and exchange (in part of the parties involved in controlled transactions), etc.

Effective management of transnational corporations involves the formation of a clear organizational management structure, development of effective economic relations between the departments. At a time when there is a need to find the optimal variant economic independence of business units, a clear definition of income and expenses of each department of the enterprise and for its impact on the overall result of the problem of research and application of transfer pricing is becoming increasingly important. In this context, the problem of transfer pricing in the enterprise management processes concerning the results of its operations, and are therefore relevant.

Multinational companies have some motivation in transfer pricing, one of which is tax reasons. According to Yuniasih et al. (2012), the purpose of transfer pricing is to reduce the tax to be paid.

The role of taxes has a considerable impact on net income and cash flow of the firm so that the impact of foreign investment decisions, financial structure and capital cost determination (MacKie-Mason, 1990; Dechow, 1994; Eiteman et al., 2012). This proves that tax motivation has a significant role in influencing a company's decision to practice transfer pricing.

Gresik (2010) gives a comprehensive perspective on practical multinational transfer-pricing behavior.

A series of survey studies by Tang (1979, 1992, 1993, 2002) provides empirical evidence regarding transfer pricing based on surveys of Fortune 500 firms. In particular, Tang quantifies the importance of the environmental factors affecting the transfer price. For instance, in 1977, "overall profit to the company" ranks first, whereas "differentials in income tax rates and income tax legislation among countries" ranks fourth (Tang, 1979). However, by the 1990 survey, the latter factor is ranked second (Tang, 1993).

Tang (2002) involves similar surveys conducted in 1997 and 1998, where "transfer pricing and other tax regulations in the United States" ranks first, and "overall profit to the



company” ranks second. Notably, “overall profit to the company”, which is ranked first in the 1979 and 1990 surveys, falls to second rank in the 1997 and 1998 surveys, and is replaced by “transfer pricing and other tax regulations in the United States”.

This evidence suggests that MNFs are tending to pay increasingly more attention to the risk of additional tax imposition by national tax authorities.

2. METHODOLOGY

The methodological basis for the research, presented in this article, was analysis of regulatory documents, scientific literature, statistical information as well as corporate publications. The comparison and sampling methods were used in the course of the research. The systematization and information modeling methods became the basis for formation of generalizations and conclusions, while the tabular and graphic methods — for visual presentation of the results of the research conducted.

3. RESEARCH PROBLEM

International transfer pricing deals with those intra-group transactions where the open market regulator is absent. The concept and definition of transfer pricing is relevant both for business from the perspective of managing a MNE, without accurate transfer prices, the company would not be able to identify those parts of the enterprise performing well and those performing less so and for tax purposes the determination of the correct transfer price is likely to be the main determinant of how the tax base of MNEs is divided between jurisdictions in which they operate.

There are many reasons why enterprises charge transfer prices on goods and services and transfer pricing deals with the charged price among associated enterprises established in different countries for their inter-company transactions. Since non-independent associate companies set the prices, it implies that prices do not reflect an independent market price.

The main goal for a MNE is to maximize its overall profit so, thus, it would try to allocate profits to a low tax country and losses to a high tax country. Therefore, transfer pricing mechanism is the tool that corporations use in order to avoid high taxation in certain countries. The fact is that globalization of the world economy, the mobilization of production factors and tax competition has forced tax administrators and legislators to seek new sources of revenue.

Consequently, this represents a major warning sign for tax authorities concerned with the fact that multinational entities use transfer prices on cross border transactions in order to

reduce taxable profits in their jurisdictions. This has resulted in tax avoidance rules and in an intensified inter nation struggle for the tax revenues of MNEs.

In the case of MNEs, the need to comply with laws and administrative requirements that may differ from country to country creates additional problems. The differing requirements may lead to a greater burden on an MNE, and result in higher costs of compliance, than for a similar enterprise operating solely within a single tax jurisdiction.

In the case of tax administrations, specific problems arise at both policy and practical levels. At the policy level, countries need to reconcile their legitimate right to tax the profits of a taxpayer based upon income and expenses that can reasonably be considered to arise within their territory with the need to avoid the taxation of the same item of income by more than one tax jurisdiction. Such double or multiple taxation can create an impediment to cross-border transactions in goods and services and the movement of capital. At a practical level, a country's determination of such income and expense allocation may be impeded by difficulties in obtaining pertinent data located outside its own jurisdiction.

The OECD estimates the total annual loss of the world economy due to the blurring (erosion) of the tax base and the withdrawal of income from taxation at between 100 and 240 billion dollars. USA, which is from 4 to 10% of global tax revenues.

The tax authorities note that the relevance of the introduction of transfer pricing rules in Ukraine is unconditional. And this is due not only to world practices, but also the traditions of domestic business of withdrawing funds abroad. For example, in 2014, \$ 4.0 billion was taken offshore. USA, 2015 - 4.8 billion dollars. USA. Interestingly, as of January 1, 2015, the country's total gold and foreign exchange reserves amounted to 6.4 billion dollars. USA, ie during the year 75% of the NBU's gold and foreign exchange reserves were exported.

According to the head of the customs subcommittee of the Committee on Tax and Customs Policy of the Verkhovna Rada Ostrykova, budget losses from non-payment of income tax for the use of transfer prices amount to about UAH 50 billion per year. Borysiuk (2018) notes that in 2013-2017, Ukraine adopted a number of regulations, which indicates the introduction of new approaches to state regulation and control of business transactions in accordance with international standards. Such changes can be explained by the need to fill the state budget, implement international standards and principles of transfer pricing in Ukraine.

