

# frontiers in tax

**Polish edition**

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**How the amendments to the law on proceedings before administrative courts impact the way the parties to tax proceedings can defend their rights**

**The principle of legal doubts to be resolved in favour of the taxpayer**

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**Penal fiscal liability – how to mitigate the risk of penal fiscal charges?**

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*cutting through complexity*

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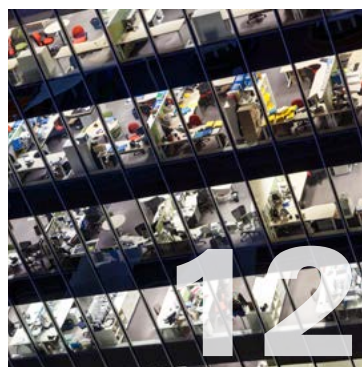
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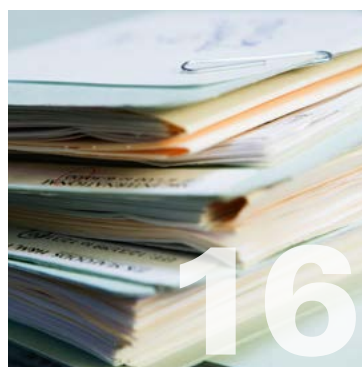
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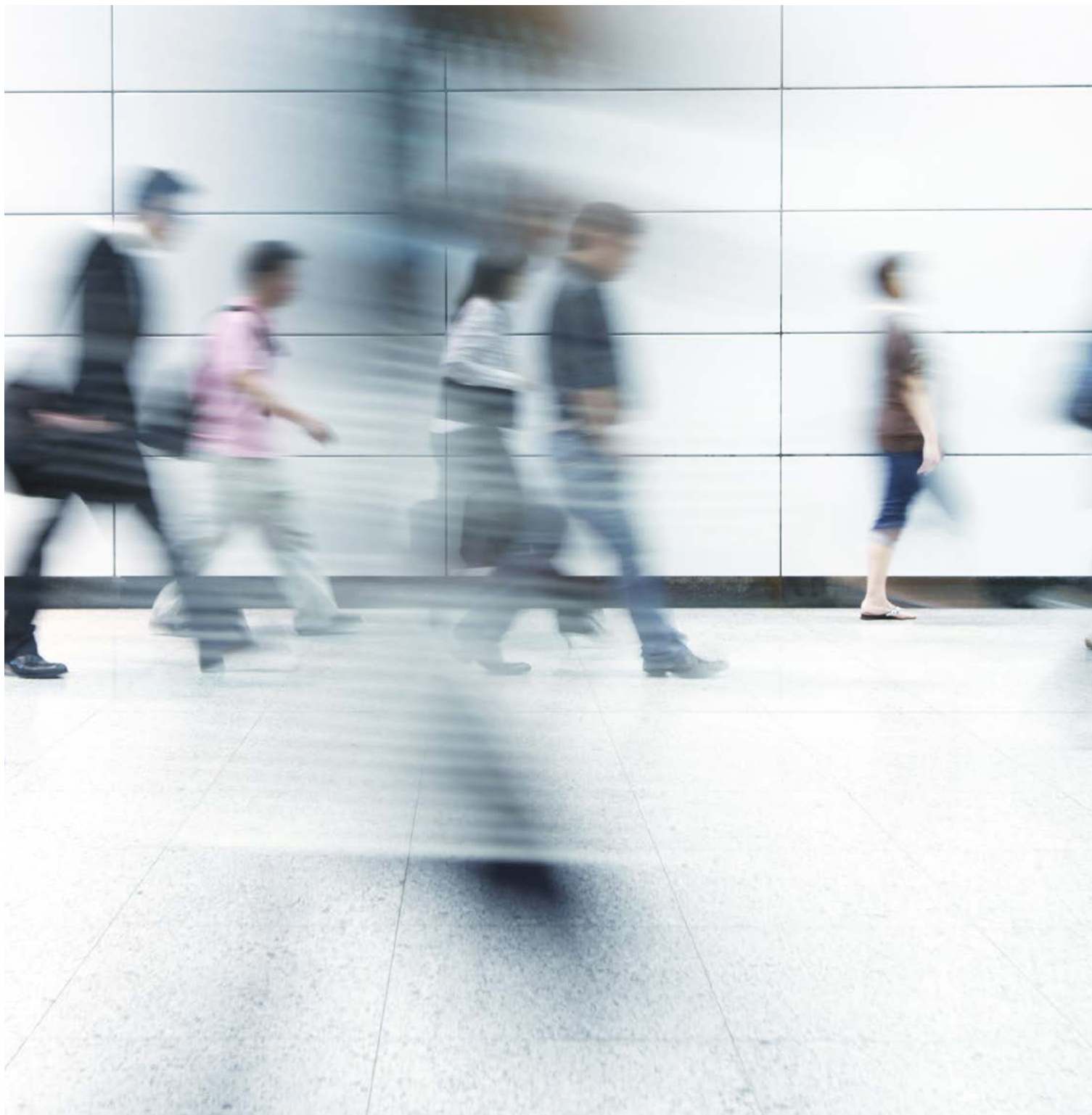
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# Introduction:



