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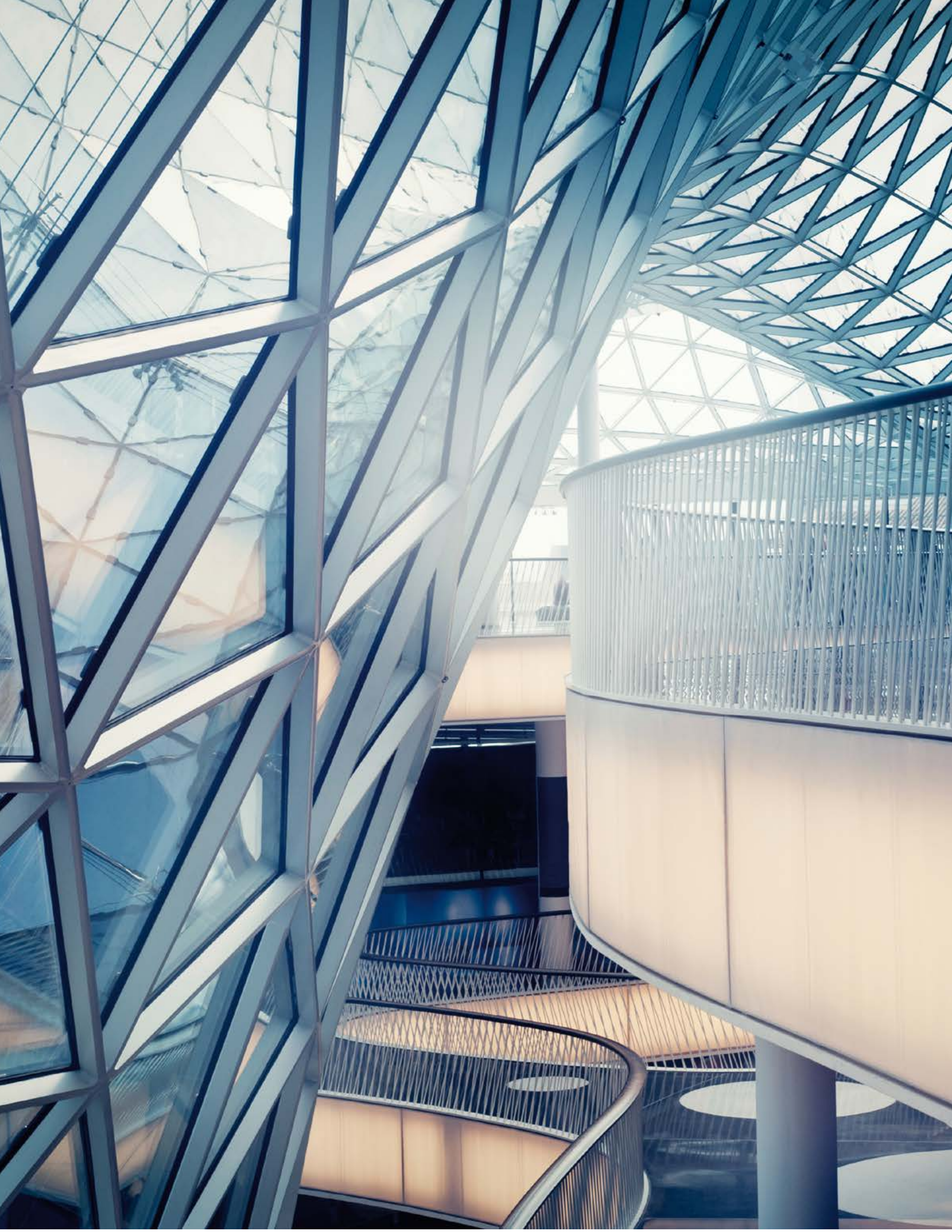

Introduction

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Taxpayers today are facing numerous challenges associated with rapid changes of the tax environment. This is particularly true for international companies and entities engaged in cross-border transactions, as their operations and the tax burden that they have to shoulder have recently become the object of a special interest by the OECD and the European Union.

Poland has consistently been working to implement new solutions in the national tax system that would tackle the issue of tax evasion and aggressive tax planning in line with the recommendations of the OECD's BEPS (Base Erosion and Profit Shifting) project and the Action Plan adopted by the European Commission. The modernization of the tax system forces taxpayers to review their existing structures and adopted investment strategies, and to design appropriate response.

In this issue of Frontiers in tax, we will present selected changes implemented in the Polish legal system that undoubtedly affect the reality of doing business in Poland. In addition, we will have a look at the important judgment of the Supreme Administrative Court which deals with the admissibility of an upward adjustment of the taxable revenue arising for the shareholder to the market value of the contribution in kind when the share premium (agio) occurs. We will present the current standpoint of the Polish tax authorities with regard to tax exemption of third-country investment funds, and we will describe the changes in pharmaceutical law that affect the risk of arising of a permanent establishment in Poland for distributors of medicinal products.