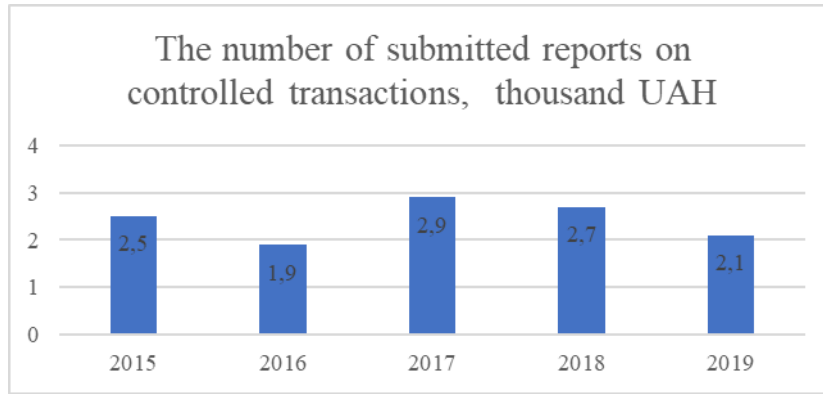


Figure 1: Reports on controlled transactions submitted to the tax authority in 2015-2019
 Source: own generalization based on data of State Statistics Service of Ukraine

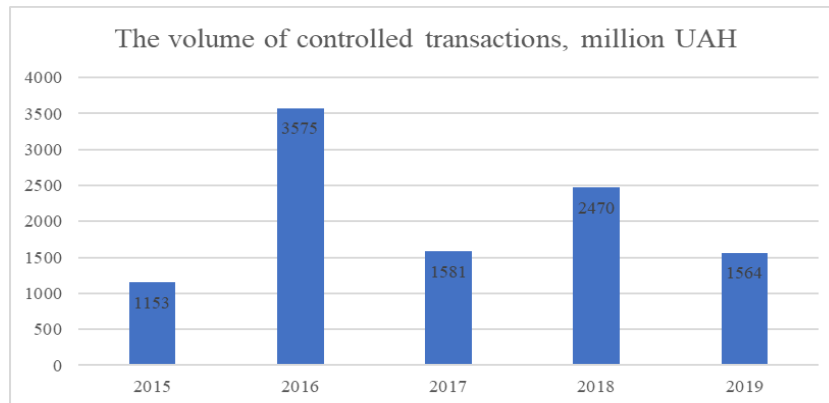


Figure 2: The volume of controlled transactions in 2015-2019
 Source: own generalization based on data of State Statistics Service of Ukraine

The growth of the volume of controlled transactions provides significant opportunities to increase the tax base and, accordingly, the amount of corporate income tax.

In 2019, the largest number of taxpayers who carried out controlled transactions were large taxpayers 39.72%, and the amount of transactions conducted by these taxpayers is 92% of all controlled transactions.

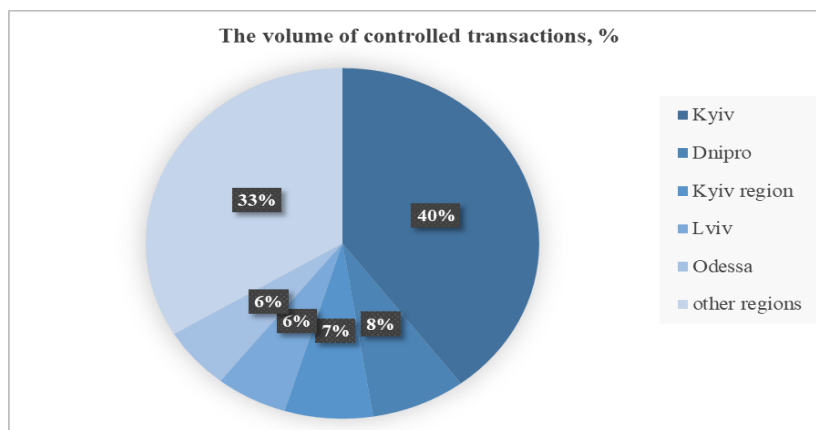


Figure 3: The volume of controlled transactions in regions of Ukraine
 Source: own generalization based on data of State Statistics Service of Ukraine

Thus, the conduct of controlled operations significantly depends on the scale of activity and location of the enterprise. Banking operations account for the largest share in the structure of controlled transactions - 57%, the share of goods is quite significant - 30%, financial services account for 6%.

Cyprus, Russia, Switzerland and the UAE are the main countries with residents of controlled transactions (excluding banking operations; 27%, 18%, 15%, 12%, respectively).

Another important criterion for the analysis of uncontrolled transactions and their comparison in the context of foreign economic activity is the country of origin or representative office of the counterparty. The State Statistics Service of Ukraine constantly monitors export-import operations in terms of cooperation countries. Comparing their list with the list of countries that the Cabinet of Ministers of Ukraine classifies as meeting the requirements of tax legislation, we can identify those countries whose transactions with residents will automatically become the subject of attention of tax authorities, and only then analyzed for control.

A comparison of these lists of countries made it possible to identify those of them whose transactions with residents will be the object of priority attention of the tax authorities (Table 2).

Table 2: Volumes of foreign economic activity with resident countries subject to analysis of transfer pricing norms, thousand dollars USA

Country	2016		2017		2018		2019	
	Export	Import	Export	Import	Export	Import	Export	Import
Bahamas	д\н	д\н	д\н	д\н	д\н	д\н	13224,2	-
Bahrain	1446,8	31,3	722,0	57,6	5216,6	81,4	4653,6	57,3
Belize	360,3	5629,1	3666,9	28,4	930,2	710,2	10517,1	865,8
Bosnia and Herzegovina	10759,3	29308,9	7409,9	9723,9	9235,4	10776,0	12472,5	12491,3
Virgin Islands (British)	110706,6	1111,5	8073,4	419,1	8863,9	0,7	902,6	23,9
Virgin Islands (USA)	д\н	д\н	д\н	д\н	д\н	д\н	-	544,1
Guatemala	4674,7	67650,1	6503,3	88994,3	353,3	76821,8	576,4	71504,0
Hong Kong	25864,3	17186,4	15439,5	12246,0	49013,4	17629,9	54074,8	29120,1
Djibouti	89528,9	-	59774,3	0,9	14893,5	-	8852,7	-
Dominican Republic	25783,9	4517,6	6483,1	3591,0	5817,5	2695,6	1141,5	4008,1
Islamic Republic of Iran	703421,7	52954,0	533571,2	30517,3	705165,5	39952,2	552584,7	70059,9
Ireland	69479,4	134006,9	59182,6	75396,4	45483,9	84712,5	55298,4	113890,3
Qatar	18720,2	11308,0	15991,3	8353,6	12433,4	26268,8	42325,2	11200,5
Kyrgyzstan	102545,8	4304,6	75501,8	5801,7	40430,8	1773,6	34315,4	3001,1
Cyprus	283724,9	50298,8	61526,1	16922,9	53481,4	22081,6	79637,6	20527,1
Cuba	84801,1	1607,3	36384,8	1183,2	7393,7	959,7	10710,7	1011,1