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Interesting times have come for tax legislation. Global and European trends set mainly by the OECD and the European Commission are slowly but surely making their way into the Polish tax system. This is resulting in more restrictive regulations aimed at limiting tax planning and increasing tax burdens for international businesses that apply aggressive tax optimisation strategies.

On the other hand, resolute demands are being voiced by entrepreneurs and tax experts for systemic modification of the tax authorities' attitude towards taxpayers, who should be treated on an equal and partner basis. The times of the inferior position of the taxpayer, considered an unwelcome customer, should be consigned to history. Tax administration should pursue modern solutions, become taxpayer-friendly and be able to handle matters via electronic means of communication.

With the view to bringing you closer to these developments, and specifically the future position of taxpayers vis-à-vis the tax authorities and administrative courts, we are now launching a new issue of 'Frontiers in tax – Polish edition'. It discusses important planned changes (the introduction of the *in dubio pro tributario* principle into the Tax Ordinance) as well as implemented modifications (amendments to the law on proceedings before administrative courts). It also talks about the risks that taxpayers are still exposed to regarding the fiscal offences law as well as the opportunities related to the option for disputes with the Polish tax authorities to be resolved by the Court of Justice of the European Union.

I hope you will find it an interesting read.

# How the amendments to the law on proceedings before administrative courts impact the way the parties to tax proceedings can defend their rights

On 9 April 2015 the Polish Parliament passed the act on amendments to the law on proceedings before administrative courts. The act was signed by the Polish President on 28 April 2015.





The basic objective behind the amendment was to optimize, simplify and accelerate proceedings pending before administrative courts. This aim was achieved by, inter alia, the solutions that would require the parties to verify their existing practice applied in administrative court proceedings. Specifically, in some cases the parties would be required to increase their initiative in the scope of the findings formulated in their submissions letter and to improve the level of detail and accuracy of their arguments. Key solutions of this type are discussed below.

### **Amendments to complaints on individual interpretation of the tax legislation**

Currently the complaints tabled with the District Administrative Court about individual interpretation of tax legislation are governed by the general principles. According to the amended law, the complaints in such cases could be based solely on the claim of the breach of proceedings, faulty statement of the substantive law or inappropriate assessment as for the application of substantive law. The court will be bound to consider the claims presented in the complaint and the quoted legal base.

Once the above-mentioned regulation is introduced, the party will have to put much more effort into exhausting presentation of its claims in the complaints as well as the legal basis. Deficiencies in this scope could no longer be corrected by the Court, as it is the case now. Specifically, when issuing its judgment, the Court will not be able to consider breaches of law that have not been presented in the claims by the party. The party will also be required to provide accurate justification that the claims it presents belong to one of the above-mentioned groups (e.g. faulty statement of the substantive law).

### **Introduction of the possibility for administrative court to issue judgments as to the merits**

According to the amended law, under certain circumstances the court will be able to issue a judgment determining the existence or non-existence of the party's rights or duties (a judgment being similar to e.g. administrative decision).

Once the amended law enters into force, the parties should account for the above-mentioned regulation by including in their complaint a precise definition of the judgment that they think should be issued by the administrative authorities. If the parties limit their complaint to the indication of the breaches of law by the authorities, as it is often the case now, there is a risk that they may not obtain a satisfactory court judgment.

### **Introduction of a self-control of the first instance court**

According to the amended law, if, before the cassation complaint is tabled with the Supreme Administrative Court, the District Administrative Court concludes that the proceedings in the case at hands were legally defective or that the grounds for the cassation complaint are evidently well founded, then the District Administrative Court lifts the contested judgment and reconsiders the case at the same session.