I wish you a pleasant read.

Tackling tax avoidance as part of work undertaken by the OECD (BEPS) and the European Union

The impact of the OECD and the EU initiatives on the tax reality experienced by Polish companies has been the subject of a lively discussion for a long time. Considered changes and plans should be closely watched especially by companies operating within international capital groups. It is worth noting that Poland is one of the most active countries to implement the OECD tax recommendations in their tax policies.

Tax avoidance by multinational corporations has become now the main topic of discussion as part of initiatives developed by the OECD and the EU in financial matters. Both the OECD and the EU are trying to counteract this phenomenon by presenting recommendations which, if implemented into national tax systems, would help eliminate the benefits achieved by means of the mechanisms of international tax planning in a more effective way.

In July 2013, during the G20 finance ministers meeting, the OECD published draft assumptions of 15 actions to counter the phenomenon of reducing the tax base and shifting profits, known as the BEPS (Base Erosion and Profit Shifting) Action Plan.

The issues covered by the BEPS Action Plan include hybrid instruments, controlled foreign companies (CFC), countering harmful practices involving in particular the creation of special tax regimes for intellectual property rights, the use of debt instruments, and abuse of agreements on avoidance of double taxation and transfer pricing documentation with particular emphasis on transactions between related parties.

In October 2015, most of the BEPS Action Plan initiatives were approved (work on other measures will be continued), and now the introduction of the proposed regulations to the tax systems is left to the discretion of individual countries. Some countries, including Poland, have already taken appropriate legislative steps to that effect.

For example, in 2015 Poland introduced new restrictive legislation to counter thin capitalisation, introducing taxation for Polish tax residents in connection with holding of shares (stock) in CFC and designed to counter the use of hybrid instruments (based on differences in the qualifications of the instruments between two or more countries) in order to obtain an additional tax advantage. Clauses

The clause against tax avoidance introduced to the directive regulating the common system of dividend taxation, which comes into force in Poland as of 1 January 2016, seems to be of key importance

excluding contractual benefits from the use of artificial structures for tax purposes have been introduced in bilateral agreements, e.g. with Luxembourg and Slovakia.

These changes are related to ongoing effort within the OECD, which is particularly evident with respect to transfer pricing. In October 2015, the Polish parliament adopted legislation introducing new rules on transfer pricing documentation consistent with the BEPS project, envisaging, for instance, the creation of group documentation and the obligation of an analysis of comparative data used to calculate settlements (benchmarking). Some of the changes will come into force in the new fiscal year and further legislative initiatives may follow.

The OECD initiatives and the so-called Luxembourg scandal (which resulted in proceedings initiated against the states issuing favourable tax rulings for multinationals recognised as unlawful state aid) have influenced the work carried out within the framework of the EU. These include in particular the coordination of rules relating to CFC and thin capitalisation, mandatory automatic exchange of tax information (including cross-border tax rulings), tightening the cooperation between states in tax audits, the mandatory Common Consolidated Corporate Tax Base (CCCTB), and preventing the abuse of exemptions under the directives governing common systems of taxation of dividends, interest, and royalties.

Many of the recommended solutions have been included in the Action Plan for Fair and Efficient Corporate Taxation adopted by the European Commission based on the BEPS Action Plan. Other solutions result from the planned or already adopted amendments to the directives that Poland has undertaken to implement by the end of this year.

The clause against tax avoidance introduced to the directive regulating the common system of dividend taxation, which comes into force in Poland as of 1 January 2016, seems to be of key importance. It excludes the application of the exemption of dividends paid to or obtained if the three cumulative conditions are met:

- obtaining a dividend is the result of a legal action of which the main or one of the main objectives was to obtain exemption
- an exemption results in an additional benefit beyond the elimination of double taxation and
- the legal action is not genuine, because it is not performed for legitimate economic reasons.

The possible consequences of the implementation of the above changes and the ensuing questions related to the interpretation of the wording of the new provision (more on that subject in the next article) have been the subject of ongoing discussions for a long time.

There is no doubt that the changing tax reality can pose a big challenge for many companies. The Polish tax authorities are equipped with a growing number of measures facilitating a thorough examination of the issues relating to the taxation of international transactions.

In view of the dynamic character and nature of the changes, adequate preparation for their coming into force, which will largely take place as of 1 January 2016, seems to be of paramount importance.

