Frontiers in tax

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Introduction

Michał Niżnik
Tax Partner
International Tax Team
at KPMG in Poland

Marcin Rudnicki
Tax Partner
International Tax Team
at KPMG in Poland

Karolina Dębska
Director
International Tax Team
at KPMG in Poland

Sabina Sampławska
Director
International Tax Team
at KPMG in Poland

In recent years we have seen many significant changes in tax law. While the majority of the changes are designed to tighten up the tax system, they are set firmly within an international context. The new regulations are a result of implementing EU directives (ATAD, DAC6) and OECD recommendations (BEPS, MLI), and copying solutions that work well in other countries (the JPK standard audit file for tax or horizontal monitoring).

There is much discussion on tax law or reporting obligations in Europe nowadays, and the Polish legislator has proven several times that changes in law can be and are made in Poland quickly - sometimes before the deadline, which was the case with tax arrangements reporting. Hence, Polish taxpayers and tax advisors are usually one of the first to cope with the changes, and other countries are attentively monitoring Poland's - quite burdensome - experience. The most recent work conducted by the Ministry of Finance is focused on introducing mechanisms for resolving double taxation disputes.

The impact of international law on tax settlements and reporting obligations is increasing on an unprecedented scale.

The most complex changes and obligations this year have been made or introduced in the areas of withholding tax and reporting tax arrangements (MDR). However, many of the tax law changes made in 2018 continue to raise doubts among taxpayers and lead to disputes with tax authorities, which are being resolved by administrative courts. Examples include limitations on the tax-deductibility of the costs of intangible services or debt financing costs.

Experience shows that not only tax advisers but also, unfortunately, tax authorities, have doubts about the application of the new regulations. As a result, many taxpayers feel uncertain and often rely only on the intuition when interpreting hastily introduced provisions. Taxpayers are forced to be cautious, often excessively cautious, and this makes them do more than they are required to do, believing that it is better to do too much than to face serious consequences. A very good example is reporting tax arrangements, where unclear guidelines issued by tax authorities and severe penalties for violations of law make some taxpayers report transactions that do not meet the criteria for being reported.

Enjoy reading this issue of Frontiers in Tax, where you will find selected practical issues and the current trends among tax authorities' and administrative courts' interpretation of tax regulations.

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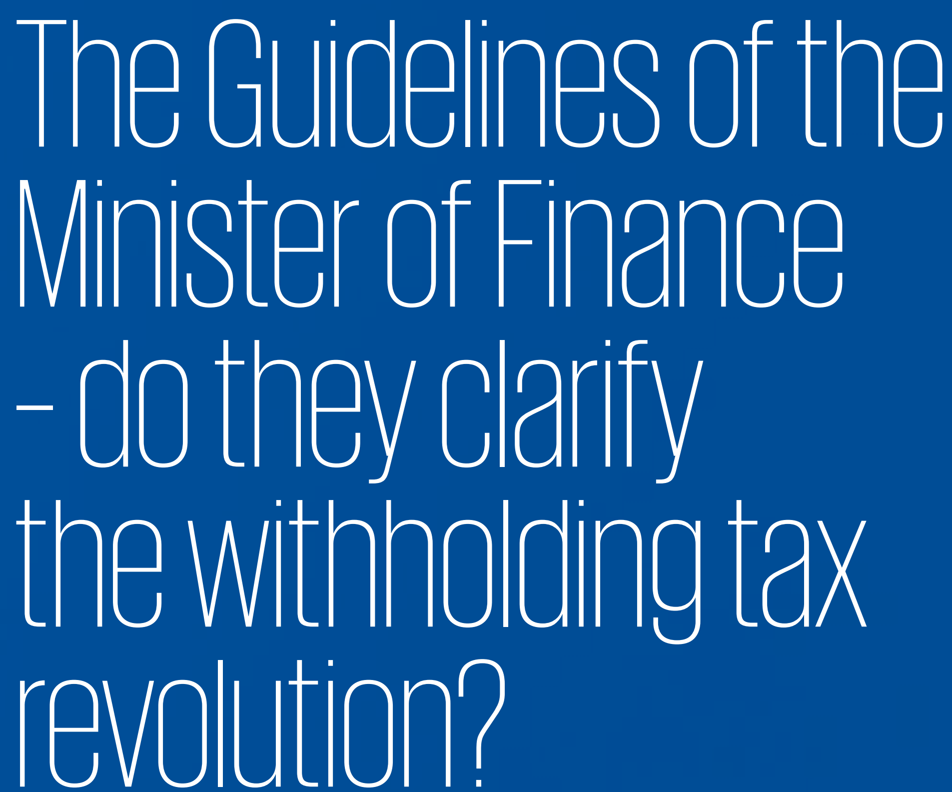

The Guidelines of the Minister of Finance – do they clarify the withholding tax revolution?

