



Frontiers in tax

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- How to calculate EBITDA?
- Thin capitalization and financial leasing
- Income tax on cash contributions?
- Interpretation problems in transfer pricing documentation
- Benchmark for re-invoices

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Introduction



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Amendments to tax regulations, especially those that introduce fundamental changes to the tax system, evoke understandable interest both among tax advisors as well as their clients. They make it necessary to adapt to sometimes completely new concepts and institutions of tax law, and these usually cause problems related to their correct interpretation. For it is not always, during the legislative process, that it is possible to convey the essence of the idea connected with the change of the fiscal system in a sufficiently clear and understandable manner, especially if the changes are made under time pressure or have the nature of implementing the international regulations.

This is undoubtedly also the case with the amendment of the Personal Income Tax Act, the Corporate Income Tax Act and the Act on flat-rate income tax on certain revenues achieved by natural persons.

The current issue of the *Frontiers in Tax* magazine contains a discussion of selected controversies that arise in

the practice of applying the amended provisions of the Income Tax Act, including inter alia the regulations regarding insufficient capitalization, contributions to companies or issues related to transfer pricing.

I hope that the presented issues will help you assess your tax obligations and their consequences.

I wish you a pleasant reading.

Legal certainty and interpretation doubts

The topic that is particularly evident when presenting changes in income taxes from January 1, 2018 is the issue of precision and clarity of the new regulations.



The objective of introducing at least part of the regulations was explicitly stated in the justification to the draft law amending the provisions of the Act on personal income tax and legal persons. They could be divided into several groups:

A. Changes "sealing" the tax system

This goal is indicated as the main purpose of the amendment. Its justification is to prevent the possibility of tax avoidance by choosing the method of conducting a given transaction or the form of running a business. In the opinion of project originators, resulting from art. 84 of the Constitution, the principle of the universality of taxation does not allow the application of different taxation rules in relation to events with an economically identical effect. In addition, one should not allow a situation in which only large entities in a potentially big tax "ready to declare" would benefit from the possibility of tax-profitable shaping of their economic situation. Finally, the project authors add that the increased tax receipts from taxpayers who have so far understated their tax result will give

the possibility of a more complete implementation of the state's economic policy.

B. Amendments introducing the Council Directive of July 12, 2016 establishing provisions aimed at counteracting tax avoidance practices that have a direct impact on the functioning of the internal market.

In this regard, the need to implement the provisions of the Directive was established, the purpose of which is to increase the efficiency of national corporate income tax systems so that taxes are paid at the place where profits are generated and value is generated. What is to lead to achieving this goal is the introduction by the European Union legislation of legal solutions (institutions) that counteract the so-called tax optimization schemes.

The introduction of the above principles in the provisions of tax acts is an element of the State's tax policy, being one of its prerogatives. It should be noted, however, that regardless of the intentions of the legislator, the rights of the taxpayer resulting from constitutional norms should also be secured. In particular, it is about the



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principle of correct legislation (certainty of legal regulations). In the case of tax law, these principles are specified in art. 84 and art. 217 of the Constitution. The first of the above-mentioned provisions of the Constitution provides for an order to precisely determine in the Act all the essential elements of the ratio of the tax. On the other hand, the second of those provisions indicates, in relation to which elements of the ratio in question (entities, subject, rates, principles of granting allowances and redemptions and categories of exempt entities), the obligation under consideration is of a special nature¹.

From this perspective, at least a few examples should be pointed out, which may cause that taxpayers will not have the comfort of certainty as to an adequate transformation of tax regulations.

1. There is no legal definition of the interest part of the leasing contracts as part of the costs of debt financing and the foreign controlled company, including the lack of delimitation of operating and financial leasing terms on legal grounds. The Act on Corporate Income Tax does not contain a legal definition of a leasing. This definition is only found in the NAS No. 5 [national regulations] and IAS 17 (EU regulations). Obviously, this leads to problems related to taxpayers' recognition of the interest part of the operational leasing

installment as tax deductible costs (in tax terms).

2. Lack of coherence in the scope of art. 12 clause 1 point 7 of CIT, where the literal wording of the provision indicates that the transaction consisting in making cash contributions to the company would be taxable. In order to dispel doubts in this respect, a draft amendment to the Law is being prepared (currently at the stage of the Standing Committee of the Council of Ministers). According to this draft, the more specific provision stipulates that cash contributions to companies and cooperatives are not taxable. Currently, only the general tax ruling of the Minister of Finance of March 2, 2018 indicates that the above provision (in the version prior to the planned amendment) does not cover the cases of making cash contributions to the company or cooperative.