Lao People's Democratic Republic	313,2	1084,6	1616,0	530,4	2385,3	744,2	174,1	860,9
Liberia	2549,6	886,1	4235,6	508,5	2982,6	3265,1	21784,6	1513,0
Lebanon	2722317,0	1413,5	300135,3	1310,6	338523,6	1077,6	426977,0	2324,1
Mauritius	6040,5	1024,3	862,2	283,3	767,8	269,3	911,3	353,1
Morocco	294771,6	35461,0	212502,0	28481,1	247323,6	33437,0	221305,5	39082,6
Marshall Islands	2941,1	41,5	748,4	189,0	2536,6	404,2	51902,2	1283,2
Republic of Moldova	743630,1	61859,5	524294,0	41242,4	481145,4	47623,2	707583,5	106719,5
Monaco	166,7	131,8	д\н	д\н	д\н	д\н	1344,2	137,3
United Arab Emirates	394943,6	66612,7	301767,2	57607,5	277604,1	63287,5	384533,4	59401,1
Cook Islands	д\н	д\н	д\н	д\н	д\н	д\н	2522,4	68,5
Panama	31531,4	1713,2	9908,4	11807,6	13904,7	2414,3	28125,8	1280,9
Puerto Rico	61,1	5376,6	138,8	2978,4	945,6	3978,5	1797,0	4708,9
Republic of Macedonia	д\н	д\н	д\н	д\н	д\н	д\н	30694,8	11920,5
San Marino	2684,3	913,8	3642,4	453,8	3347,9	704,8	1948,4	724,7
Seychelles	289,5	384,6	д\н	д\н	д\н	д\н	3748,9	526,4
Saint Kitts and Nevis	д\н	д\н	д\н	д\н	1800,9	18,1	2735,0	365,9
Serbia	111732,8	140739,6	105917,8	83256,4	156132,5	106506,9	170866,0	132422,7
Sudan	77736,6	309,5	75217,3	237,9	34361,1	1037,3	72080,6	189,6
Turkmenistan	431232,6	24578,5	170325,7	16318,4	108981,9	34336,1	62142,3	89345,8
Uzbekistan	308563,7	72916,1	174497,3	62329,5	142392,7	71060,2	167113,3	122721,1
Montenegro	1796,4	1082,6	1139,9	4881,7	4670,2	2710,9	8871,5	3597,5

Source: own generalization based on data of State Statistics Service of Ukraine

The main violation of taxpayers is incomplete and untimely filing and declaration of controlled transactions, which is confirmed by the relevant statistics of violations identified by the tax authorities: 600 facts in 4 reporting periods. In 2014-2019, the analysis of the submitted reports on controlled transactions resulted in the sending of 235 inquiries to 538 taxpayers in order to provide information on controlled transactions, as a result of which 58 inspections were conducted and UAH 400 million were accrued. corporate income tax, accrued VAT in the amount of UAH 5.8 million, accrued interest in the amount of UAH 68 million. This has increased the level of transparency of companies and the level of their responsibility by changing prices to increase taxable income by taxpayers.

It should be noted that domestic researchers focus their attention mainly on studying international experience in transfer pricing adjustment, as Ukrainian companies often use this mechanism in transactions with offshore companies, which is a commercial secret.

In the course of the historical development of economic system of many countries undergoing significant changes. Which, let's try to understand, considering foreign experience pricing, its patterns and trends.

History has confirmed the ineffectiveness of a monopolized, and the market economy, has shown the benefits of a mixed type of economy. Most of the economies in the mixed type as the overall strategy selected certain pricing rules. These rules are formalized in the form of legislative acts regulating the procedure and methodology for pricing.

Methodological aspect of pricing in developed countries is to develop public authorities of general principles, methods and standards for pricing. In addition to making decisions on strategic and tactical issues of public authorities are taking over the function of the settlement of specific prices for goods and services that are crucial for the national economy.

In addition to the direct establishment and management of public authorities exercise control over the prices. In developed countries with mixed economies in the state-controlled pricing scope is 10-30% of the total output (CMU, 2013).

On the ways and methods of state regulation of prices is influenced by multiple factors (national, climatic, raw, political) as well as a place that takes the country in the global division of labor. Consider, by what measures and methods of state regulation of prices carried out in different countries.

The first country, which adopted specific legislation, particularly governing transfer pricing issues, the United States began. In August 1971, on the initiative of the administration of US President Richard Nixon for the first time in the postwar years has been established centralized control of prices (Nepesov, 2007).

US law is substantially different from the laws of other countries concerned. That is what prompted many governments to seek acceptable for most countries, the principles and methods of determining the order of transfer pricing tax regulations.

Total US government is adjustable from 5 to 10% of the price (Vasilieva, 2013). Particularly noteworthy are the methods of state regulation of prices for the products of the agricultural sector. As part of federal farm programs, farmers, growers of grain products, obtained from the Ministry of Agriculture loans to finance production. Harvest, they can sell at market prices and pay for part of the loan proceeds. If market prices fall below the reference price set by Congress, the farmer can pass the crop to the state at the reference price, paying for a loan and getting revenue.

Likewise rates are regulated in the dairy industry. Congress determines the fair level of the reference price for milk, butter, cheese. If market prices fall below the level of the state



buys products. They go to the free breakfast for school children, helping the poor, food aid to underdeveloped countries and sales to other states.

