Name of Country: Poland **Last updated: January 2012**

ORDINANCE OF THE MINISTER OF FINANCE
of 10 September 2009

on the Mode and Procedure of Determining Legal persons' Income by Estimation and on the Mode and Procedure of Eliminating Legal Persons' Double Taxation in Connection with the Adjustment of Profits of Associated Entities

(Journal of Laws of 29 September 2009)

Pursuant to Article 11 Clause 9 of the Corporate Income Tax (Journal of Laws of 2000, No. 54, Item 654, as amended), The Minister of Finance hereby orders what follows:

Chapter 1
General Rules

Paragraph 1

1. The provisions of the Ordinance govern the mode and the procedure of determining income, by estimation of prices, referred to in Article 11 of the Corporate Income Tax of 15th February 1992 and the mode and procedure of elimination of double taxation in connection with the adjustment of profits of associated entities.
2. The provisions of this Ordinance should be applied accordingly in estimation of the part of income of the taxpayer that do not have the place of residence within the territory of the Republic of Poland, conducting its business activity by permanent establishment situated within the territory of the Republic of Poland and the taxpayer having its place of residence within the territory of the Republic of Poland, conducting its business activity by permanent establishment situated on the territory of foreign country.
3. The objective of the application of the provisions of this Ordinance shall be to determine and to tax income which can reasonable be deemed to have been earned within the territory of the Republic of Poland, and with respect to entities having its place of residence on the territory of the Republic of Poland, also income earned abroad, if it can be reasonably attributed to these entities.
4. The provisions the Ordinance shall not apply to the transactions, in which price or the mode of setting the price of the object of such transaction is prescribed in the acts of law and enforcement regulations issued on its basis.

Paragraph 2

For the purpose of this ordinance, the following terms shall be understood as:

1. entity – an individual, a legal entity or entity without legal personality,
2. domestic entity – a domestic entity in the meaning of the provisions of Tax Code of 29th August 1997 (Journal of Laws from 2005, No. 8, Item 654, as amended),
3. foreign entity – a foreign entity in the meaning of the provisions of the Act of law indicated in Point 2;
4. associated entities – entities which are in relations referred to in Article 11 Clauses 1 and 4-6 and 8a of the Act of law indicated in Paragraph 1 Clause 1;
5. independent entities – entities that are not in relations indicated in Point 4;

6. permanent establishment – permanent establishment in the meaning of the provision referred to in Article 4a Item 11 of the Act of law mentioned in Paragraph 1 Clause 1.

Paragraph 3

1. The tax authorities and the fiscal audit authorities shall determine income of the associated entity by estimation in the amount as it would have been settled between independent entities.
2. In order to estimate the income indicated in Clause 1, the methods mentioned in Paragraphs 12-14 as well as 15-18 have to be applied exclusively, taking into account the rules indicated in Chapter 2. Such estimated income is treated as being at fair market value.
3. Estimation, as indicated in Clause 1, covers especially all types of transactions where occur transfer of ownership or transfer of rights to use tangible and intangible property as well as granting of loans (credits) and performing services or undertaking common arrangements indicated in paragraph 23.

Paragraph 4

1. The tax authorities and the fiscal audit authorities shall determine the fair market value of the object of a transaction between associated entities on the basis of all information available to them, which may affect determination of this value.
2. During determination of the fair market value of the object of a transaction, the tax authorities or the fiscal audit authorities assure that taxpayers can actively participate at each stage of proceedings, in particular submission to these authorities' documents, notes and other data which formed the basis for the calculation of the price of transaction.
3. During determination of the fair market value of the object of a transaction, the tax authorities or the fiscal audit authorities shall not take into account circumstances which the parties could not be aware of at the date of conclusion of transaction and which, had they been known to the parties, might have caused the parties to determine higher or lower value of the object of such a transaction.
4. Where a taxpayer determined the fair market value of the object of a transaction based on a method or methods referred to in Paragraphs 12-14 and submits to the tax authorities or the fiscal audit authorities the data indicated in Clause 2 and the documentation referred to in Article 9a of the act of law mentioned in Paragraph 1 Clause 1, and the reliability and objectiveness of the data submitted can not be justifiably questioned, the authorities shall determine the fair market value of the object of such a transaction using the method applied by a taxpayer, unless application of another method is evidently more appropriate in light of the provisions of the ordinance, especially of chapter two, and the data available.