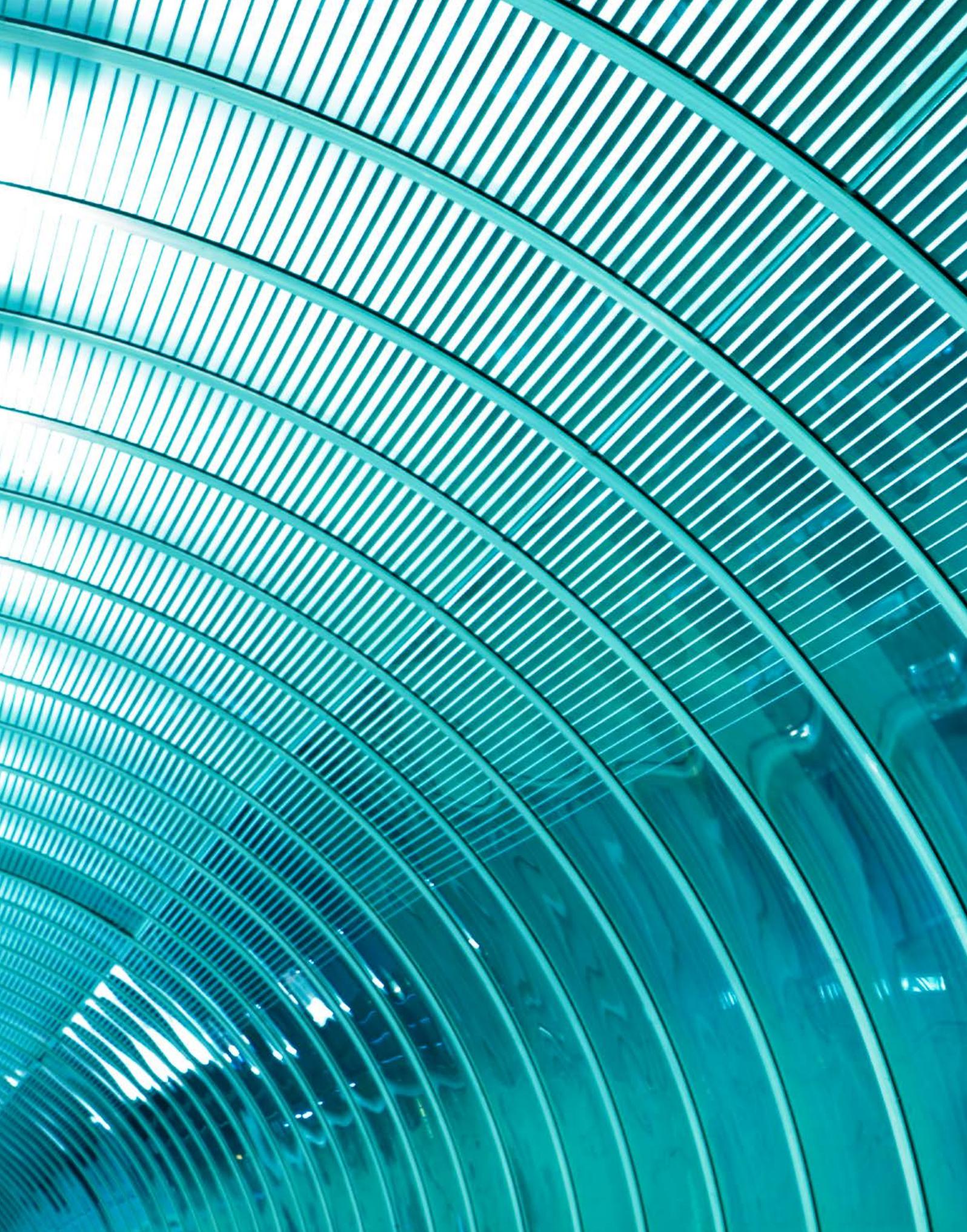
3. Imprecise regulation of art. 15ca of CIT. The wording of the provision by the legislator leads to a situation where the provision in the literally understood wording applies only to cases where debt financing costs exceed the value of debt financing determined according to market creditworthiness, i.e. a situation where interest for a given year is higher than debt for the same period. Therefore, draft of another

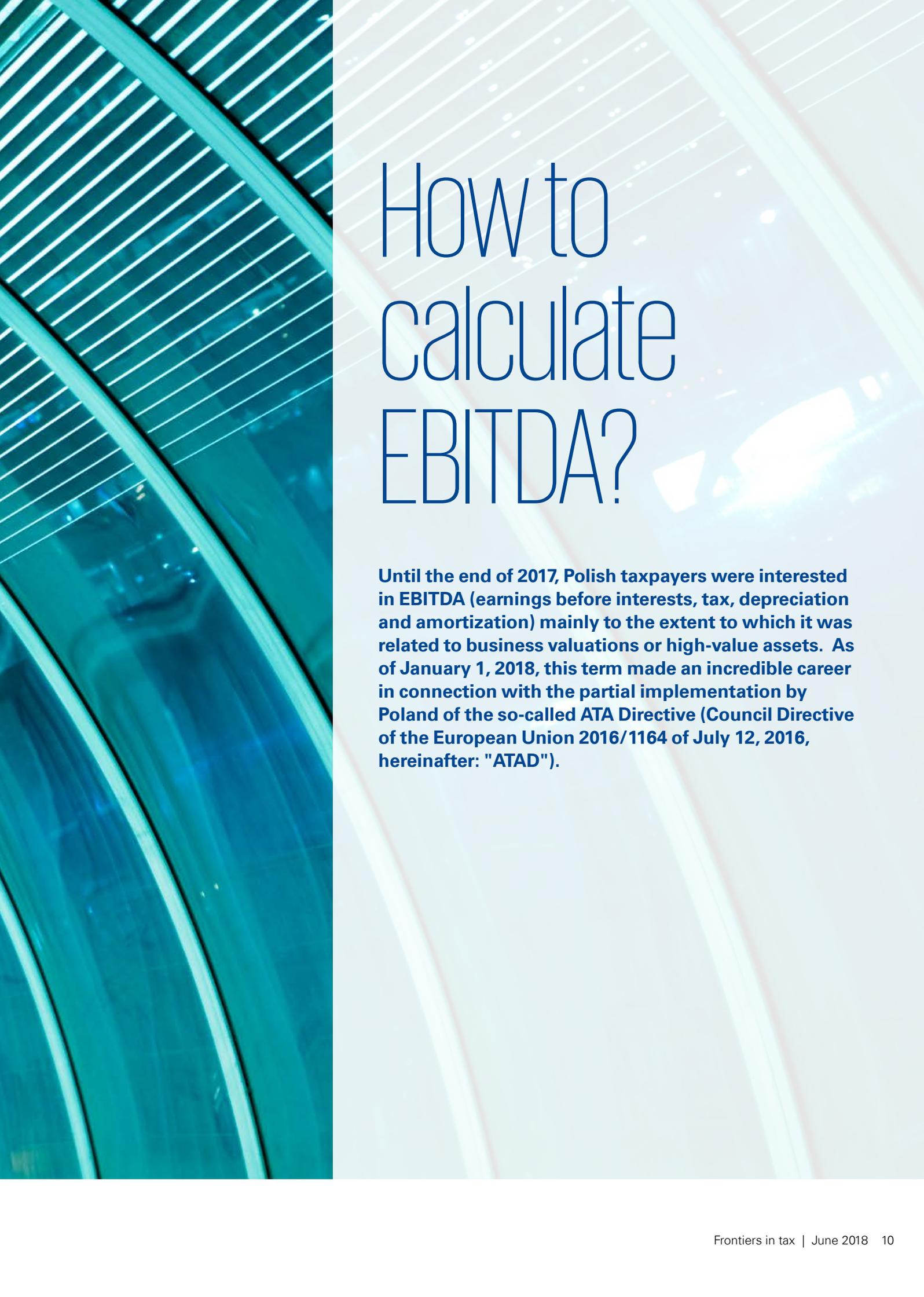
amendment to art 15ca, consisting in excluding from tax costs the interest cost of financing exceeding the creditworthiness of a given taxpayer has been prepared.