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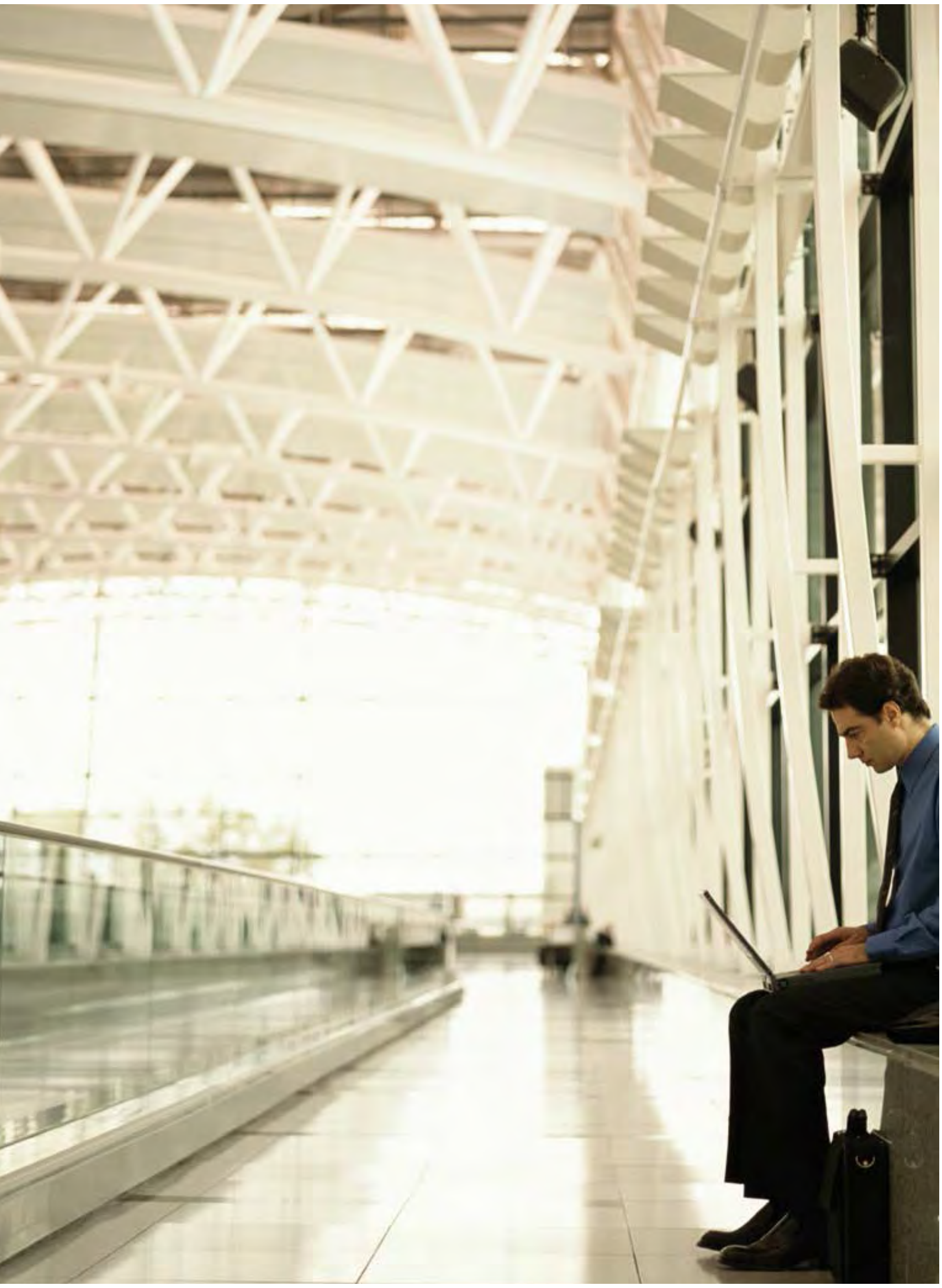
Clause preventing abuse of the provisions of the Directive on the common system of taxation applicable in the case of parent companies and subsidiaries

The common system of taxation applicable in the case of parent companies and subsidiaries of different Member States of the European Union is currently one of the pillars of European tax law. This system is in force under EU Council Directive 2011/96/EU, the provisions of which have been implemented in Poland in Art. 20 and Art. 22 of the Corporate Income Tax Act. The implementation of the system was designed to facilitate the formation of capital groups within the EU by harmonising tax legislation of the Member States providing for less favourable taxation of intra-Community movement of dividends compared to domestic movement.

The preamble to the Directive states that its purpose is to exempt dividends and other profit distributions paid by subsidiary companies to their parent companies from withholding taxes and to eliminate double taxation of such income at the level of the parent company. Consequently, the Directive aims to eliminate double taxation both in the legal sense (exemption from withholding tax), and in the economic sense in the country of residence of the parent company by exempting the resulting income or granting an appropriate tax credit. Double economic taxation is considered to be taxation of the same income of two different taxpayers on the basis of a similar tax for the same period.



As a result, the Directive's objective will be met when double taxation is eliminated both in the legal and economic sense. If the subsidiary is not taxed due to the total or partial exemption, the exemption will not result in the elimination of double taxation in the economic sense, because no tax on income will be paid by the subsidiary or only a portion of this income will be taxed, which would indicate double non-taxation.

In January 2015, the Directive was amended by a clause under which the Member States will not grant the benefits of this Directive to an arrangement or a series of arrangements which having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of this Directive. The genesis of the amendment suggests that it was introduced to counteract double non-taxation.