Paragraph 5

1. Where in a transaction (transactions) between associated entities the terms agreed are less favorable to one of the entities as compared to the terms which would be agreed by independent entities, and at the same time in another transaction (transactions) involving the same entities the terms are agreed are more favorable to this entity, no adjustment of the prices of the objects of such transactions by the tax authorities or the fiscal audit takes place in cases where lower benefits obtained in the first transaction (transactions) are compensated with higher benefits obtained in that another transaction (transactions).
2. The compensation referred to in Clause 1 shall be deemed compliant with the arm's length principle where independent entities would make such a compensation.

Chapter 2

Comparability analysis of transaction

Paragraph 6

1. While conducting comparability analysis of transactions concluded between associated entities with those concluded between independent entities, differences in the economically significant characteristics of the compared transaction, to the extent that these features can affect the market prices established in these transactions, shall be taken into account.
2. Deemed as comparable may be transactions in which none of the possible differences between compared transactions or between entities undertaking these transactions could have a material impact on the price of the object of such transaction on free market or where reasonably accurate adjustments can be made to eliminate material effects of such differences.
3. To factors determining comparability belongs in particular:
   1) characteristics of the object of transaction,
   2) characteristics of the entities undertaking transactions,
   3) contractual terms,
   4) economic circumstances occurring at the time and in place, where the transaction took place,
   5) business strategy.

Paragraph 7

1. While conducting an comparability analysis of the objects of transaction between the associated entities with the objects of transactions undertaken by independent entities, differences in the characteristics of products, services or other disbursements, which are the objects of compared transactions, to the extent that these features may affect the market price of the object of transaction and the applied method, are to be taken into account.
2. In particular, the characteristic features of the objects of transaction which affect market prices and are to be taken into account during determining comparability of the market value of these objects in a given market, are in cases of:
   1) tangible goods – their physical features, quality, durability, accessibility, possible pledges of the related rights in favor of third parties, accessibility of goods and related services as well as volume of supply,
   2) intangible goods – duration and extent of protection as well as projected benefits from the use of these goods,
   3) for services and other disbursements – type, scope and quality of such services and considerations.
3. In the case when the applied method does not require strict comparability of the objects of transaction, the comparability analyses referred to in Clause 1, shall be conducted in relation to the business sector, to which the transaction relates, taking into account especially provision referred to in paragraphs 8 and 10.

Paragraph 8

1. While conducting comparability analysis of the entities undertaking transactions in a given market the course of transaction shall be taken into account, including the functions performed by these entities in the compared transactions, taking into consideration analysis of assets used, including also tangibles and intangibles not classified as assets, human capital and risks assumed.

2. The analysis of entities undertaking transaction shall determine, which party to the transaction performs functions, uses assets and assumes risks that are economically important, that is which are the most relevant to generating value and profit from the transaction.
3. While performing analysis referred to in Clause 1 and 2, the following is to be taken into account:
   1) types of functions performed by parties to transaction,
   2) type and value of assets and tangible goods used, especially land, buildings, constructions, premises, machinery, equipment, means of transport,
   3) type and value of assets and intangible goods used,
   4) degree of human capital engaged,
   5) type and allocation of business risk and responsibility of parties to the transaction.

Paragraph 9

1. Comparability analysis of transactions shall take into account terms of compared transactions to the extent, that differences of these terms can affect the market prices of the object of transaction.
2. Terms of transaction which may affect the market price of the compared transactions include in particular:
   1) dates, conditions and forms of payment,
   2) the period within which the transaction is realized and the factors connected with passage of time,
   3) punctuality of transaction realization,
   4) hedging of transaction.