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¹Judgment of the Constitutional Tribunal of 13/09/2011 File ref .. P 33/09





How to calculate EBITDA?

Until the end of 2017, Polish taxpayers were interested in EBITDA (earnings before interests, tax, depreciation and amortization) mainly to the extent to which it was related to business valuations or high-value assets. As of January 1, 2018, this term made an incredible career in connection with the partial implementation by Poland of the so-called ATA Directive (Council Directive of the European Union 2016/1164 of July 12, 2016, hereinafter: "ATAD").

Pursuant to ATAD, Member States were obliged to introduce a tax deductibility limitation of debt financing costs (a detailed method of implementation is described in the article "Application of thin capitalization provisions in relation to financial leasing") based on the EBITDA mechanism.

ATAD has been implemented in Poland by the amendment of the CIT Act, which entered into force on January 1, 2018. This unusually extensive amendment introduced also numerous other changes, including the limitation of tax deductibility of expenses on intangible goods and services (art. 15e of the CIT Act). In this respect, the Polish legislator tried to introduce another deductibility limitation based on the EBITDA mechanism, but this time he did it voluntarily, not as a result of the implementation of the Community regulations.

In a nutshell, according to both limiting regulations, the Polish taxpayers may currently deduct expenses on each of the above cost groups up to PLN 3 million. Above this limit, they are obliged to disallow the expenses exceeding 5% EBITDA in the case of intangible goods and services and 30% in the case of debt financing costs. However, it turned out to be problematic that methodology of accounting EBITDA for both of these expenses is different.

In the case of debt financing costs, this mechanism consists in adjusting tax income by depreciation, amortization and revenues and costs of debt financing (in accordance with the statutory definition contained in art. 15c clause 12 of the CIT Act). On the other hand, in the case of intangible goods and services, EBITDA is calculated as a tax deductible income adjusted by depreciation, amortizations and earned and paid interest. The difference is seemingly small, but the CIT Act contains a legal definition of the debt financing costs and it is much broader

than the concept of earned and paid interest.

This automatically means that the basis for calculating the limit of both expenses is different. It is difficult to find justification for this situation, especially since the purpose of both provisions is essentially identical (reduction of tax deductible costs) and the mechanism of counting (except the indicated difference) is identical.

The consequence of the above is the unforeseen increase in the level of tax settlement complications through the need to conduct parallel calculations of two tax EBITDAs.

Unfortunately, this is not the end of the complication - in the case of EBITDA calculated for the purposes of debt financing costs, one cannot forget about quite wide transitional provisions. According to them, during the year 2018, the revised provisions (specifically Art. 15c) are not applied to credits and loans granted prior to the end of the year 2017. Additionally to the undoubtedly intended goal, which was to provide *vacatio legis* in relation to "old loans", it turns out that this provision interferes in the mechanism of calculation of EBITDA itself. Lack of application of art. 15c to "old loans" also results in the fact that interest on them should also not be included in the calculation of EBITDA until the end of 2018.

By the way, it is worth pointing out that it is interesting to see why a similar *vacatio legis* mechanism was not introduced in the case of leasing - in fact also limited (see again the "Application of thin capitalization provisions in relation to financial leasing"). For, even though the application of new regulations were postponed in relation to the "interest", the same has not been applied to leasing, and leasing companies were not considered to be financial companies exempted from the application of the debt financing

In the case of EBITDA determined for the purposes of intangible services, tax income should consistently be adjusted with interest only.



limit (discrimination and asymmetry of regulation).

Returning, however, to the point - the situation when the transitional provisions exclude the application of new restrictions of debt financing costs to "old loans", only deepens the difference in the calculation of both EBITDA ratios in 2018 and complicates them significantly. In the case of EBITDA for the purpose of debt financing costs, tax income should be adjusted by the costs and revenues of debt financing, however including only interest on loans or credits granted in 2018 (interest on older loans and credits are not limited by new regulations and are not included in the calculation of EBITDA). In the case of EBITDA determined for the purposes of intangible services, tax income should consistently be adjusted with interest only. Here, however, another question arises - whether the calculation of EBITDA for the purposes of intangible services should exclude all interest or take into account the limits of their deductibility resulting from thin capitalization provisions applied to loans and credits granted before 2018.