On 19 June 2019 the Polish Minister of Finance published the long-awaited draft document with guidelines on the new withholding tax (WHT) rules ("Guidelines"). Among others, the Guidelines deal with the particularly controversial concepts introduced by the new rules, such as *beneficial owner* or *due care*.

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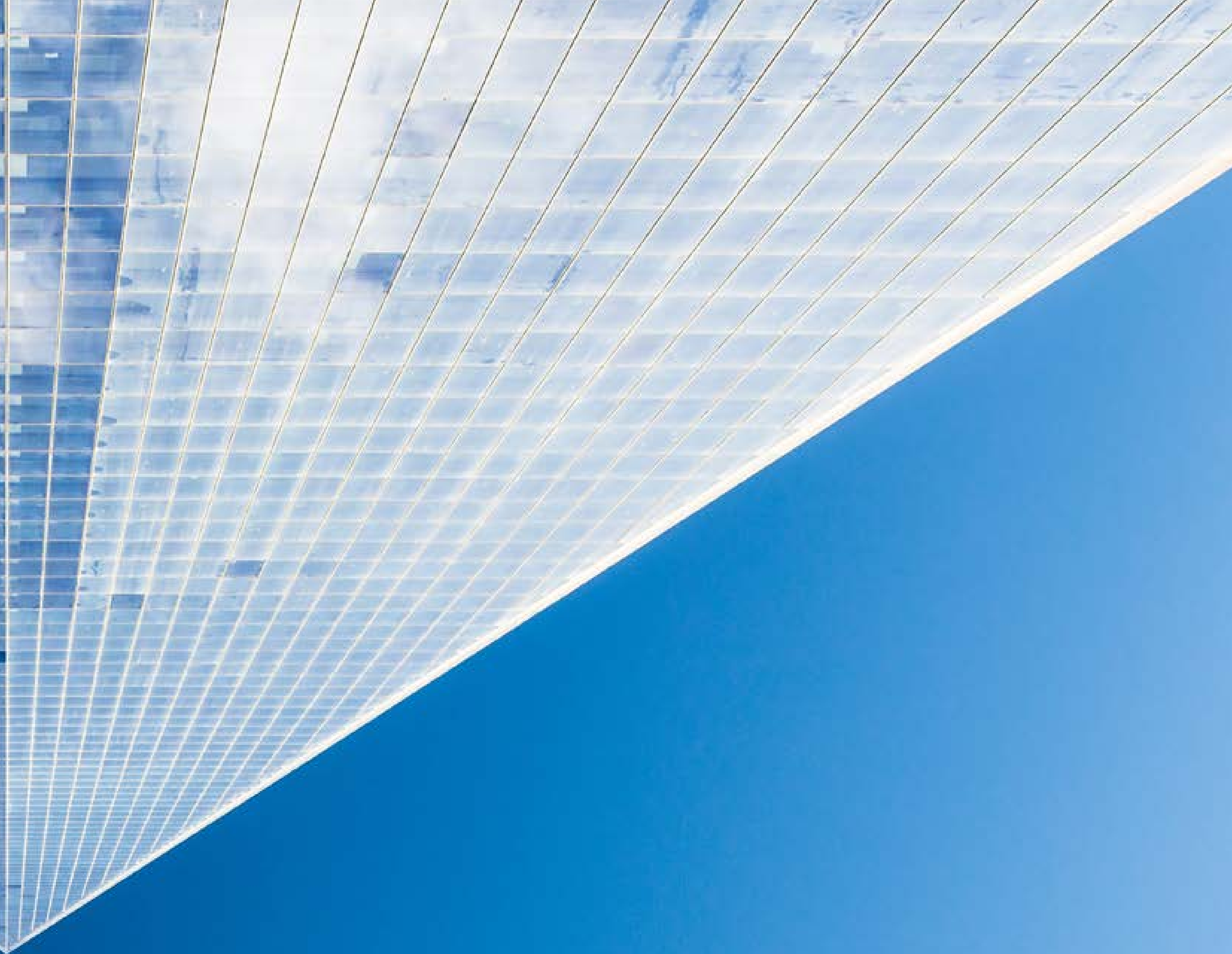