Paragraph 10

Comparability analysis of transactions conducted on different markets shall take into account conditions existing on comparable markets to the extent that these differences can affect the market prices of the object of transaction. Belongs to them in particular:

1. size and geographic location of a given market as well as characteristics of the market (retail or wholesale),
2. supply-to-demand ratio with respect to given goods or services, consumer purchasing power, bargaining power of suppliers and level of competition,
3. availability of substitute goods or services as well as risks related to it,
4. substance and scope of government regulation of the market and degree of risk inherent in pursuing activity on a given market,
5. the level and structure of costs related with transaction on a given market.

Paragraph 11

1. Comparability analysis of transaction shall take into account used business strategy, in the case when such strategy affected the price of the transaction. The business strategy include in particular:
   1) promotional prices when entering a new market,

2) temporary decrease in profits in return for higher long-run profits,
3) incurring higher costs for a definite period to retain the current market position or to gain a new market.

2. Impact of the factors involved in the implementation of a business strategy as declared by an entity may not be taken into account in cases where subsequent activities of this entity prove that a given strategy is not actually being implemented, unless failure to implement such a strategy is due to reasons beyond the control of the entity, which reasons could not be predicted at the time of selecting a given strategy for implementation.

Chapter 3

Basic Methods of Determining Taxpayers' Income by Price Estimation

Paragraph 12

1. The comparable uncontrolled price method relies on comparison of the price agreed in transactions between associated entities with the price applied in comparable transactions by independent entities and, on this basis, determination of the market value of the object of transaction concluded between the associated entities.
2. Comparison, referred to in Clause 1, is made on the basis of prices applied by a given entity on a given or comparable market in transactions with independent entities (internal price comparison) or on the basis of prices applied in comparable transactions by other independent entity (external price comparison).
3. Where the comparable uncontrolled price method can be applied, this method shall take priority over the methods defined in the provisions of the Ordinance, unless application of other method allows determination of the prices in the transaction at a level closer to the market value of the object of such transaction and allows more accurately to determine taxpayer's income.

Paragraph 13

1. The resale price method relies on reduction of the price agreed in a transaction of a given entity with an independent entity, involving goods or services acquired by this given entity from a associated entity, by resale price profit margin. Thus determined price may deemed to be the market price set in transaction of a given entity with associated entity.
2. The resale price profit margin includes direct expenses and, subject to Clause 3, indirect expenses incurred by a given entity in connection with this transaction plus a profit rate appropriate for this type of transaction. Where, prior to the resale, the entity reprocessed or otherwise changed the value of goods or services, this change shall be considered during adjustment of the price adjustment referred to in Clause 1.
3. The resale price profit margin does not include expenses equivalent to the price of the object of transaction and general administrative costs, that is costs of operating the entity as a whole and costs of managing the entity.
4. The resale price profit margin shall be determined by comparing the margin charged by the same entity in transactions with independent entities or the margins charged by independent entities in comparable transactions.
5. While determining the resale price profit margin, it is necessary to consider the following in particular:
   1) factors related to the period of time between the original purchase and the resale, in particular those concerning changes in the market with regard to costs, currency exchange rates, inflation;

2) changes of condition and degree of wear of goods or rights constituting the object of transactions, including those resulting from technological progress in a given field,

3) exclusive right of the reseller to sell certain goods or rights, which may affect the decision to change the margin.

Paragraph 14

1. The reasonable margin method (cost-plus method) involves determination of the sales price of objects and rights and provision of services in a transaction of a given entity with a associated entity, at a level corresponding to the sum of cost base and profit margin, comparable to cost base and profit margin set between independent entities, which take into account comparable functions, risks assumed and assets used.
2. As cost base it is understood a sum of costs directly related to the purchase or own manufacturing of the object of the entities and indirect costs, with the exception of general administrative costs, that is costs of operating the entity as a whole and costs of managing ot the entity.
3. In the reasonable margin method ptofit margin is calculated in relation to cost base.
4. Profit margin in relation to certain cost base, reffered to in Clause 3, is determined by comparing the margin charged by the same entity in comparable transactions with unrelated entities or the margin charged in comparable transactions by independent entities.