In the light of the above, the party should consider to include in its cassation complaint also the arguments for the court of first instance to exercise self-control. It is possible that valid argumentation may convince the court to apply the self-control mechanism.



**According to the amended law, under certain circumstances the court will be able to issue a judgment determining the existence or non-existence of the party's rights or duties (a judgment being similar to e.g. administrative decision).**



### **Expanding the possibility for the Supreme Administrative Court to decide on the case**

The amended law introduces a solution for the application of the cassation complaint, whereby if the Supreme Administrative Court decides that the case is sufficiently explained, it will be able to recognize the substance of the complaint in a broader scope (rather than to return it for re-consideration of the District Administrative Court) as it is the case now.

In its cassation complaint, the parties should account for the recommended solution not only by requesting its application but also by presenting detailed arguments that conditions for its application were fulfilled in the case. On top of that, not only should the party present arguments evidencing breaches of law made by

the court of the first instance, but it should also define precisely the contents of the judgment expected to be issued by the Supreme Administrative Court with application of the above-mentioned regulation (judgment as for the substance of the case).

### **Conclusion**

In the context of the amended law, the parties should consider to make broader use of professional representatives in the proceedings before administrative courts. The amended law introduces a number of solutions (e.g. substantive judgments issued by the administrative courts), which, if skillfully used by the parties, will increase their chances to gain a fast and satisfactory solution to their case. We should also point out to higher requirements concerning court pleadings of the parties

(specifically in the complaints about individual interpretations). Deficient representation of the party in the proceedings before the administrative courts may result in a situation when the party, in a broader scope than nowadays, is not able to fully defend its rights. Furthermore, mistakes made within the scope discussed even at the initial phase of the proceedings before the administrative court may in practice prove impossible to remedy at the later stages. Thus, the amended law increases the importance of comprehensive professional representation covering the entire proceedings before the administrative court.

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# The principle of legal doubts to be resolved in favour of the taxpayer

Draft amendments to the Tax Ordinance Act proposed by the President of Poland introduce the principle of legal doubts to be resolved in favour of the taxpayer (*in dubio pro tributario*) into the Polish tax legislation. This principle would be applied by tax authorities in their decision-making and in jurisprudence of the administrative court.

The objective of the proposed amendment is primarily to increase the taxpayers' level of security and to eliminate uncertainty caused by the lack of uniform interpretations of legislation. 'We would like to operate by the rule that the State is there for the Citizens and not the Citizens for the State, that tax offices are there for the taxpayers and not the other way round,' said Bronisław Komorowski when signing this draft law.

### Stimulus for changes

The need to introduce the *in dubio pro tributario* principle is determined mainly by the complexity of tax legislation. According to the Polish Constitution, all tax-related rights and obligations must result directly from the provisions of the law, which means that any amendment to the list of public levies requires modifications in the underlying law. Furthermore, this is one of the most dynamically developing branch of law. The above-mentioned factors imply naturally the existence of faults and gaps in the system. Its complexity gives rise to numerous doubts about the statement of the law voiced by the taxpayers as well as the tax authorities or and administrative courts. The complexity of the Polish

tax legislation is reflected in the number of the issued interpretations of the tax law, over 30 thousand per annum over the recent years. A correct statement of the tax law is particularly important, as its faulty application has direct financial consequences.

### Law of quality only

The obligation to resolve doubts in favour of the taxpayer derives from the Polish Constitution and the principles of a democratic state, statutory tax rules, property right and economic freedom provided for therein.

The Supreme Administrative Court issued numerous judgments expressing the opinion that only law of quality may serve as basis for levying tax duties. Only these regulations, which fulfill the constitutional requirements concerning its form and contents, can be considered law of quality. The review of the Supreme Administrative Court's jurisprudence leads to the conclusion that any doubts related to interpretation of unclear tax law provision should be resolved in line with the *in dubio pro tributario* rule, because taxpayers should not be

charged with negative consequences of imprecisely written law.

Nevertheless, this rule is not always respected by the administrative courts or, more importantly, by the tax authorities, which have a natural affinity to seek such statements of the law that would increase taxpayers' charges and, hence, to ignore the obligation that doubts should be resolved in favour of the taxpayers.