The above issues will pose a considerable problem in tax settlements, and not only due to the appalling level of complexity, but also different possibilities of interpreting the provisions. While the interpretation of the calculation method of EBITDA for the purposes of debt financing costs will have to take into account the jurisprudence of the Court of Justice of the European Union, this will not happen for EBITDA for the purposes of intangible goods and services. Based on our experience - interpretative doubts are rarely removed over the time, as life brings about cases that are unforeseen by both the legislator and even the best experts.

It is difficult to understand why the legislator did not attempt to formulate a single definition of EBITDA - the same for the debt financing costs and intangible goods and services. Such a solution would not only make life easier for taxpayers (and probably for tax authorities) but could also be used for further simplifications, such as replacing anachronistic limitations of tax deduction of depreciation of passenger cars based on an abstract amount of EUR 20.000.



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Thin capitalization and financial leasing

The new regulations of the Corporate Income Tax Act (the CIT Act), in force from January 1, 2018 significantly limited the possibility of including debt financing costs into tax-deductible costs.



On the basis of the current regulations and the dispute between tax authorities and taxpayers, there are doubts as to whether, in terms of debt financing costs, it is possible to apply the restriction to operating lease, in the same way as to financial leasing. Director of the National Tax Information (NTI Director) in the individual tax ruling issued on April 17, 2018 (reference number 0111-KDIB1-1.4010.86.2018.1.BK) stated that the provisions on thin capitalization apply to all types of leasing contracts.

Insufficient capitalization - exclusion range

From January 1, 2018, pursuant to Article 15c par. 1 of the CIT Act, taxpayers are, in principle, obliged to exclude costs of debt financing from the tax deductible costs, in the part in which their surplus exceeds 30% of "EBITDA", i.e. 30% of the amount corresponding to the excess of revenues from all sources of income less interest income over the sum of tax deductible costs, less the tax deductible expenses recognized in the tax year to the tax-deductible costs of depreciation, referred to in Article 16a-16m and costs of debt financing not included in the initial value of a fixed asset or an intangible and legal asset. The above limitation does not apply to the costs of debt financing in the amount not exceeding PLN 3 million.

In turn, the definition of costs of debt financing has been included in Article

15c par.12 of the CIT Act. This provision extensively extends the concept of debt financing costs as all costs related to obtaining from other entities, including unrelated entities, financial resources. The legislator introduced an example calculation of such costs as, for example: interest, commissions, bonuses or interest part of the leasing installment.

It should be emphasized that the term "interest portion of the leasing installment" has not been explicitly used in any other provisions of the CIT Act, except for provisions on thin capitalization. It is therefore difficult to state clearly whether the concept of both "interest" and "leasing" should be considered from tax or accounting perspective (or otherwise).

The ATAD directive

In connection with the above, in order to find a correct interpretation of the above issue, we need to refer to the Council Directive of the European Union 2016/1164 of July 12, 2016, (Directive ATAD), whose main assumption is to counteract tax avoidance practices by limiting the deductibility of the surplus of borrowing costs.

Directive, in Article 2 par. 1 introduces the definition of "external financing costs". This term on, the basis of the directive is understood very widely. It means expenditure on interest on all forms of debt, other costs economically equivalent to interest and expenses

incurred in connection with obtaining financing. Discussed definition uses the term "interest element of financing in the case of payments due to financial leasing". However, also in this case, the Directive does not specify whether financial leasing should be considered from tax or accounting perspective.

Regulations regarding the costs of external financing raise many doubts both at EU level and within the scope of their implementation into national regulations.

Taking into account the provisions of the Directive, it should be noted that in the light of the provision introducing the definition of external financing costs, it is necessary that the categories listed therein should comply with national provisions of national law. However, although it is generally accepted that Article 17f of the CIT Act concerns financial leasing, it does not introduce, like the whole act, a precise definition of this concept.

Limitation range

The issue of the scope of the term of debt financing included in Article 15c of the CIT Act, in the context of fees incurred in respect of tax operating lease, became the subject of an individual tax ruling issued by the Director of the National Tax Information on April 17 of this year.

In the issued ruling, tax authorities argued that the provision of Article 15c

Regulations regarding the costs of external financing raise many doubts both at EU level and within the scope of their implementation into national regulations.

par. 12 of the CIT Act on the costs of debt financing and the economically equivalent revenues specified in Article 15c par. 13 CIT Act does not indicate one type of leasing to which they directly refer. In addition, according to the Director of the National Tax Information, also the lack of a statutory definition of the concepts of financial and operational leasing argues that the provisions on the limitation of the surplus of debt financing costs related to both types of leasing.

Effects for taxpayers

In case of financial leasing from accounting' perspective and operating lease from the tax one, usually the basic fee is invoiced by the financing party in a single position. However, in such a

situation the financier should distinguish it from the lease payment accordingly:

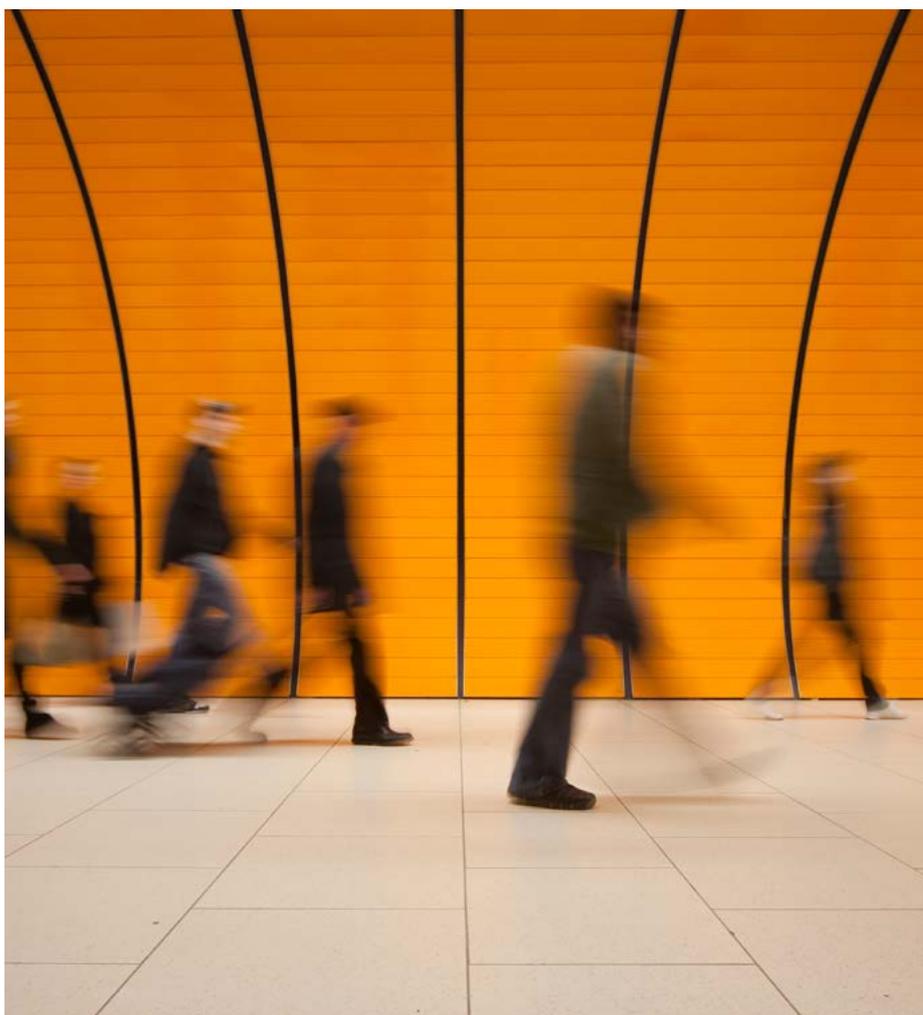
- the capital part - constituting the repayment of the liability originally included in the ledgers,
- interest part - corresponding to the financial costs of the leased asset.

If the above-mentioned breakdown does not appear on the invoice received from the leasing company, then the user, in order to obtain a fixed, periodic rate of return from the unpaid liability balance uses the one of the three possible methods described in the National Accounting Standard No. 5

The opinion indicated by the Director of NTI in the above ruling results in the necessity to take into account the costs of interest part of the operational leasing

in the tax deductible costs and their potential, partial exclusion.

Having in mind the lack of a legal definition in the provisions of the Directive regarding the "interest element of financing in the case of payments due to financial lease" and the National Tax Information Director ruling of the national provisions regarding thin capitalization and regulations relating to leasing (i.e. operating lease and financial), it is not currently possible to clearly determine which line of jurisprudence will be adopted by the administrative courts in the present case. In connection with the above, it is the taxpayers' responsibility to review the lease contracts from tax and accounting perspective.



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Income tax on cash contributions?

The date of January 1, 2018, resulted for the corporate income tax payers in the necessity of getting used to many fundamental changes in the Corporate Income Tax Act (CIT Act), which, in a revised form - at least until the end of this year - will determine the method of settlements under this tax.

Apart from the changes planned and signaled by the Ministry of Finance, consistently from the day of the first publication of the draft amendment Act, there were also those which were initially not planned. This state of affairs should be regarded as particularly undesirable, not only in the context of the application of legal provisions by taxpayers, but also from the perspective of quality of law itself, which in certain areas imposes obligations on citizens and therefore should not be misleading.

One of the changes introduced by the Act Amending the Income Tax Act of October 27, 2017 was the modification within the scope of regulations pertaining to the issue of taxation of cash contributions to companies and cooperatives.

Doubts related to the literal content of art. 12 clause 1 point 7 of the CIT Act

According to the current wording of Article 12 clause 1 point 7 of the CIT Act, in the case of contributions to companies / cooperatives, the taxable revenue is the value of this contribution specified in the company memorandum, articles of association or in another document, not lower than the market value of the subject of the contribution (if the value determined by the taxpayer is lower than the market value of the subject of the contribution or this value has not been specified in the articles of association, the memorandum or another similar document, the revenue is the market value determined as of the day of transferring the ownership of non-cash contribution item). The change of the aforementioned provision was motivated by the legislator's decision to apply the so-called small anti-abusive taxation clause to contributions in kind of enterprises and organized parts of enterprises (OPE). Under the current legal status (since January 1, 2018), contributions in kind of are tax-neutral transactions only if

they are made for justified economic reasons. While the legislator managed to achieve the intended objective in this respect, additional consequence of adding an economic justification clause to an in-kind contribution of an enterprise or OPE has occurred. It has namely become no clear whether the legislator also intended to make cash contributions to the company or cooperative a subject of taxation.

Irrespective of the circumstances that the admissibility of generating tax revenue by cash contributions is in itself incorrect, the literal content of the provision in fact allows such a conclusion. The provision after the amendment of October 27, 2017 does not differentiate the rules for taxing contributions depending on their subject. It does not also use the notion of an in-kind contribution, which in the commercial law nomenclature means only non-cash contributions.