The main legal acts are the US Internal Revenue Code, interim instructions to the Code, the Tax Code of the United States «IRC». Transfer pricing control is carried out as follows (IRS, 2020):

- Control of the competent authorities of related parties by dividing the distribution of gross income, discounts, allowances, if the authority determines that such distribution entails tax evasion;
- Verification of cost saving in the case of actions under the jurisdiction of the conditions characterized by low costs;
- Check the price determination methods that do not meet the principle of "arm's length» (arm's length principle);
- Analysis of the financial ratios of the taxpayer with statistics data (SOI);
- Verification of methods for determining prices (comparable uncontrolled price method, resale price method, the method of "cost-plus" method profit sharing, profit comparison method).

In this case the authority may make the analysis of the distribution of gross income, if revenues exceed \$ 10 million per year.

At present current trends of the global regulatory practices and monitoring of the transfer pricing for tax purposes of the OECD and the EU experts are recognized (Malis, 2014):

- ordering and providing explanations on the rules of transfer pricing to address specific areas of activity in which the current rules have led to undesirable results;
- the formulation and approval of the general requirements for documentation of controlled transactions;
- the development of materials with respect to risk assessment of transfer pricing and advice on avoiding such risks to the further development of effective mechanisms for settling disputes on transfer pricing;
- accumulation of materials, their analysis and to provide explanations regarding the schemes with the provision/use of intangible assets, and send/receive rights to such assets (intellectual property), as well as schemes to the provision/use of goods and

services in a digital format; the inclusion of such work results in transfer pricing rules and provide explanations on the use of these new rules;

- accumulation of materials, their analysis and to provide explanations regarding aggressive tax planning schemes and their analytical processing (in terms of circuits using transfer pricing);
- development of initiatives related to the mandatory disclosure and exchange of information, forms of joint supervision of compliance with the terms of such disclosure and exchange (in the part of the parties that are members of controlled operations), etc.

It should be emphasized that in the developed countries control over transfer pricing line practically does not apply to intra-group transactions. Of course, the abuse of this practice among taxpayers quite common, but in most countries it is legalized (through a consolidated taxpayer concept-household taxpayer, etc.) or offset by other means. Among the latter can be identified unitary taxation system applied at the level of regional authorities in several countries; taxation at the main place of the company (regardless of where it is registered); natural forms of taxation (for example, under the terms of production sharing agreements); the order of taxation for each area of the company (the latter, incidentally, is already present in the Ukrainian legislation regarding regulation of taxation "permanent missions").

The tax control of transfer pricing applies only in respect of transactions which are related parties. Universal list of interdependent parties, adopted in all countries does not exist. Different countries use different rules for determining the degree of control under which the parties considered related transactions. Most of the countries as the interdependence test uses a threshold to overcome 50% direct or indirect participation of the subject in a different transaction. In some countries, the existing legislation on transfer pricing set a lower threshold.

In addition, in some countries there are rules by which the parties to the transaction can be recognized as interdependent in the event that they have common economic or political interests, or are under common control.

Adopted by the OECD Model Convention on taxes on income and on capital based on the conditions of the international economy and international cooperation of countries in the field of tax administration. Definition Article 9 of the Model Convention recognizes the interdependent taxpayers if (2014):

- The organization directly or indirectly in the management, control or capital of another

organization of one or another state;

- The organization set between a specific commercial and financial conditions, which differ from those which would occur between independent organizations.

Thus, the definition of interdependence is always based on the criteria of the existence of common interests between the two parties to the transaction, arising from the different possible conditions. These document the reasons for the recognition of interdependent organizations are not the only ones possible. Model Convention deals with the tax authorities of the member states can use other methods to identify non-market relationships in order to implement tax audits on transfer pricing, thereby allowing some freedom of use of the shopping center in the face of economic realities of individual States.

Most of the countries – participants of the OECD use a definition of interdependent persons quite widely. Moreover, the relationship may not be the only vertical – the parent company - subsidiary, but also horizontal.

The law on transfer pricing in US concept of interdependent persons replaced by the controlled entity. Literally translated, the control definition is interpreted as: "... any form of control, direct or indirect, legal or not formalized, including the control, which is the result of the actions of two or more taxpayers working on a mutual agreement, or with a common goal, or intention artificially to redistribute the revenue or expense items between these taxpayers and controlled by" (GAAP, 2020).

If one person directly or indirectly owns more than 50% of the capital of another person in transactions between such persons control will fail. In those cases where a formal one person owns 50% or less of the authorized capital of the second person, the tax authorities should conduct a more detailed analysis of the relationship between the parties for the establishment of the need to control. US tax authorities, for example, found that if one person sells the property to another person, then it returns the property of the seller, but on lease, then these people have reason to recognize the controlled.

Article 39 of the Tax Code significantly expands the concept of "related parties" in Ukraine, as well as in contrast to the old version of the Tax Code defines the possibility of joint influence. Earlier, the tax authorities have tried to prove the economic interdependence of people by defending their position in court, and now such litigation are minimized, since the criteria established by law depending. The list is closed and formalized, classified by regions of interdependence (TCU, 2020).



Thus, in foreign countries, the tax control of transfer pricing is focused on the content of the transaction rather than its form. Thus, the relationship of objects of the transaction is determined based on actual rather than the formal relationship between the parties, and the list of criteria for determining the interdependence of individuals is wide, and takes into account the impact of the various options on the parties to the transaction price.

Article 39 of the Tax Code introduces the concept of controlled transactions for which the tax authorities in Ukraine will be entitled to check the level of prices. According to the Tax Code of Ukraine recognized as controlled transactions between related parties, as well as the equivalents of the transaction. Under Articles 39, not all transactions between related companies, are controlled and not all transactions between independent companies are not subject to control. The tax legislation of Ukraine in the field of transfer pricing in the recognition of transactions controlled, divides them into foreign trade and domestic. Among the controlled foreign trade transactions are all transactions with related parties, as well as transactions with the counterparty is registered in an offshore zone in excess of the total threshold for all transactions of 10 million UAH (TCU, 2020).

In countries that are members of the OECD, as well as in some other countries have a different procedure. Taxpayers should make special pricing on transactions that fall under the risk of tax control. At first glance it may seem that it only complicates the situation. But the statistics of foreign practice of tax control of transfer pricing shows the opposite picture. In most cases, all the differences that arise between the taxpayer and the tax authority in relation to the prices used in controlled transactions are settled through negotiations.