Tax-related disputes going on for many years confirm that the rule on favourable treatment of taxpayers in the resolution of tax legislation is often waived. Frequently quoted reasons behind such status quo are doubts about the effectiveness of the rule and the scope of its application, resulting from lack of its literal establishment in the Polish tax legislation.

The most striking examples of an unfair battle between the state administration and the taxpayer are the cases of Optimus S.A. and JTT Computer S.A., which were described in detail in the Ministry of Finance's publication entitled 'The White Book on JTT Computer S.A. and Optimus S.A.'. This document revealed significant problems on the side of the public administration and flaws in tax legislation.



**The obligation to resolve doubts in favour of the taxpayer derives from the Polish Constitution and the principles of a democratic state, statutory tax rules, property right and economic freedom provided for therein.**



## In dubio pro tributario

This problem can be resolved by explicit establishment of the *in dubio pro tributario* principle as a legal norm in the Tax Ordinance Act. Breach of this rule by an administrative authority would be treated as direct breach of a legal norm. Implementation of this rule would result not only in its consolidation within the legal system and the obligation to respect it on non-incidental basis, but primarily it would strengthen the currently frail position of the taxpayers vis a vis the tax authorities and administrative courts.

Establishment of the principle would serve two basic tasks:

- it would eliminate the decisions incompliant with the correct literal interpretation of the tax law, if they lead to detrimental consequences for the taxpayers;
- it would oblige the authorities applying the law to adopt the most favourable solution for the taxpayer in case of ambiguous results of the literal interpretation of the law.

## Conclusion

In the current tax legislation, the principle *in dubio pro tributario* is applied only as a derivative of constitutional principles. Its implementation would eliminate

doubts about the possibility and scope of its application. It would offer an additional interpretation guideline for the substantive law. In the legal procedure law, implementation of this principle would provide for more restrictive criteria by which the authorities applying the law could assess the taxpayers' operations as illegal.

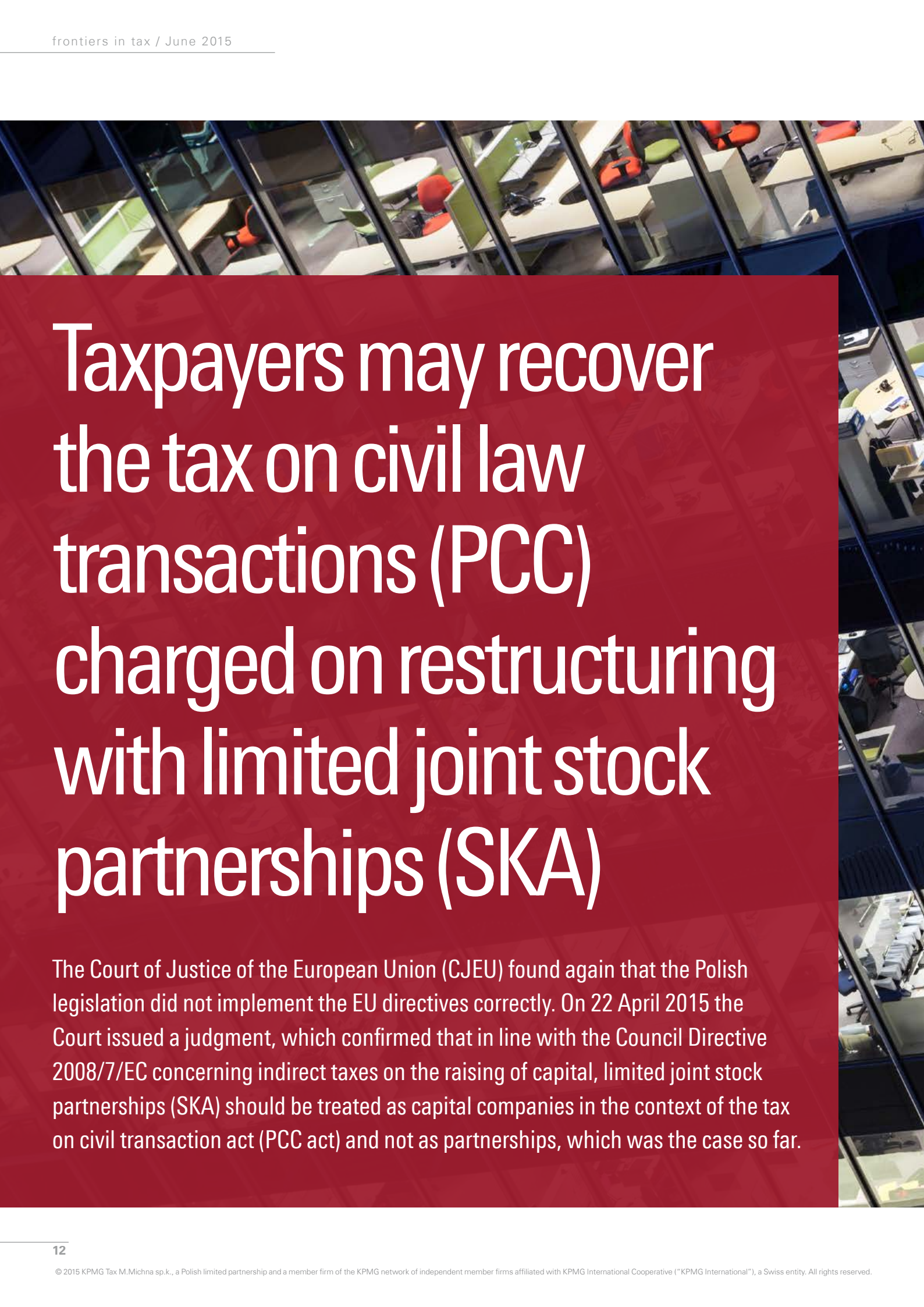
In the light of the above, the suggested amendment should be considered as a move in the right direction. We should hope that this legislative initiative of the Polish President will make it to the official Journal of Laws.