As of 1 January 2016, this clause will apply on the basis of the Polish CIT Act and will result in excluding the possibility of an exemption of obtained or paid on dividend income and other corporate profit distributions, established by Article 20 par. 3 and Art. 22 par. 4 of the CIT Act, if the three cumulative conditions are met:

1. obtaining a dividend is the result of a legal action of which the main or one of the main objectives was to obtain exemption
2. an exemption results in an additional benefit beyond the elimination of double taxation and
3. the legal action is not genuine, because it is not performed for legitimate economic reasons.

Each of these conditions should be evaluated separately. First of all, the content of a legal action should be analysed. The exemption will not apply only when the distribution of a dividend would be connected to the legal action of which the main or one of the main objectives was to obtain

As a result, the Directive's objective will be met when double taxation is eliminated both in the legal and economic sense

exemption. In practice, the assessment of whether the above condition has been fulfilled can lead to numerous disputes between taxpayers and the tax authorities.

As regards the second condition, it should be noted that the legislator did not specify in the Act what additional benefit may result in the exclusion of the exemption. The justification of the amendment indicates, however, that what is meant is a tax benefit in contravention of the essence of the Directive, hence it may be reasonably concluded that as the purpose of the Directive was to eliminate double taxation both in the legal and economic sense, the benefit should be understood as the double non-taxation of income that would occur in the absence or only partial payment of income tax by subsidiaries. In this case, it would be impossible to achieve the basic purpose of the Directive, i.e. to eliminate double taxation in the economic sense, since such double taxation would not occur or it would be only partially eliminated. At the same time, double juridical taxation would be eliminated, so obtaining an exemption would result in an additional benefit beyond the elimination of double taxation in the legal sense.

The third condition relates to the lack of a genuine character, which can lead to disputes as to the interpretation of this notion. Like in the case of the first condition, the provisions of the Directive and of the CIT Act are not specific enough, the latter indicating only that the condition concerns situations where the ownership of shares of the dividend-paying company is transferred by way of a questionable act or the company generates revenue (income) that is then distributed in the form of dividends or other income from the share in profits of legal persons. It should be pointed out that in accordance with the position of the European Economic and Social Committee, the fact that a transaction would be the most advantageous from the taxation perspective does not make it "artificial" by itself.

It seems that the evaluation of the conditions would mainly depend on the qualification of dividend income at source by the state, which is now obliged to apply the exemption from withholding tax to eliminate double taxation in the legal sense. If the state decides that the application of the exemption (non-taxation) would result in double non-taxation (in the absence of the genuine character of the arrangements mentioned in the Directive), then due to the exclusion of tax exemption and levying the withholding tax, the country of tax residence of the parent company would not be entitled to apply the clause (excluding the right to an exemption or tax credit) because no double non-taxation would occur as a result of a prior application of the clause by the withholding state. Only in the case of a non-application of the clause, or in the absence of withholding tax, the classification of income by the application of the clause would be performed in the country of tax residence of the parent company.

In accordance with the transitional provision of the amendment, the clause will apply to the income generated as of 1 January 2016, which means that under this provision an exclusion of the exemption may be evaluated based on legal acts performed before the amending act comes into force. This regulation raises doubts as to the constitutionality of deriving the tax consequences based on legal acts performed in the tax year during which the clause was not part of the system of applicable law.

The ambiguity of the introduced anti-avoidance provisions can lead to misinterpretations of the clause by the tax authorities. An adequate analysis of the structure of a capital group would certainly reduce the potential risk of a dispute with the tax authorities as to whether such exemptions may be applied.

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The issue of the admissibility of upward adjustment of the taxable revenue arising for the shareholders/ stockholders to the market value of the contribution in kind when the share premium/ *"agio"* occurs

On 20 July 2015, the Supreme Administrative Court (the "SAC"), composed of seven judges, passed the long-awaited judgment (case no. II FSK 1772/13) that was expected to settle doubts whether Article 12.1.7 of the Corporate Income Tax Act allows the tax authorities to make an upward adjustment of the taxable revenue arising for the shareholder/stockholder to the market value of the contribution in kind, if the nominal value of issued shares/ stocks is lower than the market value of such a contribution in kind. Did the judgment meet the above mentioned expectations?

The substance of the dispute

The issue of the admissibility of upward adjustment of the taxable revenue arising for the shareholders/ stockholders of Polish companies (hereinafter "shareholders") as a result of a contribution in kind (other than an enterprise/business or its organised part) when share premium/"agio" (i.e. the excess value of the contribution in kind over the nominal value of newly issued shares/ stocks that is allocated to the supplementary capital) occurs has been the subject of a dispute between taxpayers and the tax authorities for years.

