



---

Supreme  
Court

OVERVIEW  
of judicial practice  
of the Administrative Court of Cassation  
in the Supreme Court  
on transfer pricing

Decisions entered into USRCD  
for the period from 2018 to August 2023

## CONTENT

<b>1. Recognition of business transactions as controlled</b>	<b>3</b>
1.1. On business transactions carried out with non-residents registered in states (territories) included in the list of states (territories) with income tax rates (corporate tax) that are 5 or more percentage points lower than in Ukraine	3
1.2. On recognition of business operations as controlled in the process of transfer pricing with a related person – a resident	3
1.3. On features of a controlled operation on the export sale of agricultural products by the payer of a fixed agricultural tax	4
1.4. On establishing the characteristics of goods / works / services when determining the comparability of controlled and comparable transactions	5
1.5. On free transfer of advertising products to a non-resident and its display in the report on controlled transactions	6
<b>2. The “arm’s length” principle</b>	<b>6</b>
2.1. On the priority of applying methods of establishing compliance with the conditions of the controlled operation	6
2.2. On the “arm’s length” principle regarding the export of rapeseed	7
2.3. On legality of assigning the wages payment (charge) to natural persons – non-residents to operations falling under the definition of controlled	8
2.4. On cost-plus method for determining normal prices	9
<b>3. Tax reporting</b>	<b>9</b>
3.1. On reporting in controlled transactions	9
3.2. On operations to return intangible assets of the counterparty	10
<b>4. Tax control</b>	<b>11</b>
4.1. On business operations carried out with non-residents registered in states (territories) included in the list of states (territories) with income tax rates (corporate tax) that are 5 or more percentage points lower than in Ukraine	11
4.2. On the authority of the supervisory body to send a request for providing the documents within the scope of checking the payer’s compliance with the “arm’s length” principle	11

## 1. Recognition of business transactions as controlled

### 1.1. On business transactions carried out with non-residents registered in states (territories) included in the list of states (territories) with income tax rates (corporate tax) that are 5 or more percentage points lower than in Ukraine

The controlling body conducted an unscheduled on-site documentary check of the payer regarding the failure to include in the report on controlled transactions for the 2015 reporting year information on all controlled transactions carried out during the year, in accordance with the requirements of the clause 39.4 of the Article 39 of the Tax Code of Ukraine. A violation was established in terms of incomplete declaration of the amount of controlled transactions with non-resident counterparties in the report on controlled transactions for 2015. The payer pointed out the falsity of the conclusions of the inspection act, which became the basis for its adoption.

The Supreme Court has come to the conclusion that economic transactions for the accrual and payment of interest under a loan agreement, carried out in favour of a non-resident, which are included in the payer's expenses, are recognized as controlled in the interpretation of the Article 39 of the Tax Code of Ukraine. The types of operations listed in this norm are not exclusive. The amount of accrued interest on a loan received from a non-resident are to be reflected by the resident payer in the report on controlled transactions.

You can read more about the text of the Supreme Court resolution dated of December 17, 2020 in the case № 820/2290/17 retrieved from the link <https://reyestr.court.gov.ua/Review/93595492>

### 1.2. On recognition of business operations as controlled in the process of transfer pricing with a related person – a resident

The bank concluded contracts and carried out business transactions, in particular, deposit transactions, with an individual – one of the founders of the bank, with a share in the authorized capital of the bank (in 2013 – 65.4097%, in 2014 – 65.5998%). The controlling body established the fact of non-submission of reports on controlled transactions for 2013–2014 and issued a tax notice-decision, which calculated the amount of the monetary liability for the payment of “administrative fines and other sanctions”. Summarized data on the relationship between the payer and the counterparty were taken into account, according to which, for the period from 2013, the amount of the bank's transactions with an individual amounted to UAH 12,724,508.47, and for 2014 – UAH 19,444,713. The essence of the dispute was to determine the obligation of the bank to submit to the tax authority reports on controlled transactions for the years 2013–2014 in accordance with the provisions of the subsection 39.2.1.1 of the sub-clause 39.2.1 of the clause 39.2 of the Article 39 of the Tax Code of Ukraine.