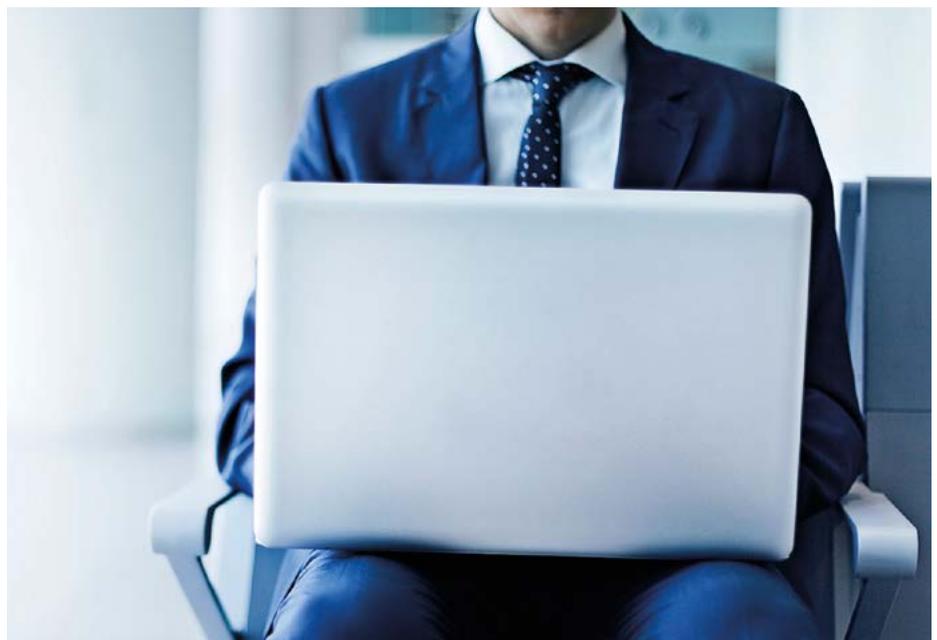
Tax consequences of amending the regulations

Taking as correct the statement that the value of a cash contribution is a tax revenue subject to CIT, would have far-reaching implications. It should be noted

that due to the lack of corresponding changes in the regulations regarding the principles of determining tax deductible costs, the revenue generated in connection with the cash contributions, differently than in the case of in-kind contributions, would not be subject to reduction by the tax deductible costs - costs in the form of expenses for the acquisition of shares (stocks) could be settled only at the time of their sale. Another consequence of the abovementioned interpretation of art. 12 clause 1 point 7 of the CIT Act, would also be a different classification of revenue generated in connection with the contribution to the company or cooperative, depending on its subject: in the case of contributions in kind, this income would be qualified as revenues from capital gains and in the case of cash contributions it would constitute the revenue from the so-called operating activity (non-capital revenues).

The Finance Ministry makes a correction

The amount and nature of discrepancies in the area of contribution taxation under the CIT Act, that would entail the recognition that cash contributions to companies and cooperatives are subject



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to CIT, allowed from the beginnings to raise suspicions that such far-reaching changes in art. 12 clause 1 point 7 of the CIT Act were not planned by the Ministry of Finance. The first emphatic signal confirming these assumptions was the draft Act (prepared prior to the moment in which amending Act came into force) amending the Act amending the CIT and PIT acts of October 27, 2017 (i.e. the draft of November 30, 2017) which aim was, inter alia, restoration of the state in which the provision on the taxation of contributions includes exclusively in-kind contributions. Finally, due to the fact that the draft Act changing the amending act has not been so far adopted by the Parliament, the Minister of Finance was forced to dispel all doubts in the indicated scope, by addressing this issue in the general interpretation issued on March 2, 2018.

Taking into account the position of the Minister of Finance expressed in the indicated general interpretation, from the point of view of practice and application of law, the issue of cash contributions to companies and cooperatives not being subject to CIT taxation shall be considered definitively settled. The Minister of Finance confirmed that art. 12 clause 1 point 7 does not cover the cases of making cash contributions to companies or cooperatives. In the opinion of the Ministry of Finance, the amendments introduced by the amending Act of October 27, 2017 were aimed only at taxing possible income resulting in the transfer of ownership of a given asset component of the taxpayer. Moreover, as indicated by the Minister of Finance, justification of the draft of amending Act did not include a fragment indicating the ministry's intention to apply CIT to cash contributions.

Protection of the taxpayers' interest

However, the described situation shall be a subject to a slightly different assessment from the perspective of the principles of legal certainty and

legislative correctness. It provides namely clear evidence that the amendment has not been prepared in a conscientious manner and with care for the interests of the taxpayers, who certainly should not be held responsible for deciding which changes in the act were planned and which "happened" accidentally. The quality of the tax law should be evaluated unambiguously negatively in the case when the legislative procedure concerns the act resulting in a factual, unjustified and unplanned differentiation of the legal status of CIT and PIT taxpayers (since symmetric changes in Personal Income Tax Act were not subject to changes).



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Interpretation problems in transfer pricing documentation

Pursuant to the Regulation of the Minister of Finance of March 14, 2018 regarding the extension of deadlines for compliance with certain tax documentation, the deadline for preparing transfer pricing documentation, submitting a statement on its preparation and adding a simplified CIT-TP report to the tax return for the fiscal year has been extended until the end of September.





Despite the fact that work on the preparation of the documentary obligation in the area of transfer pricing is mostly at the advanced stage, it cannot be forgotten that many issues in this area are still under discussion. The Ministry of Finance has already attempted to explain them collectively in the general tax ruling of the Minister of Finance of January 24, 2018. It seems that the biggest emotions of the taxpayers arise from the explanations of the tax Authorities regarding the issue of homogeneity of transactions.

According to Article 9a paragraph 1d of the Corporate Income Tax Act (CIT Act) for transactions or other events having a significant impact on the taxpayer's income (loss), and therefore, those that are subject to the documentary obligation are considered transactions and other events of one kind, whose total value exceeds the equivalent of 50 thousand euro in a given tax year.