In line with the interpretation presented so far by the tax authorities, Article 12.1.7 of the CIT Act enables to determine the shareholder's taxable revenue in the amount of the market value of the contribution in kind in a situation when the nominal value of issued shares/stocks differs from the market value of the said contribution in kind. The tax authorities derived this interpretation from Article 12.1.7 in fine of the CIT Act, in conjunction with Article 14.1-3 of this Act, according to which, if the price unreasonably differs in a significant way from the market value, the tax authority shall determine the taxable revenue in the amount equal to the market value.

According to taxpayers, the nominal value of the shares/stocks per se is not subject to market mechanisms, so it cannot be verified by the tax authority.

The standpoint presented by the Supreme Administrative Court

In the justification of the judgment in question, the SAC pointed out that the provisions of the CIT Act preclude the recognition of taxable revenue arising for the company making the contribution in kind (i.e. for the shareholder) in the amount other than equal to the nominal value of the shares/stocks taken up in return (for the contribution).

The SAC stressed that in accordance with the provisions of the Commercial Companies Code (CCC), the nominal value of shares/stocks is characterised by its stability, i.e., the value is derived directly from the company's articles of association – so it reflects the will of the shareholders. Hence, the nominal value of shares/stocks, in principle, is not subject to market mechanisms, so it cannot be subject to verification by the tax authority.

As indicated by the SAC, in accordance with the regulations of the CCC, it is possible to establish the nominal value of shares/stocks of the company issued in exchange for the contribution in kind in different value than the market value of the contribution (in accordance with the provisions of the CCC, shares/ stocks may not be taken up below their nominal value, a contrario the legislator permitted taking up the shares above their nominal value – using the share premium/"agio" mechanism).

Consequently, it follows from the above that the tax authorities cannot challenge the nominal value of shares/ stocks as established in the company's articles of association, even if the value differs from the market value of the contribution in kind. Since under the CCC, it is possible to make a contribution in kind to a company in such a way that the market value of such contribution exceeds the nominal value of the shares/stocks taken up in return (indicating the manner of recognising share premium/"agio"), it cannot be deemed that, at the same time, the legislator obliges the tax authorities to increase the value of taxable revenue arising from taking up such shares in each case when the market value of the contribution in kind is higher than the nominal value of those shares and such surplus is duly disclosed and transferred to the supplementary capital.

Moreover, the provisions of the CIT Act also suggest that the legislator envisaged the legal possibility of making a non-cash contribution by a way of the share premium mechanism. It should be noted that the CIT Act includes provisions that duly protect the fiscal interests of the state and enable to preserve the proportionality of taxable revenues and tax deductible costs in such cases (e.g. Article 16.1.63 letter d of the CIT Act).

The SAC also pointed out that the risk of double taxation of the contribution in kind is yet another argument indicating that the taxable revenue arising for the company making a contribution in kind cannot be assessed in other amount than in the amount equal to the nominal value of the shares/stocks taken up in return. If at the time of making the contribution in kind, taxable revenue should have been recognised not only as the amount equal to the nominal value of shares/stocks, but also as the amount allocated to the supplementary capital, then if the company later decided to transfer the

The SAC stressed that in accordance with the provisions of the Commercial Companies Code (CCC), the nominal value of shares/stocks is characterised by its stability funds from the supplementary capital to the share capital, the tax authorities might consider that the taxable revenue has been generated again in accordance with Article 10.1.4 of the CIT Act.

It is worth noting that despite the positive (from the taxpayer's point of view) interpretation, the SAC made a reservation concerning the amendment to Article 15.1k.1 of the CIT Act, which came into force on 1 January 2014, corresponding, on the cost side, to the provisions being interpreted in the judgment at hand. This amendment consists in determination of tax deductible costs (with respect to the disposal of shares/stocks taken up in exchange for a contribution in kind) by reference to "the amount determined in accordance with Article 12.1.7" of the CIT Act and not to "the nominal value of take up shares (stocks)," as it is was before. According to the SAC, the amendment had a normative rather than harmonising character. As the current case related to the period prior to the amendment, this reservation is not clear enough due to the fact that the SAC did not decide whether this amendment would have any significance for the validity and applicability of the interpretation of the Article 12.1.7 in conjunction with Article 14.1-3 of the CIT Act presented in the judgment also with respect to the case occurring after 1 January 2014.

The importance of the judgment and its implications for taxpayers

It should be emphasised that judgment in question does not constitute a general resolution of the SAC (even though it was passed by a court composed of seven judges) and as such is formally binding only in the particular case analysed by the SAC. However, in our opinion, the authority of the SAC and the gravity of the decision are so important that practically it is very unlikely that administrative courts would depart from the standpoint presented in this judgment.

Despite the reservation made by the SAC regarding the normative character of the amendment to Article 15.1k.1 of the CIT Act, bearing in mind all the arguments presented in the justification of the judgement, especially the fact that the judgment concerns the interpretation of Article 12.1.7 in conjunction with Article 14.1-3 of the CIT Act (rather than the amended Article 15.1k.1 of the CIT Act), it seems that the interpretation adopted by the SAC should apply also in relation to situations occurring after 1 January 2014, due to the relevance of the remaining arguments raised by the SAC in the judgment at hand.