The Supreme Court has formulated a legal position according to which, taking into account the provisions of the Article 39 of the Tax Code

of Ukraine, a controlled transaction can only be an economic activity equal to or exceeding UAH 50 million, specifically with an individual who has a share in the authorized capital of the bank and is connected with the latter. The bank has the right to provide banking and other financial services, in particular, to attract funds for deposits.

You can read more about the text of the Supreme Court resolution dated of December 28, 2020 in the case № 820/2540/16 retrieved from the link <https://reyestr.court.gov.ua/Review/93859349>

### 1.3. On features of a controlled operation on the export sale of agricultural products by the payer of a fixed agricultural tax

In 2014, the payer of the fixed agricultural tax did not pay corporate income tax. Since 2015, the taxpayer has moved to the fourth group with regard to the single tax and has become exempt from the obligation to calculate, pay and submit tax reports, in particular, from corporate income tax. According to the results of the inspection, the supervisory authority established a violation regarding the late submission of the report on controlled transactions for 2014 and adopted a tax notice-decision, which applied fines. The taxpayer did not agree with the established violations and noted that the transactions did not have the characteristics of controlled ones, the list of which was given in the sub-clause 39.2.1 of the clause 39.2 of the Article 39 of the Tax Code of Ukraine, excluding the obligation to report on such transactions in accordance with the sub-clause 39.4.2 of the clause 39.4 of the Article 39 of this Code, and negative consequences in case of non-submission / late submission of the report.

The Supreme Court has ruled that in view of the purpose and principles of transfer pricing, as well as the provisions of the Article 39 of the Tax Code of Ukraine, economic transactions are recognized as controlled for the purpose of charging corporate income tax, if they affect / could affect the object of taxation of the payer.

According to the clause 307.1 of the Article 307 of this Code, as amended at the time of the disputed legal relationship in 2014, fixed agricultural taxpayers are not corporate income taxpayers. The economic operations of a producer of agricultural goods who is a payer of a fixed agricultural tax, from the sale of agricultural products for export, do not affect the object of corporate income taxation. This entity is exempt from the obligation to calculate and pay this tax. As a result, these operations are not recognized as controlled for the purposes of income tax collection in accordance with the Article 39 of the Tax Code of Ukraine.

The activity of a representative office in collecting and/or providing information, conducting scientific research of samples of chemical products without the purpose of their further delivery on behalf of a non-resident is not an economic activity in accordance with tax legislation and does not belong to the activity of permanent representative offices of non-residents.

You can read more about the text of the Supreme Court resolution dated of March 31, 2021 in the case № П/811/3371/15 retrieved from the link <https://reyestr.court.gov.ua/Review/95945862>

## 1.4. On establishing the characteristics of goods / works / services when determining the comparability of controlled and comparable transactions

Based on the results of the inspection, the controlling body adjusted the prices in the controlled operations for the content of iron ore, silica (silicon dioxide), and moisture, as well as for the amount of the premium (surcharge) for finished products. The payer indicated an error in the calculation methodology regarding the price adjustment for pellets in the context of iron content (Fe 62% for standard Ferrexpo coils and Fe 65% for Ferrexpo high-quality coils), silica content (silicon dioxide), moisture, adjustments for on the basis of the physical form, physical location and terms of delivery, determination of the market price range of the product according to the method of comparative uncontrolled price. According to the taxpayer, the tax authority did not take into account the established practice of relations on the market of iron ore raw materials regarding quarterly and monthly pricing.

The Supreme Court has noted that, according to the principle of freedom of entrepreneurial activity, a business entity has the right to sell goods / works / services at a contractual price, in particular, in controlled transactions.

The application of the provisions of the sub-clause 4.1.4 of the clause 4.1 of the Article 4, the clause 56.21 of the Article 56 of the Tax Code of Ukraine is connected with the discovery by the court of norms that give grounds for an ambiguous or multiple interpretation of the rights and obligations of the payer and/or the controlling body, including calculations regarding adjustments pellet prices considering iron content.