Despite the fact that in most countries the legislation based on the recommendations that the OECD has developed, yet well-defined hierarchy, the use of these standards for the purpose of tax control there. The tax authorities and taxpayers have the right to use any method that allows you to get a result in which the market price will be determined. This position should be the majority of European countries. Moreover, the tax authority is obliged in the course of his research to determine compliance rates using the same method as that of the taxpayer. A similar position on the use of the definition of transfer pricing methods adhere to the Ukrainian tax authorities, which is provided by law in the tax code.

The rules adopted in the United States have some differences compared with the approach of the OECD regulated. Guided by the "best method rule" must use the method that allows you to get a more accurate result, despite the fact that other methods can also be applied

to transactions that the taxpayer makes in the course of a tax audit. The tax authority, as well as the taxpayer has the right to use the method, which, in his opinion, is more appropriate in a particular case (Malis, 2014).

An important aspect of the tax control of transfer prices in international practice is to establish the tax authorities of the market price range within which the market price of the transaction is recognized for tax purposes and the corresponding level of market prices. The application range of market prices provided by the legislation on transfer pricing in most countries, including Ukrainian.

With the differences in the approaches to the choice of transfer pricing method are closely related and the differences in the requirements for documentation that can confirm the taxpayer's policy on transfer pricing. Thus, the tax authorities have specific requirements for documentation. It should contain:

- Characteristics of goods sold and services rendered;
- Analysis of the organization, including risk analysis undertaken by the organization in the process of activity, the analysis of the involved property;
- The conditions of the contracts concluded between the parties, which are related parties;
- Economic conditions of work and analysis of the organization's strategy on the external and the internal market, if the strategy has any influence on pricing (for example, promotion of new products on the market or policy aimed at capturing new markets as soon as possible).

This documentation, which has prepared and submitted a taxpayer must confirm and justify the choice of method for establishing the price of the transaction.

In order to ensure effective fiscal supervision of transactions for transfer pricing, the tax authorities of countries with large-scale and open economy, such as in the US, you must have the required number of well-trained and qualified personnel in this field. For this reason, the tax authorities a lot of money invested in the development of these countries and training specialists who would be able to effectively carry out the analysis of controlled transactions and, if necessary, to challenge the position of the taxpayer in court. For example, the tax authorities have special employees who are engaged exclusively in monitoring and tracking activity of taxpayers to identify violations of the transfer pricing rules.

In the international practice of tax control of transfer pricing is often applied enter into preliminary agreements on pricing and consolidated financial statements.

OECD Guidelines provide for the possibility to conclude the parties to the transaction and the tax authorities on prior agreements setting prices, this means that before committing taxpayer transactions are defined economically justified criteria, according to which there is a price for such transactions for a certain time. Agreement does not allow to carry out additional checks on the validity of used prices for the purpose of accrual of a number of taxes, because they are fixed conditions for determining prices for tax purposes and its duration. If this is available legislation of a specific country, the taxpayer can get a pre-approval of the transfer price (or its method of application of transfer pricing) from the tax authority, which, of course, radically reduces the tax risks.

Institute of the pricing agreements is widely used in international practice. Institute of pricing agreements - a tool used to determine the pricing procedure (method of comparable transactions information necessary adjustments to prices, etc..). Taxpayers and tax authorities, and in the course of preliminary discussions, and at the conclusion of the Agreements are way to increase mutual trust. As world practice shows, the process is quite complex and lengthy procedure. In economically developed countries are not more than two or three dozen contracts per year. The main obstacle to the conclusion of preliminary agreements on prices becomes that the taxpayer and the tax authorities negotiation procedure can be long and in special situations occur more than a year.

The preliminary agreement between the tax authorities and taxpayers about the prices are particularly prevalent in the United States and is an effective form of tax control of transfer pricing. The practice of concluding preliminary agreements on prices and perceived quite positively by many taxpayers. According to the international transfer pricing studies conducted by experts, about 21% of the companies to enter into preliminary agreements on pricing. At the same time 86% of them have learned from this practice positive experience and express their willingness to prolong these agreements expire, since the preliminary price agreements are an effective way to manage the risks arising from transfer pricing (Vasilieva, 2013).

The maximum term of imprisonment of the Institute of the pricing agreements on one or several transactions, having one and the same thing, is not more than 5 years (the conclusion is not more than 3 years, plus the extension - no more than 2 years). As a general rule, for consideration and agreement in international practice fees are not charged. In the US, the size

of fees can range from 5 to 50 thousand. USD. Depending on the category of the taxpayer and the number of transactions provided for in the Agreement. Pricing agreements can be terminated if at its conclusion was submitted false information, there has been a fraud, or the terms of the Agreement are not met by the taxpayer. Termination of this Agreement shall cease to be bound by it as a taxpayer and the tax authority, signed such an agreement.

A major innovation in relation to the tax administration of transfer pricing in Ukraine is the possibility of concluding a preliminary agreement on pricing among the largest taxpayers and tax authorities. The main objective of the Institute of the pricing agreements is as follows: the taxpayer to the tax authorities opened a market method of calculating the price at which it will work with other companies, and in return receives a guarantee that does not face the problem of unannounced inspections and additional charges.

Agreement between the tax authorities and taxpayers in Ukraine had never committed. The law is built almost on the same monitor application of transfer pricing rules, which exist in the world of tax control over pricing, particularly in Europe and the United States. Under the new rules in Ukraine are set entirely new mechanisms of tax administration of transfer pricing - pricing agreements. The law contains a number of provisions clearly favoring the representatives of big business. It is, first, an exemption from recognition of controlled transactions between members of the consolidated group of taxpayers, and secondly, the possibility of concluding an agreement on pricing for the largest taxpayers

Institute of fiscal consolidation and the formation of a consolidated group of taxpayers established in many countries, regardless of the fact that the mechanisms and procedure for implementation differ significantly.

With regard to the tax control of transfer pricing organizations, one group, note that the tax authorities of certain countries apply the correlation corrections. This means that the price change in terms of transfer pricing to reduce the tax burden, the first group of organizations should lead to certain restrictions to make appropriate changes to the price of the second group of the organization, which operates in the same country. Therefore, application of the tax consolidation significantly contributes to reducing the amount of these adjustments within a single state.