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Beneficial owner

The Guidelines refer to one of the main reasons behind the introduction of the beneficial owner concept, which is to counteract what is known as treaty shopping. The treaty shopping practice is a violation of Polish law, as the benefits provided by the double tax treaties ("**DTT**") or directives should be enjoyed only by taxpayers (beneficial owners). The Guidelines explain that intermediary entities whose sole activity is the receipt of income and its transmission to the beneficial owner or to other conduit companies are not beneficial owners. As a way to prevent the treaty shopping practice, the Guidelines explain that the verification of whether the payment recipient is the beneficial owner should be made in respect of all DTTs, including those that do not envisage the beneficial owner clause. The first step of assessing the entitlement to treaty benefits is to identify who is the taxpayer, i.e. the person that actually obtains (realizes) income, and only then should the relevant DTT be referred to. The Minister of Finance supports this view with judgments issued by the Polish Supreme Administrative Court ('SAC') in cases issued on the ground of cash pooling[1].

On the positive side the Guidelines confirm application of the so called *look through* approach based on which the Tax Treaty between Poland and the taxpayer’s (beneficial owner's) country of tax residence may be applied in the case where the direct recipient of the payment from Poland is not entitled to treaty benefits due to the lack of beneficial owner status.

The Guidelines may also be satisfactory to entrepreneurs making payments to foreign collective rights management organisations. It is confirmed in the Guidelines that, as a rule, such organisations should be regarded as the beneficial owners of such payments.

Actual economic activity

When discussing this part of the definition of beneficial owner, the Guidelines introduce the concept of *substance [Polish: substrat majątkowo-osobowy]*. The Guidelines do not define the concept itself but make references to similar concepts based on economic substance, which have been developed in the practice of international law (e.g. BEPS Report, Actions 5 and 6) and referred to in the recent CJEU cases[2].

The Guidelines attempt to adopt a practical approach to the criteria of genuine business activities. These criteria can be either general (e.g. the existence of a structure that is separate from any economic reasons) or specific, depending on the type of business activities pursued by the entity concerned. The Guidelines also provide examples of circumstances under which certain entities may fail to meet the requirement in question. This applies, for example, to:

- holding companies: the fact that an entity does not pursue genuine business activities may be indicated by, among others, a minimal property and personnel base, salaries paid to personnel engaged in managing high-value asset portfolios being too low in relation to their responsibilities, or the existence of intra-group cash flows that serve to transfer income from an operating company to its holding company as a way to avoid taxation or to reduce the taxable base;
- shared service centres: to be regarded as actually pursuing business activities, the activities of the centre must not be limited to the process of mathematical dividing of the costs of services purchased by the centre among the companies that use the centre's services.

The clarifications in the Guidelines are, therefore, of highly general nature. It is the taxpayer that should decide what concrete criteria to apply in the particular case and how to prove that these criteria are met.

Due care

It is important to note the attempt to take a reasonable approach to this matter by indicating that when assessing whether due care has been exercised, it must be checked whether the withholding agent is related to the payment recipient and whether it is actually able to receive

[1] SAC judgment of 20 October 2017, II FSK 2594/15; SAC judgment of 26 June 2018, II FSK 1674/16; SAC judgment of 30 November 2016, II FSK 3107/14; SAC judgment of 18 March 2016, II FSK 82/14.

[2] CJEU's judgment of 26 February 2019, N Luxembourg 1 (C 115/16), X Denmark A/S (C 118/16), C Denmark I (C 119/16), Z Denmark ApS (C 299/16) v Skatteministeriet, ECLI:EU:C:2019:134, para. 90.

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The Guidelines explain that tax authorities should apply the new provisions reasonably, considering what the withholding agent can actually do. Although such approach may sound optimistic, many taxpayers would prefer certainty of procedures they should follow, in order to ensure that they are not held liable for non-compliance with the law.

the necessary information from the recipient. This obviously means that higher standards of due care should be applied in relations between related parties. The required standard of due care also depends on the amount of the payment. It is reasonable for the withholding agents to take additional steps to verify the payment recipient, particularly if the payments to the same taxpayer during a tax year amount to "many hundreds of thousands of zloty".

The Guidelines contain examples of questions that may be asked to the other party in a transaction as part of the due care obligation. The position of the withholding agent may be strengthened if the response to each of the questions is confirmed by appropriate documents, including documents from publicly available sources (trade magazines, databases). It is also indicated in the Guidelines that the withholding agent may use, as a form of protection, a report issued by an independent auditor or tax advisor regarding the business activities of the recipient.

The Guidelines explain that tax authorities should apply the new provisions reasonably, considering what the withholding agent can actually do. Although such approach may sound optimistic, many taxpayers would prefer certainty of procedures they should follow, in order to ensure that they are not held liable for non-compliance with the law.