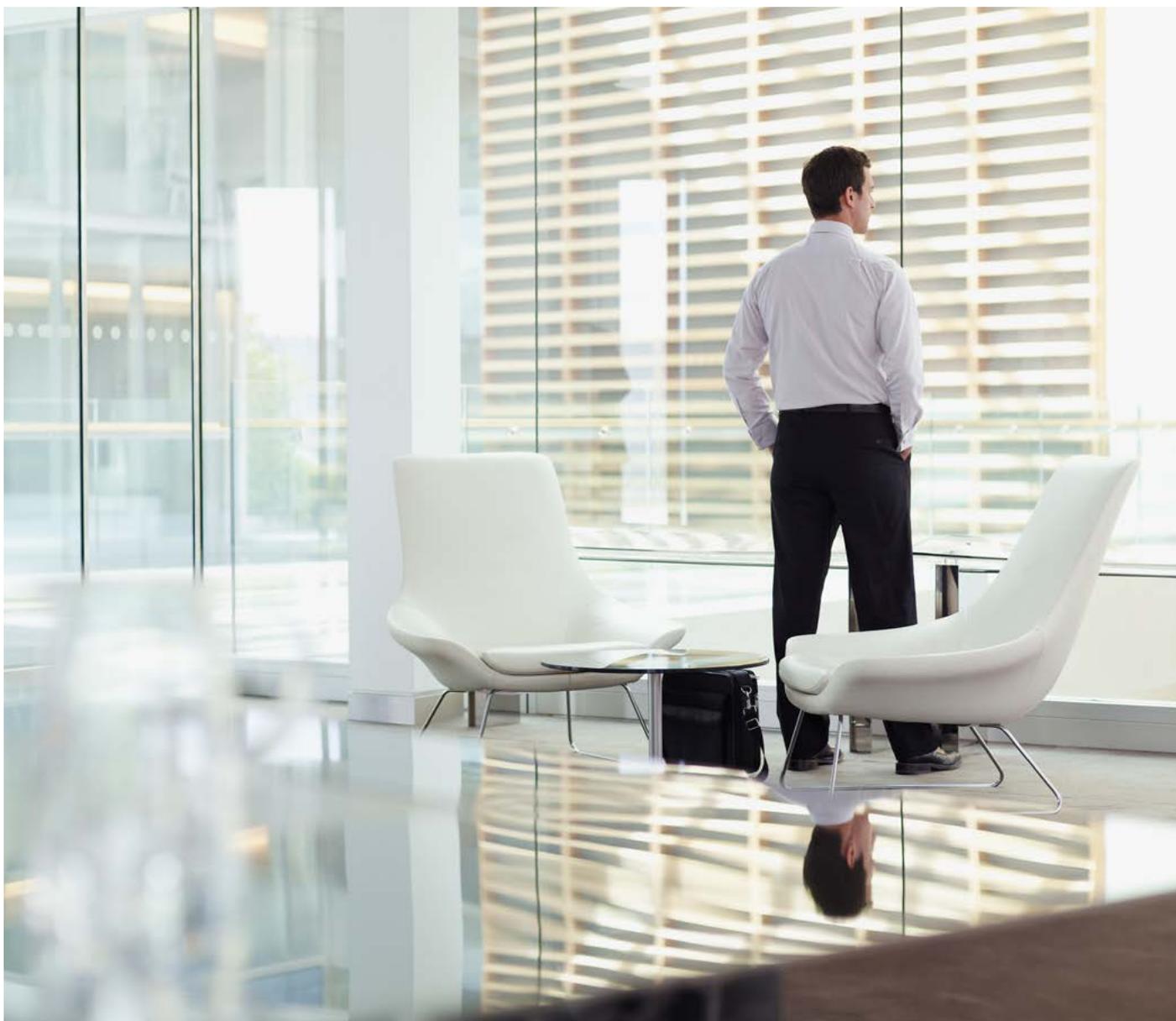
How to understand the concept of "homogeneity of transactions"?

However, both the provisions of the CIT Act and the Regulation of the Minister of Finance of September 12, 2017 do not explain what the concept of "transactions and other events of one kind" mean and how taxpayers should sum up the value of transactions carried out (i) separately for each counterparty from the statutory limit (ii) or perhaps in a summarized way.

This issue was frequent subject of interest on the part of the Director of the National Tax Information (NTI Director) who, as part of issued individual tax rulings, stood on the side of taxpayers many times. For example, we should mention here individual tax rulings issued by the Director of NTI on: December 11, 2017 (No. 0111-KDIB1-3.4010.325.2017.2.APO), December 14, 2017 (No. 0111-KDIB1-2.4010.391.2017.1.ANK), December 19, 2017 (No. 0115-KDIT2-3.4010.288.2017.1.KP), December 20, 2017 (No. 0111-KDIB1-3.4010.447.2017.1.MST) and December 29, 2017 (No. 0111-KDIB1-1.4010.156.2017.1.SG), where the tax authorities clearly states that the statutory limit of transactions and other events of one kind should be related separately to each transaction concluded with a given related entity.

However, as it appears from the general tax ruling of the Minister of Finance of January 24, 2018, an economic entity that is performing one-kind transactions on analogous terms with various related entities results in the transaction being homogenous in nature. Thus, the Minister of Finance clearly emphasizes that the provisions of tax acts do not determine in any way the necessity to set the documentation threshold separately for each related entity.

Taxpayers who received individual tax ruling in their case and applied to it will lose their protection.



Loss of the protective power of individual interpretations

In connection with the above, taxpayers who received individual tax ruling in their case and applied to it will lose their protection. within according to Article 14k of the Tax Code, the interpretation provides protection only until the application of the change or statement of its expiration. It is almost certain that many taxpayers who have received protection through the individual tax ruling issued by a Director of the

NTI may soon be deprived of it by a decision declaring its expiry. We have noticed an increased activity of the tax authorities in the scope of repealing individual tax rulings relating to the problem of homogenous transactions.