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# Taxpayers may recover the tax on civil law transactions (PCC) charged on restructuring with limited joint stock partnerships (SKA)

The Court of Justice of the European Union (CJEU) found again that the Polish legislation did not implement the EU directives correctly. On 22 April 2015 the Court issued a judgment, which confirmed that in line with the Council Directive 2008/7/EC concerning indirect taxes on the raising of capital, limited joint stock partnerships (SKA) should be treated as capital companies in the context of the tax on civil transaction act (PCC act) and not as partnerships, which was the case so far.



## Taxpayer before the Court of Justice

The Polish legislator does not always implement the EU directives correctly. It is worth remembering that in such a case the taxpayer can make direct use of the EU law and draw favorable results from it. The CJEU confirmed this possibility on numerous occasions, inter alia, in the cases of *Van Gend & Loos* (C-26/62) and *Francovich & Bonifaci* (C-6/90 and C-9/90).

Therefore, it is in the interest of the taxpayers to provide argumentation that would raise administrative courts' doubts about the interpretation of the EU legislation by the tax authorities or potential incompliance of the Polish acts and regulations with the EU law. If this is the case, the District Administrative Court or the Supreme Administrative Court will refer to the Court of Justice of the European Union with a relevant inquiry.

Although the whole procedure is time-consuming, its positive effects for the entrepreneurs are often spectacular.

It should be emphasized that the taxpayer's position before the Court of Justice is by definition equivalent to that of a member state, and so it is strong and the Court of Justice has issued numerous judgments in favor of taxpayers. An example of such a judgment is the 2013 decision when the Court of Justice of the European Union ruled that an insurance service is not a comprehensive composite leasing service under the VAT regulations. Consequently, the taxpayers recovered millions of zlotys.

Therefore, one cannot overestimate the role of the Court of Justice in resolving long-standing disputes with tax authorities. One of such disputes was the dispute whether limited joint stock partnerships (SKA) should be treated as partnerships or capital companies in the scope of the tax on civil law transactions (PCC).

## Dispute about SKA nature in the scope of PCC

For many years the taxpayers were trying to demonstrate to the tax authorities that in line with the Directive on indirect taxes on the raising of capital, limited joint stock partnerships (SKA) should be treated as capital companies and benefit from a number of PCC exemptions.

The Directive introduces an absolute ban to tax some restructuring activities of capital companies, which restrict free flow of capital and thus impede the development of the single market. Following the provisions of the Directive, the Polish PCC act exempts the following company agreements and amendments thereto from taxation:

- mergers of capital companies;
- conversion of a capital company into another capital company;
- contributions of the following assets made to the capital companies in consideration for its shares or units:
  - undertaking of a capital company or its organized part;
  - units or shares in another capital company, constituting a majority of rights or subsequent units or shares if the company to which the units or shares are contributed already has a majority of rights.