The doubts of taxpayers and withholding agents that were not addressed in the Guidelines may be resolved on their own initiative through the application for an individual tax ruling. This route, however, is not possible in case of questions regarding the beneficial owner criteria as a result of the exclusion in the amended Article 14b of the Tax Ordinance Act as of 1 January 2019. In practice, it may be difficult to obtain a confirmation of how to deal with the particular situation, especially if tax authorities will refuse to issue such tax rulings, as they do in case of tax rulings concerning mandatory disclosure rules (MDR).

Summary

Although the Guidelines intend to ensure that the new provisions are not interpreted in a way that might constrain honest taxpayers, the reality is that new rules impose considerable burdens on entities that make cross-border payments. The Guidelines are, to a large extent, an explanation of why the new provisions are necessary rather than a guide on how to apply the provisions in practical situations. In addition, they fail to solve many practical problems, including whether the *look through* approach will apply, if the tax preferences depend on the existence of direct capital relations. Or how often it is necessary to verify the particular recipient, given the fact that any such verification requires gathering many documents and plenty of information? Or what documents should accompany an application for an opinion confirming the taxpayer's entitlement to an exemption from withholding tax?

Let us hope that at least some of these issues will be addressed in the final version of the Guidelines.

Katarzyna Trzópek
Manager in the International Tax Team at KPMG in Poland

Maciej Synowicz
Senior Consultant in the International Tax Team at KPMG in Poland

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On 1 January 2019 the provisions of the Polish Corporate Income Tax Act on withholding tax ("withholding tax" or "WHT") were amended. However, the Ministry of Finance has already postponed the effective date some of the new WHT provisions twice this year. Below we present the most frequent practical concerns resulting from the new provisions – both these being already effective and these waiting to take effect due to extended *vacatio legis*.

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Lack of precise criteria for the due care obligation

The new WHT provisions include the requirement for withholding agents to exercise due care in verifying the possibility of applying a reduced tax rate or an exemption in respect of payments subject to withholding tax. Unfortunately, no clear definition of the due care requirement is provided. Although the Ministry of Finance has attempted to explain this definition in the draft document with guidelines on the new WHT rules, there is still no step-by-step instruction for withholding agents. The due care is another vague term and its interpretation will have to be settled by courts. If it was impossible for the legislator to clearly define the obligations of taxpayers in this regard, it is all the more difficult for taxpayers.

Practical difficulties related to applications for an opinion confirming the taxpayer's entitlement to an exemption from withholding tax

One way for a withholding agent of avoiding the obligation to collect withholding tax on certain payments (e.g. dividends or interest) is to obtain an opinion confirming the taxpayer's entitlement to an exemption from WHT (so called WHT clearance opinion).

Such an application may be filed by the taxpayer or the withholding agent (if it is the withholding agent that bears the economic burden of the withholding tax). Foreign entity that is the taxpayer (beneficial owner) may also apply for a WHT clearance opinion.

The first obstacle for a foreign taxpayer is to fill in an electronic WH-WOZ form (application for a WHT clearance opinion must be submitted electronically). In this form, the taxpayers must provide their Polish tax registration number (known as *NIP*). However, it is unusual for foreign taxpayers to be registered for tax purposes in Poland and to have such a number assigned, if they do not pursue any business activities in Poland. Therefore, the foreign applicant will have to apply for a Polish tax registration number before applying for the WHT clearance opinion.

The challenge is also to gather documentation confirming foreign entity's economic substance and the fact that it is the beneficial owner of the payment concerned. The Polish CIT Act does not contain an exhaustive list of documents to be submitted together with the application for the WHT clearance opinion, and no such documents are listed in the draft guidelines issued by the Ministry of Finance. It is, therefore, the taxpayer's responsibility to decide what documents should be submitted with the application and what documents it needs as evidence of its beneficial owner status.

No solution to the problem of identifying the beneficial owner of interest in cash pooling arrangements

The purpose of a cash pooling arrangement is to optimise the use of the financial resources of a group of companies.

In practice, the efficiency of such arrangements is reduced, as tax authorities refuse to grant the pool leader the protection provided for in the double tax treaties on the grounds that the pool leader is not the beneficial owner. However, within most cash pooling arrangements, it is impossible to precisely identify the owner of the funds used by the company that needed funding.

It is important to note at this point that the idea behind the beneficial owner requirement is to prevent tax avoidance. It could apply to a cash pooling if the pool leader within the arrangement was a company established in a particularly privileged tax jurisdiction. However, the location of the pool leader is, in principle, based on purely business-related reasons. In such cases, the way that tax authorities interpret the beneficial owner requirement in relation to cash pooling arrangements results in the requirement being applied for purposes for which it is not intended.