Such a decisive change in the interpretation'line of tax authorities raises questions about the legitimacy of applying for protection under tax rulings, and also allows to make some considerations related in general to the sense of using them on the taxpayer - tax authority line.



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Benchmark for re-invoices

As it follows from the individual tax ruling of March 2, 2018 issued by the Director of the National Tax Information (Director of NTI), taxpayers will not be exempt from the obligation of conducting the comparability analysis in the case of the so-called re-invoicing. According to the tax authorities, in related parties relationships the use of the same price as that established between unrelated parties, does not determine its market level.

The obligation to compile comparative data in relation to transactions concluded in 2017 concerns taxpayers whose income or costs in the previous tax year exceeded the equivalent of EUR 10 million. The value threshold for one transaction which is a subject to obligatory comparability analysis amounts to PLN 90,000 euro and increases by EUR 5 thousand with each additional EUR 1 million of the revenue or expense achieved by the taxpayers in the previous year. The criteria on the basis of which the value threshold is set for one transaction have been more precisely defined in the general tax ruling of the Minister of Finance of January 24, 2018. The Minister specified that transactions of one type, concluded under analogous conditions with different entities should be aggregated in relation to the applicable

transactions' thresholds subjected to the documentary obligation.

A re-invoice does not automatically mean that the settled price was the market price

In the individual tax ruling, the Director of NTI pointed out that the obligation to prepare a comparative analysis in relation to selected categories of transactions is aimed at determining whether the prices applied to the acquisition of goods or services were determined in accordance with the conditions that unrelated parties would establish between each other in comparable circumstances. Thus, the purchase of a good or service from an unrelated entity and its subsequent disposal without imposing a margin meets the conditions of a "transaction"



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and is subjected to a documentary obligation. Consequently, the Director of NTI claims that the mere use of the same price that was prior used between independent entities does not automatically mean that the determined price between related parties was the market price. In addition, the party which is re-invoicing the costs of the service may perform many other functions related to the transaction, such as conducting trade negotiations or servicing contracts. In this case, the transfer only of the costs of acquiring a specific service to a related party may lead to the conclusion that in an analogous, comparable situation, the unrelated entity would behave differently.

Doubts about the double documentary obligation and the manner of performing the benchmark

It is worth noting that the Director of NTI in the issued tax ruling in no way referred to the argument of the taxpayer regarding OECD guidelines on the adjustment of the documentation needs to the costs and administrative burdens of the taxpayer. One of the obligatory elements of tax documentation is the indication of the

method and the manner of revenue calculation with justification of such a choice. Therefore a taxpayer's explanation regarding the reasonability of the costs re-invoice and the circumstances which led to the lack of imposing a margin is already at the stage of tax documentation. The lack of response to the taxpayer's argument from the tax authorities indicates that the earlier analysis of the re-invoice costs at the documentation stage does not exempt the taxpayers from an in-depth transaction analysis at the comparative analysis stage.

There are also doubts about the technical implementation of the comparability analysis in relation to the re-invoiced transaction. In the opinion of our experts, supported by the response obtained from the representatives of the Ministry of Finance during the Transfer Pricing Forum of April 12, 2018, the most adequate way to prepare benchmark analysis in this area is to prepare a so called assertion describing how the transaction terms are consistent with terms unrelated parties would have agreed on.



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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.



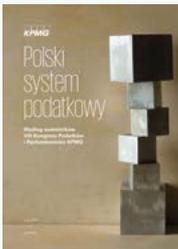
Abolishing the social insurance (ZUS) premium limit from the perspective of companies operating in Poland

The report was based on a survey carried out on a sample of 201 companies operating in Poland. The study was carried out at the turn of January and February 2018, by means of the CATI method (English: Computer-Assisted Web Interview) among persons responsible for the company's finances. In the survey took part companies with Polish capital (88%), foreign (9%) and mixed capital (3%). The aim of the study was to get to know the opinions of enterprises operating in various sectors in Poland on the impact of the annulment of the social insurance (ZUS) premium limit on their activities.



The road ahead. The KPMG Survey of Corporate Responsibility Reporting 2017

The report was based on responses from specialists from 49 KPMG member companies that reviewed annual financial and corporate responsibility reports from the largest 100 companies, by revenue, in their countries and regions. Research sources included PDF and printed reports as well as online content published between July 1, 2016 and June 30, 2017. The results of the survey are based on the analysis of only publicly available information, and no information was provided directly by companies to KPMG companies.



The Polish tax system according to the participants of the 8th KPMG Tax and Accounting Congress

The report contains the results of a study on the tax system in Poland conducted on January 9, 2018 among participants of the 8th KPMG Tax and Accounting Congress, i.e. the representatives of the management, financial directors, chief accountants and heads of financial reporting and controlling. The research was aimed at getting to know the assessment of the Polish tax system from the point of view of the top management of enterprises from various industries from all over Poland. 191 people answered the questions.



Automotive industry, Q1/2018 Edition

The report belongs to a series of quarterly reports whose purpose is to present the current trends in the automotive industry in Poland, understood both as the automotive market, 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.



Barometer of family businesses. Optimistically ahead

The report is the sixth edition of the survey conducted by KPMG in selected European countries, and Polish family businesses took part in the survey for the fifth time. The report was based on the results of internet interviews (CAWI) carried out in May-August 2017. The report focuses on a comprehensive analysis of the situation of family businesses, their plans for the future, priorities and challenges they have to cope with every day.



The cyber security barometer. Cyber attack is a common phenomenon

The report was based on a study carried out on a sample of 101 companies. The study was carried out by means of the CAWI method (English Computer-Assisted Web Interview) among persons responsible for IT security (board members, security directors, presidents, IT directors or other persons responsible for this area). The research was carried out at the turn of November and December 2017 by Norstat Polska.

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