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CIT exemption for investment funds from third countries

Five years have elapsed since the introduction to the Act on Corporate Income Tax (CIT) of a tax exemption for investment and pension funds from the European Union (EU) and the European Economic Area (EEA) intended to align their tax status with that of the Polish funds. Though some of the exemption conditions imposed on the European funds are seen as controversial, majority of these entities efficiently recover the paid tax. This stands in contrast to the position of the funds from third countries. Faced with the lack of an equivalent exemption, those are still forced to fight for equal treatment in courts. In spite of the numerous court judgments in favour of investment funds from third countries, the tax authorities continue to seek ways to refuse or to at least postpone the tax refunds of the often substantial amounts.

In its judgement of 10 April 2014 in Case C-190/12, the Court of Justice of the European Union (CJEU) referred to the Polish regulations and stated that the third country funds find themselves in a situation which is objectively comparable to the situation of the Polish funds. It pointed out the fact that the local regulations which do not allow the former to take advantage of the tax exemption enjoyed by the domestic funds may lead to discrimination, which is prohibited in the light of the free movement of capital. Difference in treatment could only be justified by a lack of a mechanism for exchange of information between a given EU member state and a third country, which would make impossible any comparison between the entities in questions. CJEU left the task of examining whether such mechanisms existed to the national courts.

The Case C-190/12 concerned an American investment fund, but it had a clearly positive impact on the position of other funds from third countries in dispute with the Polish tax authorities. The administrative courts have referred to this case when ruling in favour of such funds. They have criticised the tax authorities mainly for imposing on the non-resident funds the requirement of having identical rules of operation and for concentrating on the smallest differences in the operational rules, negligible from the standpoint of comparability. For example, the Supreme Administrative Court (SAC) stated directly in one of its judgements (II FSK 1284/12) that "contrary to the contentions of the tax authority, there are no significant differences between the structure and the operation of Polish and American investment funds".

On the issue of the information exchange condition, as raised by CJEU, the courts have most often pointed to the existence of the legal basis for such an exchange while leaving to the discretion of the tax authority the assessment whether and, if so, to what extent it is required in a given case.

There is no doubt today that this condition is fulfilled in the case of many third countries. On the basis of the exchange of information clauses of bilateral double taxation treaties and/or the OECD Convention on Mutual Administrative Assistance in Tax Matters, the Polish tax authorities can and have received information from such countries as the United States of America or Canada. Aware of the scale of potential inquiries, the American tax administration actually went a step further. In response to some of the first applications for exchange of information, it prepared a detailed analysis which demonstrated the comparability of the operational rules of the EU (including Polish) and the American investment funds, and thus performed the research work for the benefit of the Polish tax authorities.

The consistent jurisprudence of the administrative courts has been slow to translate into a change in the standpoint of the tax authorities on the tax reclaims coming from the non-EU and non-EEA funds. The fact that the reclaims of this type (even if they come from a single claimant) need to be considered by different tax offices (the venue depends on the registered seat of the Polish company being the tax remitter of the withholding tax) has certainly been a factor affecting the slow pace of change in this area. To a certain extent, the resistance of the tax authorities may arise from rather general nature of the guidelines for further proceedings provided by the courts, which instructions the tax authorities prefer to interpret with the fiscal interests in mind.

The case which led to adoption of the aforementioned judgement by CJEU can serve as a positive example. The tax office to which the case returned used materials obtained through the exchange of information by another tax authority and in a relatively short period of time issued on that basis a decision in favour of the fund. We also observe

Some tax offices continue to rule unfavourably and to use the arguments refused by the courts on numerous occasions

a progress in the stance taken by the tax chambers, which having lost at the district administrative court level are now more reluctant to challenge such judgments to SAC.

Some tax offices continue to rule unfavourably and to use the arguments refused by the courts on numerous occasions. The lack of any new and uniform approach at the level of the tax authorities evidences itself most clearly in the actions which seem to aim at postponing the issuance of a decision or at discouraging the claimants from continuing the proceedings.

Actions of that type include the commencement of an information exchange procedure in nearly every individual case, this in spite of the position of the courts that there is nothing to stop the tax offices from using the information previously obtained by other tax offices in identical or similar cases.

Another example of such actions are requests for submission of a large number of additional documents, e.g. voluminous pieces of foreign legislation applicable to the business of the funds only to a very limited extent, along with their complete sworn translations.

When initiated, the information exchange procedure effectively extends the proceedings by about six months. It is more difficult to estimate the impact on the duration of such proceedings of an intention to analyse extensive acts of law of another state.

However, such actions on the part of the tax authorities seem short-sighted. Taking into account the unequivocally positive judgement of CJEU in Case C-190/12 and the current case-law of the Polish courts, the tax authorities will need to capitulate sooner or later. Any delay in the issuance of a decision may lead to refund of the tax amounts with interest. The current fiscal policy in this respect may thus prove costly for the state budget.