Chapter 4

Determination of Income while Using Transactional Profit Methods

Paragraph 15

1. Where it proves impossible to determine income by using the methods referred to in Paragraphs 12-14, the transactional profit methods may be applied which involve determination of income on the basis of profit which could reasonably be expected to be obtained by a given entity participating in a transaction.
2. The transactional profit methods are to be applied in such a way so that no to increase the tax liabilities of the entity only because profit generated by the entity is lower than an average profit of other entities, if lower profit or failure to generate profit by given entity can be attributed to economic or organisational factors.

Paragraph 16

While determining income form transactions realised by associated entities, the following transactional profit methods may be applied:

1. the profit split method and
2. the transactional net margin method.

Paragraph 17

1. The profit split method, reffered to in Paragraph 16 Clause 1, relies on identification of aggregate profits generated by associated entities in a given transaction (transactions) and allocation of these profits to these entities, in a proportion that would have been applied by independent entities.

2. Proportional allocation of profits which would be applied by independent entities participating in a given transaction (transactions) should be carried out by:
   1) residual analysis, in which the sum of profits generated in a given transaction (transactions) by associated entities participating in a given transaction (transactions) is allocated in two stages; in the first stage, to each participant of the transaction is allocated basic profit adequate to given kind of transaction that is generated by independent entities performing rutine functions, using typical assets as well as assuming standrd risk in those kind of transactions; in the second stage, all the profits remaining after the allocation of profits in first stage are divided between the assocated entities participating in a given transaction in accordance with the terms which would be agreed by independent entities participating in such a transaction; where the sum of profits generated by related entities is lower than the sum of profits allocated in the first stage, the profits allocated shall be reduced; the adjustment made in the second stage shall take into account the economic functions referred to in Paragraph 8 Clause 2, or
   2) participation analysis in which the sum of profit from a transaction, involving goods manufactured or improved by these entities, is allocated between the entities, on the basis of the relative value of activities undertaken by each associated entity, having regard to the factors referred to in Paragraph 8.
3. Allocation of profits, referred to in Clause 1, is made by appropriate determination of the earnings generated by each related entity and the costs incurred related to a given transaction (transactions).

Paragraph 18

1. The transactional net margin method, reffered to in Paragraph16 Point 2, relies on examination of the net profit margin achieved by an entity in a transaction or transactions with another associated entity and determination of it at the level of the margin obtained by that same entity in transactions with unrelated entities or the margin obtained in comparable transactions by independent entities.
2. The transactional net margin, referred to in Clause 1, is determined by deducting from the earnings generated in the transaction the costs incurred in order to generate those earnings, including general administrative costs.
3. Deduction of general administrative costs, referred to in Clause 2, is made by taking into account the ratio of the earnings from a given transaction to total earnings.
4. While applying the net transactional margin method, one should take into consideration the differences between the entities whose margins are being compared; in particular the following factors shall be taken into account: competition from other market participants and substitute products, efficiency and management strategy, position on the market, differences in costs structures and costs of raising capital as well as degree of business experience.

Chapter 5
Special Cases and Conditions of Determining Market Value of Intangible Goods and Services

Paragraph 19

1. On determining the fair market value of intangible goods or services in transactions among associated entities, the tax authorities or fiscal audit authorities at first examine, whether

independent, reasonably acting entities would conclude such transaction on conidtions, which were agreed by associated entities.

2. Where reasonably expected benefits of an entity concluding such transaction are evidently lower than the expenses incurred in this transaction, and the entity doesn't indicate rational causes justifying their incuring in a given amount, tax authorities and fiscal audit authorities examine corectness of determination of amount of incurred expenses.
3. While determining the level of expenses, referred to in Clause 2, other costs on which the use of a given intangible or service is conditional are be taken into account.
4. The provisions of Clause 2 is not applicable where a given entity is obligated by separate regulations to undertake a given legal action.