The contract pricing formula of RR – “pellet premiums” [premium / surcharge for finished products] refers to an increase in the price of iron ore in order to bring it into line with the price of pellets as a product obtained as a result of the processing of iron ore raw materials.

The application of the “pellet premiums atlantic blast furnace 65%Fe” approach by the controlling body meets the requirements of the provision of the sub-clause 39.2.2.2 of the clause 39.2 of the Article 39 of the Tax Code of Ukraine regarding the analysis of the characteristics of goods / works / services that are the subject of the transaction, when determining the comparability of controlled and comparable transactions.

You can read more about the text of the Supreme Court resolution dated of June 27, 2022 in the case № 440/1053/19 retrieved from the link <https://reyestr.court.gov.ua/Review/105086314>

## 1.5. On free transfer of advertising products to a non-resident and its display in the report on controlled transactions

Based on the results of the tax audit, the supervisory body drew up an act with a conclusion that the payer violated the requirements of the sub-clause 39.4.2 of the clause 39.4 of the Article 39 of the Tax Code of Ukraine, since the samples of advertising products given to a non-resident free of charge were not reflected in the report on controlled transactions. The payer did not agree with the results of the inspection and indicated that the conclusions were incorrect, since the goods had been received free of charge and the operations did not affect the object of taxation.

The Supreme Court has concluded that a mandatory requirement for classifying economic transactions as controlled is the possibility of their influence on the object of taxation by the income tax of the payer's enterprises, when one of the parties is a non-resident registered in the state (territory) included in the list of states (territory), approved by the Cabinet of Ministers of Ukraine.

If the expenses from transactions for the purchase of advertising products, transferred free of charge to a non-resident, were reflected as part of sales expenses during the period of free transfer of advertising products, then such transfer affects the determination of the financial result of taxation. This result is to be reflected in financial statements in accordance with national accounting regulations (standards) or international financial reporting standards, which are subject to corporate income tax.

You can read more about the text of the Supreme Court resolution dated of July 11, 2023 in the case № 804/2961/17 retrieved from the link <https://reyestr.court.gov.ua/Review/112126503>

## 2. The “arm’s length” principle

### 2.1. On the priority of applying methods of establishing compliance with the conditions of the controlled operation

The controlling authority conducted a tax audit regarding the completeness of the calculation and payment of taxes during the implementation of controlled transactions and came to the conclusion of underestimation of tax liabilities for income tax and overestimation of the amount of the negative value of the taxable object as a result of the allowed deviation from the level of normal prices. The payer indicated the correctness of the application of the comparative uncontrolled price method (similar to sales), and for controlled export operations – of the net profit method.

The Supreme Court has indicated that in the interpretation of the provisions of the Article 39 of the Tax Code of Ukraine, uncontrolled transactions of parties who are not related parties, are to be recognized as comparable transactions. Amendments to the Tax Code of Ukraine, which entered into

force on January 1, 2015, did not establish a new regulation of disputed relations, but only more clearly revealed the purpose of transfer pricing.

The method of comparative uncontrolled price (similar sales) is a priority (compared to other main methods) if it is possible to use it. The use of this method in relation to controlled operations of natural gas import from a non-resident is possible in case of lack of information on comparable uncontrolled operations in official sources.

For controlled transactions regarding the export of saltpeter in favour of a non-resident, when applying the net profit method, the investigated party has to choose a resident due to the lack of freely available information about the non-resident and the impossibility of calculating the net profitability for each controlled transaction.

You can read more about the text of the Supreme Court resolution dated of October 9, 2019 in the case № 817/1737/17 retrieved from the link <https://reyestr.court.gov.ua/Review/84899759>

### 2.2. On the “arm’s length” principle regarding the export of rapeseed

Based on the results of the inspection, the controlling body established that the prices in the controlled operations for the export of goods of commodity item code 1205 in accordance with the UCT ZED [Ukrainian classification of foreign economics goods] did not comply with the “arm’s length” principle. The payer indicated that the application during price verification in controlled operations on the basis of FOB was illegal and inappropriate due to the lack of information on all possible costs.