These exemptions were not available for SKA because the PCC act defined them as partnerships. The taxpayers paid the tax or engaged in disputes with tax authorities. The administrative courts that considered these disputes provided inconsistent judgments and the taxpayers' uncertainty continued.



These doubts no longer exist. When considering another dispute of this kind between a taxpayer and a tax authority, the Provincial Administrative Court in Kraków asked the Court of Justice of the European Union for a preliminary ruling.





## Court of Justice at the taxpayers' side

These doubts no longer exist. When considering another dispute of this kind between a taxpayer and a tax authority, the Provincial Administrative Court in Kraków asked the Court of Justice of the European Union for a preliminary ruling.

The Court of Justice unequivocally confirmed that the taxpayer's position was right. According to the Court, since the SKA shares can be traded at the stock exchange, then it fulfills the conditions to be considered a capital company. Based on the Court's judgment, one can be sure that the tax exemptions described therein pertain also to restructuring with the participation of a SKA.

## Taxpayers' refunds

The CJEU's judgment would result in millions of zlotys in tax refunds for unduly charged tax on civil law transactions with interests. The taxpayers who paid PCC on the above-mentioned transactions in the past can apply for a refund within 30 days since the publication of the judgment in the Official Journal of the European Union. Thirty-day deadline is to motivate taxpayers to react quickly and a guarantee that the refund will be made with interests accrued since the emergence of the overpaid tax until the date of payments. Taxpayers who fail to meet the deadline and apply afterwards will also receive refund of the overpaid PCC, but interests will be accrued only since the date of the emergence of overpaid tax until the 30th day after the publication of the CJEU's judgment.

It should be remembered that the pace of tax refund by the tax authorities depends on the way in which the application is formulated. An accurate application with complete documentation may significantly accelerate the receipt of due funds.

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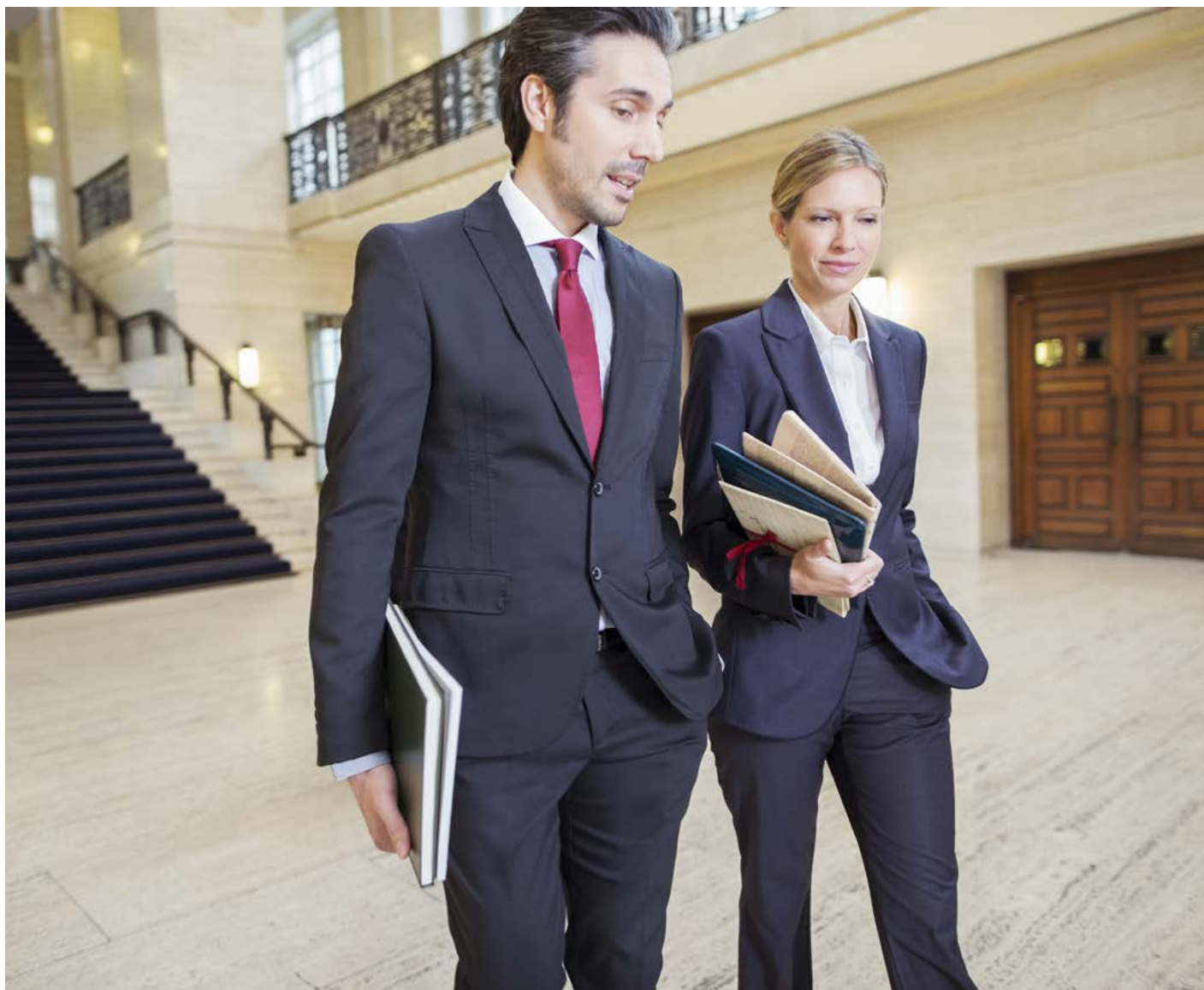
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# Penal fiscal liability – how to mitigate the risk of penal fiscal charges?