Paragraph 20

1. While estimating income, the tax authorities or the fiscal audit authorities determine advertising costs incurred by associated entities, proportionally to benefits from advertising generated by these entities. Where one taxpayer incurs the costs of advertising, the benefits of which an associated entity related to this taxpayer also participate in, it is deemed then, that this first entity performs commercial services in limits, in which they correspond of their nature and scope to services run by independent advertising enterprises.
2. In particular, for the purpose of establishing proportionallity of the expenses for advertising, which carrying on generates potential benefits for two or more associated entities, one should take into account, the markets where the advertising is carried on and the share of sales of advertised goods and services sold by particular associated entities on the markets where the advertising is being carried on.

Paragraph 21

1. If a taxpayer grants a loan (credit) to a associted entity reletad to it or receives such a loan (credit) regardless of their purpose and assigement, or where he grants or is granted a guarantee or a pledge in any form, the market price for such service are interest or commission or any ohter form of payment, which would be agreed for such a service, provided under comparable terms, by unrelated entities.
2. The market value of interest is determined on the basis of the lowest interest, that a given entity would have to pay to an independent entity for obtainig of a loan (credit) with similar maturity under comparable terms.
3. While determining the value, referred to in Clause 2, all relevant circumstances involved in a given case shall be taken into account, in particular:
   1) the amount of the loan (credit) and the period for which it has been granted,
   2) the character and purpose of the loan (credit),
   3) risk involved and security on the loan (credit), having regard to special terms, which the lender (creditor) could grant to an unrelated borrower,
   4) currency of the loan (credit), risk involved in exchange rates fluctuations, costs of funds hedging the loan (credit) and funds limiting the risk of exchange rates fluctuations,
   5) the amount of commission.

Paragraph 22

If one entity related with another entity or with more entities launches research as commissioned by this other entity or entities, for the purpose of determining earnings by these entities from such a

transaction (transactions), it is deemed to accrue eventual benefits from outcome of research to the principal. For the purpose of determining earnings of the contractor for providing such services it is appropriate to use method referred to in Paragraph 14.

Paragraph 23

1. If a taxpayer shares the costs jointly incurred by associated entities for the manufacture of intangible goods, the level of the cost incurred by the taxpayer attributed to it may be deemed to have been determined in accordance with the arm's-length principle only if such terms, in light of expected benefits from such participation, would be approved by unrelated entities.
2. The terms, referred to in Clause 1, apply in particular to charging these costs to the entities in proportion to expected benefits and, additionally, to allocation of benefits which were not expected (taken into account) on setting these terms in proportion to the level of charges.
3. Where a taxpayer has an opportunity to obtain comparable benefits within the agreement, referred to in Clause 1, or from an independent entity and in one of these cases the taxpayer will incur lower expenses, than for the purpose of determining the market value of the benefit the of this taxpayer lower value one should use lower value.
4. In the cases, referred to in Clauses 1-3, the provision of Paragraph 4 Clause 3 shall apply accordingly.

Chapter 6
Procedure of Making Adjustments of Tax Liabilities

Paragraph 24

1. In order to eliminate double taxation of income ofassociated entities, if income of a taxpayer, which is a domestic entity, is included by the tax administration of the other state in the income of a foreign entity and taxed accordingly in connection with determination by this tax administration of the terms which would be agreed by independent entities, on the request of the domestic entity, minister responsible for public finances may make an adjustment of the tax liability of this taxpayer, on condition that the relevant international agreements, to which the Republic of Poland is a party, foresee such adjustment.
2. The adjustment, referred to in Clause 1, may be made, if the terms determined by the tax administration of this other country are, in light of the provisions of the Ordinance, are consistent with the terms, which would be agreed by independent entities.
3. I case when the adjustment, referred to in Clause 1, took place competent tax authority makes change of tax liabilities of this taxpayer, in the scope resulting from the adjustment.

Chapter 7
The Mode and Procedure of Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Entities.

Paragraph 25

1. In order to eliminate double taxation of income of associated entities, domestic entity may request the minister competent in matters of public finance to initiate a mutual agreement procedure according to Convention of 13 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (Journal of Laws 2007, No 152, Item 1080) or according to double taxation treaties concluded by the Republic of Poland. The request shall be submitted within three years from the date of delivery of tax audit report or tax decision to

taxpayer or its associated entity which result or is likely to result in double taxation, unless double taxation treaty according to which request is issued provides for different time limit. The three year period starts with the first of the following dates: date of delivery of tax audit report or date of delivery of tax decision.