The Supreme Court has specified that the absence of relevant amounts in Annex P (Differences) (in the differences by which the financial result is increased) to the income tax declaration indicates the failure of the payer to reflect the amount of price deviation as part of the object of taxation of income from controlled operations on the sale of seeds rapeseed from prices that correspond to the “arm’s length” principle.

If, as a result of the inspection of the controlled operations for the export of the commodity “rapeseed seeds”, it is established that the prices in the controlled operations for the export of goods of commodity item code 1205 according to the UCT ZED, carried out by the taxpayer (taking into account the adjustment for the cost of transshipment of the goods on board the ship) are lower for the minimum values of the price intervals (ranges), and the sales prices of the goods are lower than the price range, the conditions of the specified transactions differ from the conditions applied between unrelated persons in comparable uncontrolled transactions. Such prices in controlled operations for the sale of rapeseed do not correspond to the “arm’s length” principle.

You can read more about the text of the Supreme Court resolution dated of March 21, 2023 in the case № 1340/3525/18 retrieved from the link <https://reyestr.court.gov.ua/Review/109759320>

## 2.3. On legality of assigning the wages payment (charge) to natural persons – non-residents to operations falling under the definition of controlled

Based on the results of the tax audit, the controlling body recognized that the transactions for the payment (charge) of wages to a non-resident natural person were considered controlled for the purposes of the Article 39 of the Tax Code of Ukraine. The payer disagreed with these conclusions. The essence of the dispute was whether the payment of wages by a legal entity to its employee – a non-resident natural person (a related person, having a share in the authorized capital of the company in the amount of 25 percent) – belonged to the controlled transaction.

The Supreme Court has concluded that transfer pricing rules could not be extended to labour relations. The sources of information defined in the Article 39 of the Tax Code of Ukraine are to provide an opportunity to compare the commercial and financial conditions of transactions. Such conditions do not exist in the case of labour relations, therefore it is impossible to compare transactions and apply transfer pricing methods. According to the sub-clause 39.1.2 of the clause 39.1 of the Article 39 of the Tax Code of Ukraine, the amount of taxable profit received by a payer (who participates in one or more controlled transactions) corresponds to the “arm’s length” principle, if the conditions of the specified transactions do not differ from the conditions applied between by unrelated parties in comparable uncontrolled transactions. The condition for applying transfer pricing methodology and procedures is the need to establish comparable uncontrolled transactions. In the absence or insufficiency of information on individual uncontrolled operations, financial information of legal entities that carry out activities comparable to the controlled operation, could be used to determine profitability indicators (provided that there is information that these legal entities do not conduct transactions with related parties). Determination of the comparability of legal entities is carried out taking into account their industry specifics and relevant types of activities carried out in economic (commercial) conditions comparable to the controlled operation.

You can read more about the text of the Supreme Court resolution dated of July 13, 2023 in the case № 640/847/19 retrieved from the link <https://reyestr.court.gov.ua/Review/112184685>



## 2.4. On cost-plus method for determining normal prices

Based on the results of the inspection, the controlling body found that the payer had understated the volume of controlled transactions for the purchase / sale of goods with related non-residents, as well as understated value added tax obligations during the use of goods in tax-exempt transactions. The payer indicated that the goods had been supplied at prices lower than usual, and did not deny that was a related party to the counterparty.

The Supreme Court has noted that the cost-plus method for determining normal prices for the year 2012 applies only to a taxpayer who is considered a natural monopolist under the law.

The use of the costs plus method is groundless if all the data of accounting account 901 was taken into account to determine the cost of finished products (in which all costs are recorded not only for corrugated sheets, but also for corrugated sheets). The provisions of the clause 199.6 of the Article 199 of the Tax Code of Ukraine apply only to the supply by the payer of waste and scrap of ferrous and non-ferrous metals. The product "waste paper" is not included in this list, and the norm refers to the exemption from taxation of (a) waste and (b) scrap metal, specifically ferrous and non-ferrous metals.