Introduction to the CIT law of a relevant exemption for the funds from third countries could remedy the situation. The chances of a legislative initiative in this regard seem for the time being minimal and thus claimants from third countries need to exercise patience.

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The work of OECD on the BEPS Project and amendments to the Polish pharmaceutical law act and the risk of permanent establishment for foreign suppliers of medicines

This article aims to highlight the need for increased management of the risk related to the recognition of a permanent establishment in Poland among foreign entities supplying medicines directly to Polish wholesalers.

We would like to point to two events which impact the need to address that issue. Firstly, the coming into force of pharmaceutical law provisions, which introduce the concept of an intermediary in the trade in medicinal products. Secondly, the work of the Organisation for Economic Co-operation and Development (OECD) on the Base Erosion and Profit Shifting Project (BEPS) aiming to expand the cases in which a state where a foreign company conducts its enterprise would be able to tax that enterprise through recognition of the foreign company’s permanent establishment.

First of all, the new pharmaceutical law regulations (i.e. Chapter 5a in effect since 8 February 2015) introduce the concept of intermediation in the trade in medicinal products. As defined in Article 73a par. 1, intermediation in the trade in medicinal products is an activity involving the purchase and the sale of medicinal products, with the exception of trade, delivery, possession or other forms of control over medicinal products involving the undertaking of independent negotiations for the benefit of a natural person, a legal person or an organisational unit without legal personality.

In practice, the new regulations can, among other things, apply to Polish companies which support foreign suppliers in developing demand for products in Poland. This also includes companies involved in promotion in Poland of medicines which are delivered directly to domestic pharmaceutical wholesalers by a foreign entity (e.g. operating as part of the same capital group). Because of the vagueness of the concepts contained in the definition of an intermediary, these are faced with a challenging task of determining whether the scope of their operation is broad enough to fulfil the criteria of an intermediary in the trade in medicinal products. If so, they need to register their operations. That way, at least from the standpoint of the administrative law, they define their position of an intermediary operating between a foreign entity and a Polish wholesaler. Furthermore, failure to fulfil the registration obligation constitutes a criminal liability and carries criminal penalties of up to two years' imprisonment.

Recognition of a Polish entity's operations as those of an intermediary in the trade in medicines without considering the tax aspects of such a status may, however, create a challenging situation for the company for the benefit of which the intermediation is being undertaken. The role of an intermediary involves an important tax aspect. Pursuant to the concept of the dependent agent, in certain circumstances the foreign enterprise's profits generated by the intermediary may become subject to Polish tax. .

The rules of recognition of a permanent establishment set out in the OECD Model Convention with Respect to Taxes on Income and on Capital ("Model Tax Convention") have been implemented in Polish tax legislation and bilateral agreements between Poland and other countries. A permanent establishment is formed when a foreign entity has a permanent outlet through which it conducts all or part of its business operations. However, a permanent establishment is also formed when another (e.g. Polish) entity operates on behalf of a foreign company and when it holds as well as habitually exercises the power of attorney to conclude contracts on behalf of that foreign company (dependent agent). What this means, in simple terms, is that if a Polish intermediary in the trade in medicines concludes contracts with Polish wholesalers on behalf of a foreign entity and is recognised as a dependent agent, the Polish fiscal authority has the right to tax the part of the company's (principal's) profits relating to the business conducted in Poland. This should be borne in mind when defining the role of the Polish company in the sales of medicinal products supplied to the market by a foreign entity.

Secondly, we need to take note of the intensive work of OECD on amendments to the Model Tax Convention proceeding as part of the BEPS prevention project. One of the objectives of OECD is to develop the permanent establishment rules in such a way as to prevent avoidance of tax settlement by permanent establishments. One of the considered proposals is to tighten the language of the provisions in such a way that they would state directly that whenever a company from one state participates in concluding of contracts of a company from another state with third parties through agreement of the contract terms, while the second company consequently concludes such contracts without major modifications to the contents, such actions would cause formation of an establishment of the latter company. If we were to apply this structure to the discussed business model, an intermediary agreeing the terms of collaboration with wholesalers, while not signing off on the resultant contracts, would be deemed the principal's dependent agent, even if it was the principal effectively signing those contracts.

Thus, we see OECD aiming to expand the applicability of the dependent agent concept. Even though the rules adopted by that organisation are not legally binding, in practice its recommendations will constitute the baseline for interpretation of the aforementioned concepts by the member states. This will hold true even if the Polish legislature does not transpose them directly to the local tax law. It is worthwhile to take a closer look at the motives OECD has pointed to as driving its work in this specific direction by examining the structures OECD has indicated as undesirable.