2. The minister competent in matters of public finance shall inform in writing:
   1) domestic entity about receipt of request indicated in Clause 1,
   2) competent authorities of the other Contracting States about submission of request by domestic entity indicated in Clause 1 attaching a copy of the request

   - within one month from its receipt.

3. The request indicated in Clause 1 shall include at least:
   1) identification of domestic entity and its associated entities involved in procedure in particular: name, address, tax identification number;
   2) details of facts and circumstances of the case, including details of the relations between domestic entity and associated entities indicated in item 1,
   3) identification of tax periods concerned,
   4) copies of the tax decisions, tax audit reports or equivalent that give evidence about double taxation (leading to the alleged double taxation),
   5) details of any appeals and litigation procedures initiated by the taxpayer or associated entities indicated in item 1, including any court decisions concerning the case;
   6) justification of the request, including explanation concerning application of Article 4 of the Convention referred to in Clause 1,
   7) an undertaking that domestic entity shall deliver to the minister competent in matters of public finance all documentation and information that may influence the outcome of the case.
4. Upon request of minister competent in matters of public finance all indicated documents shall be translated into working language agreed with competent authorities of other Contracting States concerned.
5. If the request does not meet requirements indicated in Clause 3 and 4 the minister competent in matters of public finance shall invite (call on) the domestic entity within two months upon receipt of the request to provide additional information.
6. The case shall be regarded as being submitted at the date of receipt of the request indicated in Clause 1 including all elements provided for in Clause 3 and 4 or at the date on which the last document with additional information on request referred to in Clause 5 is being submitted.
7. If the request indicated in Clause 1 appears to minister competent in matters of public finance to be justified but it is not itself able to resolve case in a satisfactory way within the framework of domestic proceedings, it should initiate a mutual agreement procedure informing the competent authorities of the other Contracting States concerned attaching a copy of information indicated in Clause 3. At the same time the minister competent in matters of public finance shall inform domestic entity about the initiation of mutual agreement procedure.
8. The minister competent in matters of public finance shall inform – on the basis of information available to him – the competent authorities of other Contracting States concerned and the domestic entity whether the request was submitted within time limit provided for in Clause 1 and of the starting point for the two-year period referred to in Article 7 paragraph 1 of the Convention indicated in Clause 1.
9. The mutual agreement procedure shall be completed within two years from the date indicated in Clause 10.

10. The two-year period indicated in Clause 9 starts at the latest (not beyond the ..) of the following dates:
    1) the date of the final tax decision or equivalent,
    2) the date on which the case has been submitted, indicated in Clause 6.
11. Undertaking the remedies provided by domestic law does not preclude mutual agreement procedure referred to in Clause 1. Article 7 paragraph 1 of the Convention indicated in Clause 1 shall not apply if the final court decision was issued in the case concerned.
12. The outcome of completed procedure referred to in Clause 1 shall be a basis for initiation of proceedings for determination of taxable income or loss.
13. Provisions of Clauses 3-8, 11, 12 shall apply as appropriate to mutual agreement procedure initiated according to double taxation treaty.
14. Provisions of Clauses 9-12 shall apply as appropriate in case when the minister competent in matters of public finance enters into mutual agreement procedure initiated, according to Article 7 paragraph 1 of the Convention indicated in Clause 1, by competent authorities of other Contracting States.
15. Provisions of Clauses 11 and 12 shall apply as appropriate in case when the minister competent in matters of public finance enters into mutual agreement procedure initiated according to double taxation treaties indicated in Clause 1 by competent authorities of other Contacting States.

Chapter 7
Transitional and Final Regulations

Paragraph 26

In cases initiated and not finished before the day of taking effect of the Ordinance previous regulations apply.

Paragraph 26

The Ordinance shall take effect in 14 days from the date of promulgation.

Remark: please keep in mind that this is not an official translation