This is an overestimation of the tax credit, if the payer attributed the amount of "input" value added tax to the tax credit in full, but did not include the share of the paid (charged) tax during the production of waste paper, which corresponds to the share of the use of such goods in taxable transactions.

You can read more about the text of the Supreme Court resolution dated of August 9, 2023 in the case № 821/836/16 retrieved from the link <https://reyestr.court.gov.ua/Review/112757755>

## 3. Tax reporting

### 3.1. On reporting in controlled transactions

The payer conducted foreign economic activity with a non-resident enterprise. According to the results of the tax audit, the controlling body applied a fine to the payer for non-submitting a report on controlled transactions. The payer indicated that there were no obligation to submit a report on controlled transactions for 2015 in electronic form.

The Supreme Court has determined that there is a special procedure for submitting a report on controlled transactions. The report is submitted only by means of electronic communication in electronic form. Sending a report on controlled transactions by means of postal communication on an optical medium in accordance with the provisions of the laws of Ukraine "On electronic documents and electronic document management" and "On electronic digital signature" does not exclude the mandatory procedure

established by tax legislation for sending the specified report specifically by the means of electronic communication.

You can read more about the text of the Supreme Court resolution dated of February 20, 2018 in the case № 820/6318/16 retrieved from the link <https://reyestr.court.gov.ua/Review/72343772>

## 3.2. On operations to return intangible assets of the counterparty

The controlling body came to the conclusion of volume violations in the part of non-declaration in the report on controlled transactions, since the operation to return the intangible assets of the counterparty had a direct impact on the object of taxation. Therefore, there was an unconditional obligation to include the indicated transaction in the report on controlled transactions. The payer pointed out the falsity of the conclusions of the inspection act, which became the basis for its acceptance.

The Supreme Court has ruled that the income from the operational and non-operational exchange rate difference is taken into account for the calculation of the annual income (50 million UAH) of the payer from any activity for the purposes of transfer pricing and is not taken into account for the calculation of the economic transactions (5 million UAH) of the payer with each counterparty for the purposes application of transfer pricing. Payers whose volume of controlled transactions with one counterparty exceeds UAH 5 million (excluding value added tax) are required to submit a report on controlled transactions (if such transactions affect taxable income) to the central executive authority by May 1 after the reporting year, which implements the state tax and customs policy.

The return of assets does not affect the increase or decrease of the object of taxation in the event of concluding an agreement between the counterparties on the termination of contracts (signed earlier regarding the implementation of economic transactions between the counterparties upon the return of assets), with the subsequent reflection in the accounting of the following data:

- the corresponding counterparty's income from the positive operating exchange rate difference (which is reflected in the line 2120 "Other operating income");
- expenses in the form of negative operating exchange rate differences (which are reflected in line 2180 "Other operating expenses");
- depreciation deductions accrued on intangible assets in the statement of financial results for the current year.

You can read more about the text of the Supreme Court resolution dated of September 16, 2020 in the case № 0740/860/18 retrieved from the link <https://reyestr.court.gov.ua/Review/91818225>

## 4. Tax control

4.1. On business operations carried out with non-residents registered in states (territories) included in the list of states (territories) with income tax rates (corporate tax) that are 5 or more percentage points lower than in Ukraine

The controlling body established a violation in terms of non-submitting a report on controlled transactions, since the founders of the paying counterparty were registered in offshore zones, and the economic transactions were controlled and fell under the definition of the subsection 39.2.1.4 of the sub-clause 39.2.1 of the clause 39.2 of the Article 39 of the Tax Code of Ukraine. The payer pointed out that the conclusions of the inspection report were incorrect due to insufficient research by the tax authority on the essence of the disputed relationship.