In its report published on 5 October 2015 and providing a summary of the work on the BEPS Action Plan (Action 7 of the BEPS Action Plan: Preventing the Artificial Avoidance of Permanent Establishment Status), OECD presents sample structures indicative of avoidance of having a permanent establishment. One of them is a structure in which a company engages in the sale of medical products (company XCO). The XCO company, being a tax resident of the state of X, uses the YCO company in the state of Y to sell its medical products in the state of Y. YCO sells the XCO products in its own name but on behalf of XCO. It is YCO that is responsible for business negotiations. OECD has declared its intention to prevent cases where under the described conditions the principal (XCO) does not have the part of its profits taxed in the country of operation of its intermediary (YCO).

In practice, the new regulations can, among other things, apply to Polish companies which support foreign suppliers in developing demand for products in Poland

Another example of a structure aimed at avoidance of a permanent establishment singled out by OECD is a model where all the contracts are negotiated in a single country, but treated as concluded in another country, because they had been signed in that other country. Here again OECD believes that part of the profits from those contracts should be taxable in the country in which the intermediary had negotiated them.

When reviewing the examples provided by OECD and taking into account the trend in legislative changes (both in Poland and internationally), we should come to the conclusion that the issue of risk of recognition of a permanent establishment for tax purposes for the counterparties of the entities classifying their activity as that of intermediation in the trade in medicinal products will form in the future an ever more important part of effective tax risk management in the operation of the global pharmaceutical groups present in Poland. The recent amendments to the pharmaceutical law offer a good opportunity for considering which activities of the companies that support the sale of medicinal products supplied to Poland from abroad are safe from the standpoint of the currently effective as well as the future rules of recognition of a permanent establishment, and which generate the tax risk for the principal.

Above all, it is important to identify the actual scope of operations of the Polish entities and to specify the activities which actually expose the principal to the risk of recognition of a permanent establishment in Poland. The next step is to establish whether the Polish company's activities lend themselves in any way to adjustment or modification. If there is a business need that calls for the Polish company to play an important role in distribution, the party will have to prepare the process of settling a permanent establishment in Poland. Equally, it could be that the permanent establishment risk relates to the intermediary's misperceptions about its role in the distribution in Poland, whereas that role is actually insignificant in business terms. In such a case, the misconceptions need to be clarified while the staff of the local company need to be enlightened as to what they can as opposed to what they cannot do within the sales process conducted from outside of Poland's borders.

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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.

Property Lending Barometer 2015

The results of the survey were developed on the basis of responses provided by over 90 financial institutions operating in the real estate sector in 21 countries (including Poland). Representatives of leading financial institutions gave their opinions on key issues in real estate lending during in-depth interviews.

The automotive industry, Q4/2015 Edition

The report is a part of a series of quarterly reports the objective of which is to present current trends in the automotive industry in Poland, covering the market for new cars as well as industrial production and automotive financial services. The analysis is based on the latest available registration, statistical and market data. The publication is a joint venture of the Polish Automotive Industry Association and KPMG in Poland.

Modern Finance as Intelligent Business Support

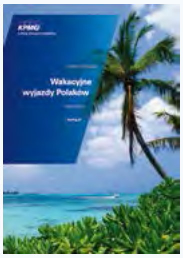
The objective of the report was to look at the trends concerning the operation of finance teams in organisations in Poland and to try to determine the direction of their development. As a result, it was possible to identify their strengths and areas for improvement and to identify the key challenges they face. The study covered a group of 120 finance directors.

Global Pulse Survey 2015: Monitoring the company's strategy and risk management

The report was prepared based on a survey conducted among 1,135 members of supervisory boards, audit committees, and top executives from 28 countries, including Poland. The survey was conducted from 30 June to 30 September 2015.

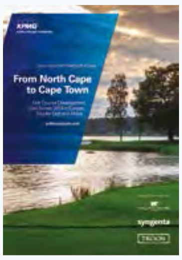
Key Procurement Challenges – the challenges and development trends in Polish procurement departments

The KPMG study aimed to review trends in the operations of purchasing departments in Polish companies, and to determine the direction of their development. The findings revealed their strengths, areas requiring development, and helped identify the key challenges that they are facing today. The study covered a group of more than 100 purchasing departments. It was conducted in August-September 2015.



Poles' vacations, 2015 Edition

The objective of the KPMG report was to learn about the plans and expenditure of Poles connected with going on holiday. The survey was conducted in August 2015 using the CATI telephone interview method on a representative sample of 1,004 adult Poles.



From North Cape to Cape Town. Golf Course Development Cost Survey 2014 in Europe, Middle East and Africa

A cyclical publication comparing the costs of constructing golf courses in Europe, the Middle East and Africa. In the latest edition, more than 100 developers and investors operating in the golf industry in 32 countries of the region (including Poland) are analysed.

Global Manufacturing Outlook

The survey was conducted in early 2015 by Forbes for KPMG International on a sample of 386 managers in manufacturing companies from 18 countries around the world. 63% of respondents were from organisations with revenues over $5 billion a year.

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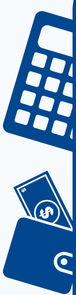

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