The calculation and payment of corporate income tax consolidated group of taxpayers produces a responsible member of a consolidated group of taxpayers. The main feature of the

consolidated group of taxpayers - the consolidation of tax liabilities, which allows you to apply for the control of transfer pricing preferential treatment.

The union organizations in the consolidated group of taxpayers create conditions for the unification of a number of tax administration procedures used in relation to the participants of the consolidated group of taxpayers by shifting the basic obligations of the calculation and payment of corporate income tax, the payment of fines and penalties, as well as on the proposal to the tax authorities of the appropriate tax return for one person – the responsible member of a consolidated group of taxpayers. It also reduces the costs associated with the execution of the tax legislation.

Comparative analysis of normative - legal regulation of transfer pricing in Ukraine and abroad is presented in Table 3.

Table 3: Comparison of Ukrainian and foreign experience in transfer pricing control

Feature comparison	Foreign experience	Ukrainian practice
Interdependence	1. Vertical and horizontal control (mostly ownership share of > 50%) 2. Analysis of the content of the transaction	1. Vertical and horizontal control (share of ownership 20%) 2. Analysis of the content of the transaction
Controlled transactions	1. Between related parties	1. Between related parties 2. Transactions with independent persons from the countries of the "black list"
Methods of transfer pricing	1. Comparable Uncontrolled Price Method 2. The method of subsequent implementation 3. Zaratny method 4. The method of comparable profitability 5. profit distribution method	1. Comparable Uncontrolled Price Method 2. The method of subsequent implementation 3. Cost method 4. The method of comparable profitability 5. profit distribution method
The hierarchy of the application of tax control methods	The hierarchy is preferred, the presence of the best method of rules	Comparable Uncontrolled Price Method is a priority, if not suitable, use one of the others.
The value of the market price	Definition range of market prices on the basis of the approach interkvantilnogo	Determination on the basis of a statistical approach the market price range
Documentation confirming the transaction price	The list of documents is a recommendation, while in some countries can be established.	The list of documents is mandatory
The presence of experts in the field of transfer pricing	As part of the tax authorities allocated individual employees concerned transfer pricing	Created department inspections of transfer pricing tax and customs Audit Department
Institute of the consolidated group of taxpayers	widely used	Lack of organic

Source: own generalization based on published statements

Thus, the analysis of foreign experience of tax control of transfer pricing, has revealed major differences between the Ukrainian practice of tax control of transfer pricing and foreign practice. Comparison of Ukrainian and foreign experience in transfer pricing tax control enables the following conclusions.

The international standards of tax control of transfer pricing, in contrast to the principles of monitoring Ukrainian tax authorities are focused on the economic substance of the transaction rather than its form through the implementation of functional analysis. Thus, in the field of transfer pricing tax control in the tax law in most countries the relationship is determined based on actual rather than the formal relationship between the two companies, to make a deal.

In addition, there is a difference and the determination of threshold values the share of direct and indirect participation. The tax authorities in most countries define the relationship by calculating interest on the one hand to the other transaction, more than 50% as having a smaller volume of participation, the organization really has no way to significantly affect the applicable organization share price which it owns. In Ukraine, interdependence, depending on the type of test participation is more than 20%.

As international experience shows, are only controlled transactions concluded between related parties, in contrast to the Ukrainian practice of tax control of transfer pricing. On the basis of Article 39 of the Tax Code of Ukraine under the tax control and can get a deal with independent organizations (TCU, 2020).

Another distinctive feature of the international experience of tax control is the fact that in most of the countries require taxpayers to provide additional information or special calculation prices controlled transactions. The tax legislation of Ukraine in relation to transfer pricing also provides the current form of tax control, according to which the taxpayer is obliged to notify the tax authority to hold each controlled transaction, and at the request of the tax authorities to provide additional documentation.

Special attention is the fact that most foreign countries is not strictly defined and regulated by the hierarchy of the use of various methods of tax control of compliance used by taxpayers market level price, as well as the existence of additional tax control methods - method of distribution of profit and the method of comparable profitability. foreign legislation establishes the right to use any method, if the result is received the result, in which the set price corresponding to the market. And in the tax law on transfer pricing in Ukraine is a priority



method of comparable market prices, and only when it is impossible to identify the specific situation with the help of his market price, and the rest are used.

Another notable difference between the foreign experience and Ukrainian practice of tax control of transfer pricing is a multi-faceted approach to the determination of the market price. Both international and Ukrainian practice of tax control of transfer pricing involves determining the market price range. However, used in the Ukrainian legislation on transfer pricing statistical calculation of interval differs significantly from interkvantilnogo under international practice.

Today the Ukrainian tax legislation, as well as the legislation of many foreign countries, established the possibility of concluding an agreement with the tax authority on pricing. Agreement to enter into an algorithm sufficiently long, has a number of features, which create difficulties for its application in practice. First, an application for the conclusion of such an agreement have the right to submit only the taxpayer is recognized by the largest. Second, when applying for a review of the tax authority, the taxpayer and the state duty paid by the funds will not be returned in case of refusal to sign the Agreement. Third, long-term review, which can be 6 months, and in exceptional cases, extended for another 3 months (TCU, 2020).

Which came into force with the changes of the Tax Code of Ukraine significantly closer together the US tax laws and regulations of the tax control Tax Code abroad, its provisions have become increasingly close to the international principles of transfer pricing, in particular the recommendations of the Organization for Economic Cooperation and Development, but still not completely eliminate the existing problems and shortcomings (OECD, 2014).

Thus, a comparative analysis of foreign experience of transfer pricing tax control with the current Ukrainian legislation, suggests a tendency to reduce the significant differences in the implementation of tax control of transfer pricing in Ukraine and other countries. However, despite this, a large number of differences still persists. The analysis of the practice of tax control of transfer pricing showed that the tax authorities are often faced with the inability to verify the conformity of transfer prices to market levels of the organization.