If taxpayers submit faulty tax returns, they must pay overdue tax with interests but they also face the risk of sanctions under the Fiscal Penal Code.





## Liabe parties

The persons who deal with a taxpayers' business matters and, specifically, the taxpayers' financial matters upon a decision issued by a relevant authority, agreement or due to factual execution of these activities can be liable under Fiscal Penal Code. In practice, the risk of penal fiscal charges rests primarily with members of the management board, whose liability depends on the division of tasks among the board members of the same authority. In practice, allocation of specific tasks to management board members has a decisive impact on the scope of their liability.

As it is possible for the taxpayers' financial matters to be entrusted to other people as well, the risk of penal fiscal liability is also connected with the position of the chief accountant, financial manager as well as a proxy and legal representative.

## The condition of intentionality

Allocation of liability upon Fiscal Penal Code requires demonstration of the intentional action taken by the perpetrator. It is not sufficient for the tax authorities to claim that the public imposts were diminished or exposed to risk of being diminished and that the taxpayers underreported their tax

obligations, e.g. by faulty reporting of expenses as tax deductible costs. It is necessary to demonstrate that these activities were intentional and deliberate.

The tax authorities should collect evidence to clearly demonstrate that the person they intend to charge with fiscal crime or misdemeanour intended to act as charged. Unfortunately, in practice, after identifying the person who may be liable, usually due to his/her position, the tax authorities would almost automatically press the charges with no evidence of intentional conduct. In such a case, the only chance to avoid this liability would be to demonstrate



## Allocation of liability upon Fiscal Penal Code requires demonstration of the intentional action taken by the perpetrator.



lack of intent at the court, which is very problematic in practical terms. In this context it should also be observed that the tax authorities usually challenge tax settlements dating back a couple of years (before the liability expires), which produces additional evidence-related difficulties.

### How to prevent liability

Not all the cases of tax underreporting are fiscal crimes or misdemeanour. However, a pro-fiscal attitude of tax authorities translates directly into a growing number of penal fiscal proceedings. Therefore, it is in the interest of the taxpayers to undertake actions aiming to mitigate the risk of penal fiscal charges and to demonstrate lack of willful misconduct if proceedings are initiated.

An efficient tool to mitigate the risk of penal fiscal liability is to verify the taxpayer's procedures and practices concerning tax calculation, reporting and payment as well as the division of tasks and liability in this scope. Our experience shows that a key factor to mitigate the risk of penal fiscal charges is to create formalized rules of tax settlements, which reflect the applicable practice. Mitigation of the risk of penal fiscal charges also requires the tax settlement rules to clearly identify the division of tasks and liability at each tax calculation phase, e.g. delivery of data for calculation

or verification of data reliability and correctness.

In practice, the rules of tax settlements aligned to the taxpayer's organizational structure and culture constitute a tool to reduce the risk of mistake and, if penal fiscal proceedings are initiated, they serve as evidence of due care adopted by the people responsible for such settlements and confirm lack of willful misconduct. If such rules are set up, they serve to demonstrate that the taxpayer is equipped with processes, including internal control, to efficiently prevent and correct emerging irregularities and the people managing the company act with due care.