The Supreme Court has come to the conclusion that the founders of the non-resident counterparty are not parties to foreign economic contracts. Therefore, the person does not have economic relations with them in such cases. The payer is not required to report on controlled transactions if (1) the counterparty is a resident of a country not included in the list of states (territories) in which income tax rates (corporate tax) are 5 or more percentage points lower than in Ukraine, but (2) is registered as a partner, and (3) the founders are legal entities of the countries included in the relevant list.

You can read more about the text of the Supreme Court resolution dated of May 21, 2020 in the case № 820/1427/16 retrieved from the link <https://reyestr.court.gov.ua/Review/89396403>

4.2. On the authority of the supervisory body to send a request for providing the documents within the scope of checking the payer's compliance with the "arm's length" principle

During the inspection of compliance by the taxpayer with the "arm's length" principle in the process of performing controlled transactions for the reporting period, the controlling body made a request for the taxpayer to provide documents. The payer indicated the lack of appropriate competence in the official who had signed the request.

The Supreme Court has indicated that the monitoring of controlled operations and the conduct of checks regarding the payer's compliance with the "arm's length" principle are different forms of tax control to establish the compliance of the conditions of controlled operations with the "arm's length" principle, the procedure of which is regulated by various provisions of the Tax Code of Ukraine.

The possibility of obtaining tax information in the manner specified by the Article 73 of the Tax Code of Ukraine is established only in the subsection 39.5.1.1 of the sub-clause 39.5.1 of the clause 39.5 of the Article 39 of the Tax Code of Ukraine, which regulates the procedure for

monitoring, not inspections. From the systematic analysis of the provisions of the subsection 39.5.1.1 of the sub-clause 39.5.1 of the clause 39.5 of the Article 39 and the Articles 72–73 of the Tax Code of Ukraine, it could be seen that the procedure established by the clause 73.3 of the Article 73 of this Code applies to requests for obtaining information for tax monitoring. Failure to provide upon request or incomplete provision of tax information for tax monitoring is grounds for appointment of an audit in accordance with the Article 78 of the Tax Code of Ukraine. The start of the inspection terminates the legal relationship associated with sending a written request on the basis of the clause 73.3 of the Article 73 of this Code.

If a report on controlled transactions sent by the taxpayer is received in accordance with the clause 39.4 of the Article 39 of the Tax Code of Ukraine, an unscheduled documentary inspection is possible only in matters of transfer pricing control.

You can read more about the text of the Supreme Court resolution dated of June 16, 2021 in the case No. 520/4404/19 retrieved from the link <https://reyestr.court.gov.ua/Review/97735580>

Overview of judicial practice of the Administrative Court of Cassation in the Supreme Court on transfer pricing (decisions entered into USRCD for the period from 2018 to August 2023) / Compiler: the Office for Ensuring the Work of the Judicial Chamber for Taxes, Fees and Other Mandatory Payments of the Secretariat of the Administrative Court of Cassation; the Office of Analytical and Legal Work of the Administrative Court of Cassation of the Department of Analytical and Legal Work of the Apparatus of the Supreme Court / Responsible for the issue: Secretary of the Judicial Chamber for Taxes, Fees and Other Mandatory Payments PhD in Law R. F. Hanova; Scientific Adviser of the Department for Ensuring the Work of the Secretary and Judges of the Judicial Chamber of the Office for Ensuring the Work of the Judicial Chamber for Taxes, Fees and Other Mandatory Payments of the Secretariat of the Administrative Court of Cassation PhD in Law A. A. Barikova. Kyiv, 2024. Iss. 4. 13 p.

**Warning:** the publication contains a brief overview of several court decisions. Each of them sets out only the main conclusion regarding the legal issue that arose in the case. For a correct understanding of the legal position expressed in the court decision, it is necessary to familiarize yourself with its full text, posted in the Unified State Register of Court Decisions.

## Follow us online

 [fb.com/supremecourt.ua](https://fb.com/supremecourt.ua)

 [t.me/supremecourtua](https://t.me/supremecourtua)

 [@supremecourt\\_ua](https://@supremecourt_ua)