For this reason, the elimination of tax control of transfer pricing problems is largely possible through the use of international experience. On this basis, the use of foreign experience in order to modernize the tax control of transfer pricing should take into account the economic and political situation in the country and rely on the rules and regulations on taxes and duties of the national legislation. Judicious use of the international experience of tax control for the

realities of Ukrainian reality will lead to greater effectiveness of control activities for the prices used by taxpayers.

Transfer pricing problems can be most clearly studied by analyzing arbitration practice. Court decisions, firstly, help to clarify the position of state bodies in the application of legislation and, secondly, allow to draw attention to the disagreements of the points of view of taxpayers and tax authorities. Given the laboriousness and long-term nature of the stage of tax audits and further stages of appealing against decisions of tax authorities, we can still talk about the recent emergence of transfer pricing norms. A limited number of transfer pricing tax disputes have been formed in the arbitration practice of Ukraine.

The analysis of foreign jurisprudence, in particular the United States, carried out in the study, shows the following:

- The court cases that have been analyzed apply the transfer pricing rules;
- Application of transfer pricing rules are aimed at protecting the national tax base when taxing cross-border transactions;
- The methodology of transfer pricing rules is based on approaches developed by the OECD, which is reflected in the high similarity of terminology used to regulate transfer pricing. The national transfer pricing rules of Ukraine are close to the OECD methodology, but not identical.
- Transfer pricing judgments tend to create a precedent system of judgments in which findings from one case are used to rule on other cases, effectively filling legislative and administrative regulation with additional rules based on case studies.

The grouping of cases by transactions, in respect of which a dispute arose on the application of transfer pricing rules, indicates that the largest number of disputes were associated with transactions for the supply of goods and with operations for the provision of services (Table 4).

Table 4: Grouping of US arbitration practice on the subject of the dispute

Case name, country, year	The subject of the dispute	The amount of primary additional charges	The amount based on the results of the trial
	Choosing the applicable method		
WESTRECO, US 1992	The possibility of applying a coefficient to the size of the salary of the company's employees to determine the size of the taxpayer's potential income, which would be received	\$7,115,584	-

	in such a calculation of the cost of research and development work for the parent company.		
SEAGATE TECHNOLOGY, US 1994	Whether a post-implementation method can be used.	-	-
COMPAQ COMPUTER CORPORATION, US 1999	Possibility of using the comparable uncontrolled price method.	\$232,402,000	\$214,852,000
VERITAS SOFTWARE CORPORATION, US 2009	Can the method of comparable uncontrolled transactions be used to determine the market size of the remuneration of a taxpayer under a license agreement with a subsidiary.	\$2,5 billion	-
Glaxo Smith Kline, US 2006	Balancing the value of research and development versus marketing and promotional efforts and choosing the appropriate method.	-	\$3.4 billion
	Redistribution of income without economic justification		
UNITED PARCEL SERVICE, US 2001	Whether the group insurance transactions through an offshore company have economic substance.	-	\$1,2 billion
	Cost allocation issues		
SEAGATE TECHNOLOGY, US 2000	Should controlled entities share the costs of the US parent company to issue employee options to employees who are involved in R&D on intangible assets.	-	-
XILINX INC., US 2005	Whether independent companies have to share costs in the form of an option for employees under a cost-sharing agreement.	-	-
	Whether the transaction is controlled		
DHL CORPORATION AND SUBSIDIARIES, US 2002	Whether a transaction that is not formally related to a controlled one, as it was concluded with an independent person, relates to a controlled transaction.	-	-

Source: own generalization based on published statements

Control over transfer pricing is one of the priorities of the US tax authorities. The auditors of the Internal Revenue Service of the US pay special attention to transfer pricing when they audit the activities of multinational corporations. In the United States, transactions involving transfers of intangible assets to other countries are closely monitored, with a particular focus on cost-sharing agreements. In addition, in the United States, more and more checks are carried out on the services provided to each other by enterprises of the same group.

The State Tax Service of Ukraine (2020) announces 80 inspections on transfer pricing issues - will check the values in controlled transactions for compliance with the rules of the "outstretched hand". Of these inspections, 56 have already been completed. Court decisions have already been made in 29 transfer pricing disputes (Figure 4).

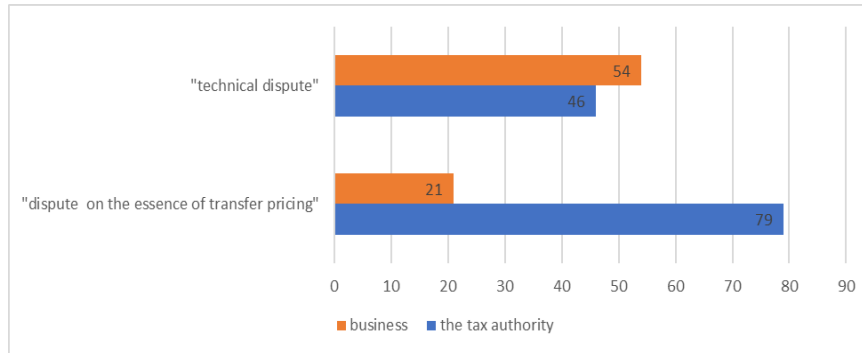


Figure 4: Winning business decisions in courts, %

In addition to the category of "dispute on the merits of transfer pricing", we can distinguish the category of so-called technical structures for transfer pricing, which relate to issues of forward data, correctness of data and reporting forms of controlled transactions, obtaining criteria for control transactions, unavailability of verification.

Ukrainian modern case law already has examples of resolving tax disputes that bring the above rules to a new level of adjustment and improvement of tax legislation. The case law of the Supreme Court of Ukraine (2019) mostly shows that decisions are made in favor of taxpayers, when considering cases in court they are carefully considered in all aspects, if necessary sent for reconsideration so that the decision was reasonable and balanced (table 5).