Another instrument to limit the risk of penal fiscal liability is also a regular tax review. In practice the frequency of such reviews depends on the taxpayers' organizational and financial possibilities. Our experience shows that regular tax reviews enable early detection and elimination of potential irregularities in tax settlements and, if penal fiscal proceedings are initiated, they may constitute evidence of due care adopted by the people responsible for these settlements, demonstrating lack of willful misconduct in the action for which the charges were pressed.

In conclusion, it is possible to develop solutions demonstrating due care adopted by the people responsible for taxes in a company and to minimize the risk of these people being charged under penal fiscal liability.

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# KPMG publications

The KPMG analyses and reports are an output of our expertise and experience.

The publications take up issues important to enterprises operating in Poland and globally.



## **The automotive industry, Q2/2015 Edition, KPMG in Poland and PZPM Quarterly Report**

The report aims at presenting the current trends in the Polish automotive industry, which includes both the automotive market, the industrial production and the automotive financial services. The publication is a joint project of the Polish Automotive Industry Association and KPMG in Poland.



## **Publication by KPMG in Poland entitled 'European Union Funds for the Years 2014-2020 - a Guide for Investors'**

For the last 20 years, special economic zones have attracted Polish and foreign investors. As projected by SSE authorities, at the end of 2014 the value of total investment outlays spent by investors in the zones may have reached PLN 100 billion. The manual presents the conditions a company must fulfill to enter a SSE and benefit from tax reliefs.



## **KPMG International report entitled 'Evidence-Based HR: The Bridge between Your People and Delivering Business Strategy'**

The report concludes that over the next three years 70% of companies are planning to start applying or expanding the application of advanced analytical tools and Big Data in their HR departments. The report was developed on the basis of a global survey involving 375 top managers from countries including USA (16.8%), United Kingdom (12%), South Africa (10.67%) and Brazil (10.4%).



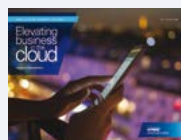
## **Luxury market in Poland: Premium and Luxury cars, KPMG in Poland Report**

An update and expansion of 'The luxury goods market in Poland. The 2014 Edition', a KPMG Report. The data relating to the registration of luxury and premium cars provided by PZPM/CEP.



## **Report by KPMG in Poland entitled 'Annual Personal Income Tax Return of Poles - 2014'**

The survey 'Annual Personal Income Tax Return of Poles - 2014' studied the way Poles settled their income tax for 2014 and was conducted on a representative sample of 1,004 adult Poles on 27-29.03.2015. The questions were answered by people who had to submit their tax returns for 2014 to the tax office, with the exception of the people whose tax returns were prepared and submitted by ZUS (Social Security Institution) or their employer.



## **Cloud Survey Report: Elevating Business in the Cloud 2014, KPMG International Report**

A report prepared on behalf of KPMG by Forbes Insights based on an online survey conducted between December 2013 and March 2014 involving 539 executives from the financial, healthcare, media, and pharmaceutical industry.



## **KPMG International report entitled 'KPMG IT Outsourcing Service Provider Performance & Satisfaction Study 2014/2015'**

The report was prepared on the basis of a survey conducted in 24 countries among over 450 organisations that use outsourcing and over 300 outsourcing providers across the world. The survey was conducted between September and November 2014. This year, Polish companies from various industries participated in the study for the first time. The report provides comprehensive findings on the global IT outsourcing market and trends within it.



## **Evaluation of the Polish tax system by the participants of the 5th KPMG Tax and Accounting Congress, KPMG in Poland report**

A survey on the Polish tax system conducted on 15 January 2015 among the participants of the Fifth KPMG Tax and Accounting Congress. The survey was designed to understand the assessment of the Polish tax system by the corporate senior management of various industries across Poland. It involved 164 respondents.



## **KPMG International report entitled '2015 Global Audit Committee Survey'**

The report was developed on the basis of a survey conducted in 34 countries and over 1,500 members of audit committees. The survey was conducted between July and October 2014. This year, representatives of audit committees from Poland took part in the study for the first time.



## **Family Business Barometer 2015, Report of KPMG in Poland and Family Business Initiative**

The survey investigated the unique nature of family businesses: the issues they face, the changes they anticipate; and strategies they implement in their companies. The Polish edition of the publication was developed in collaboration with the Family Business Initiative.

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