Table 5: Ukrainian court practice on transfer pricing

Case name, year	The subject of the dispute	Decision to court	Note
Sumikhimprom, 2017	Appointment of forensic economic examination and recognition as illegal and cancellation of the tax notice-decision.	In favor of the taxpayer	-
"AZOT", 2017	Application of the method of comparative uncontrolled price.	In favor of the supervisory authority	Objectivity in pricing in controlled transactions.
Odesky Port Plant, 2017	Questions regarding business operations on import of natural gas in gaseous state from a non-resident company.	In favor of the taxpayer	The issue of completeness of accrual and payment of taxes during the implementation of controlled transactions for the export of mineral fertilizers to non-resident companies. The impossibility of using the method of comparative uncontrolled price, as well as the feasibility of using the net profit method for natural gas import operations.
Sverodonetsk ob'ednannya AZOT, 2018	Recognition of illegal and cancellation of the tax notice-decision.	In favor of the taxpayer	-

Kernel-Trade, 2016	The facts of concluding additional agreements to the forward contract reclassify it into a regular contract of sale.	Sent for new consideration	The legislation defines a special procedure for establishing the compliance of prices with the principle of "outstretched arm" for transactions carried out under forward contracts.
SIS GROUP, 2017	Export prices of wheat, corn, barley and rapeseed, made in 2013-2014.	In favor of the taxpayer	For the first time in Ukraine, a final decision was made without referral for reconsideration and it was recognized: - the expediency of the analysis of the comparison at the time of signing the contract indicators of quantity of goods, delivery times, payment terms, distribution of responsibilities and other conditions that directly affect the formation of the contract price (including available markups or discounts, marketing policy); objectivity of research of all possible sources of information; - determination of the date of the controlled transaction and the date of transfer of ownership.
Meat processing complex LTD, 2018	Incorrect comparison of commercial and financial conditions of transactions, incorrect application of the method of determining the price of controlled transactions, which led to the unfoundedness of the conclusion in the inspection report.	In favor of the taxpayer	Objectivity in determining the date of conclusion of contracts for controlled transactions.
Rivne-AZOT, 2017	Completeness of accrual and payment of taxes during the implementation of controlled operations on natural gas imports from Ostchem Holding Limited (Republic of Cyprus) and the export of mineral fertilizers to NF Trading AG (Swiss Confederation).	In favor of the taxpayer	The total amount of tax notices-decisions that are being appealed exceeds UAH 1.5 billion.

Source: own generalization based on published statements

Having considered the detailed characteristics of these court cases, we note that most of the issues of completeness of accrual and payment of taxes in the conduct of controlled transactions for export transactions to non-resident companies are justified. The objectivity of the definition and a clear review of the schedule of contracts for controlled transactions should be key during the inspections by the tax authorities of Ukraine.

Table 6: The main differences in the methodology of transfer pricing abroad and in Ukraine

Foreign experience	Domestic practice	Implications for domestic business
Tax authorities require only a report on controlled transactions (in some countries - documents proving the fairness of the price)	Along with the report on controlled transactions and analytical materials to confirm the transfer prices, businesses are	Increased administrative costs of business; shadowing of the economy due to the growing burden on business;

	required to submit all primary documents related to the performed operations	bureaucratization and growth of the informal economy
Transfer pricing is aimed exclusively at regulating and controlling transnational transactions with related parties	Fiscal regulation covers transactions with all companies (including unrelated ones) located in countries where the income tax rate is 5 percentage points or more lower than in Ukraine (in particular, Bulgaria, Georgia, the Republic of Cyprus, Moldova, Montenegro and etc.)	Tighter regulation of transfer pricing than in most countries of the world; buying goods from a foreign trading company-unrelated person, the Ukrainian company is forced to prove the fairness of the price, which in practice is often impossible
Transfer regulation covers the price relevant at the time of the contract	In the case of comparing the price of a forward contract for any product on the date of conclusion of such a contract with the price at the time of delivery, the domestic enterprise may incur additional costs for the payment of taxes	There is a threat for companies that work with forward contracts (in particular, for grain traders), because when signing such contracts is based on the price set for similar contracts in the market on the date of signing the contract, not on the date of actual delivery. On the date of shipment of goods, the price may fluctuate in any direction

Source: own generalization

It should be noted that today in Ukraine the formation of the transfer pricing mechanism is extremely blurred. Procedures for substantiation and reflection of transfer prices in financial statements are complicated, there are no clearly established rules for avoiding double taxation and resolving tax disputes, there are significant expenditures of time and resources for effective implementation of the transfer pricing mechanism.

The current transfer pricing procedure in the value chains of industrial enterprises is the sale of products and services or the payment of liabilities through related companies that are in "low-tax" jurisdictions at discounted prices.

4. CONCLUSIONS

Based on the result of the research conducted, it can be concluded that:

- 1) Foreign experience of transfer pricing tax control, in particular the US experience shows that can be controlled not only the price of the transaction, but also a wide range of facilities, including income, profits, losses, expenses, the amount of the tax credit, etc., which may be converted, according to the law on transfer pricing.
- 2) The international standards of tax control of transfer pricing, in contrast to the principles of monitoring Ukrainian tax authorities are focused on the economic substance of the transaction rather than its form through the implementation of functional analysis. As international experience shows, are only controlled transactions concluded between related parties, in contrast to the Ukrainian practice of tax control of transfer pricing.

Another distinctive feature of the international experience of tax control is the fact that in most of the countries require taxpayers to provide additional information or special calculation prices controlled transactions. In most foreign countries is not strictly defined and regulated by the hierarchy of the use of various methods of tax control of compliance used by taxpayers market price level.

- 3) In foreign countries, the tax control of transfer pricing is focused on the content of the transaction rather than its form. The interdependence of the objects of the transaction is determined based on actual rather than the formal relationship between the parties. The use of the international experience of tax control for the realities of Ukrainian reality will lead to greater effectiveness of control activities for the prices used by taxpayers.
- 4) Most civilized countries implementing the tax control over transfer pricing based on Transfer Pricing Guidelines of the Organization for Economic Cooperation and Development for multinational corporations and tax administrations. These recommendations in turn formed on the basis of the US Internal Revenue Code provisions, as it is in the US for the first time there was legislation on transfer pricing.
- 5) The main distinguishing feature of the Recommendations of the OECD transfer pricing is to establish a level playing field, both for the tax authorities and taxpayers, not just in a particular country, but also in all countries, tax legislation which is based on the provisions of this Recommendation.

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