Neither the new WHT provisions nor the guidelines on the provisions have been used by the Ministry of Finance to address these problems. Quite the contrary, the stricter criteria of the beneficial owner of a payment make it even more difficult for groups of companies to manage their financial resources.

> The way that the new withholding tax provisions are being implemented raises questions about the quality of the legislative process.

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A few words on the legislative work of the Ministry of Finance

The Ministry of Finance originally decided to postpone the effective date of the new provisions until 1 July 2019. It seems that the decision was a result of the hasty changes made to the Corporate Income Tax Act, for which the Ministry of Finance, taxpayers and withholding agents alike were not prepared. The market was surprised to learn that the effective date of the new provisions would be deferred yet again, until 1 January 2020. The new date was specified in a regulation published a few days before the previously planned effective date.

Moreover, the fact that the Ministry of Finance has not postponed the effective date of similar withholding tax provisions in the Personal Income Tax Act has led to a situation where different legal regimes apply for similar practical situations.

The way that the new withholding tax provisions are being implemented raises questions about the quality of the legislative process. While entrepreneurs have had to make intensive preparations for the new law, the Ministry of Finance has decided, at the last minute, that putting the new provisions to work was not as urgent as the Ministry's initial efforts might have indicated.

It is important to stress again that the quality of the legislative process, which includes introducing regulations that are absolutely necessary and in a way that builds trust of a taxpayer to the system, is crucial to offer the taxpayers the optimum conditions for doing business. The instability of the Polish tax system has been an issue brought up by Polish and foreign businesses for years. The chaotic implementation of the new withholding tax provisions is another ground for these allegations.

Szymon Bernat
Manager in the International Tax Team at KPMG in Poland

Marta Korc
Consultant in the International Tax Team at KPMG in Poland

Agnieszka Stępniewska
Consultant in the International Tax Team at KPMG in Poland

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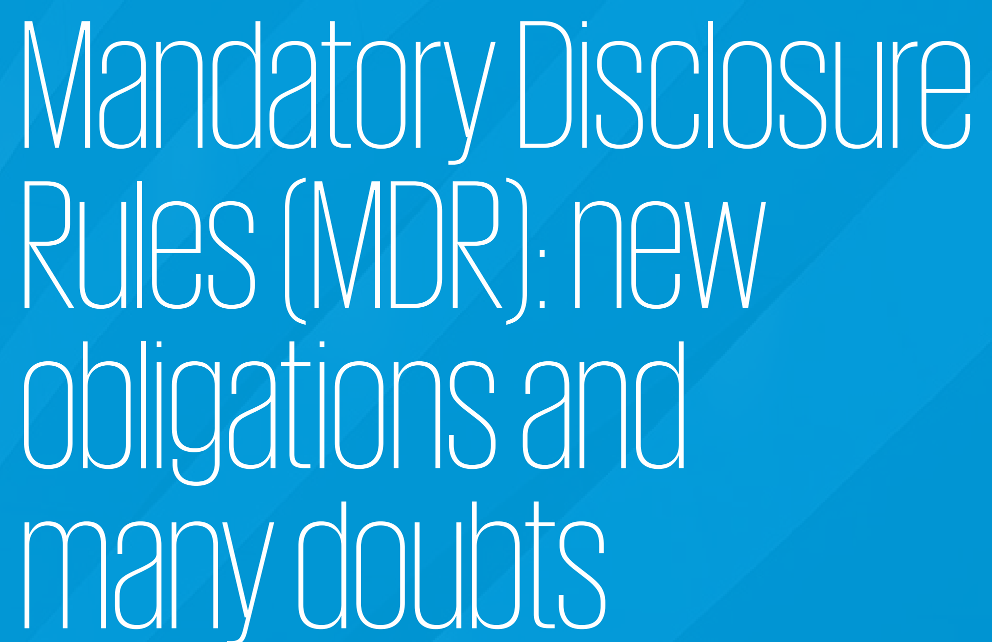

Mandatory Disclosure Rules (MDR): new obligations and many doubts

On 1 January 2019 new regulations introducing the reporting obligation under the Mandatory Disclosure Rules into the Polish tax system came into force. The new provisions raise many questions and, contrary to the initial statements of the Ministry of Finance, the new law will have very far-reaching implications for "ordinary" taxpayers.

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Does dividend constitute a reportable tax arrangement?

One issue is particularly problematic, namely the classification of dividend payments exceeding PLN 25m as tax arrangements. In the MDR Guidelines, the Ministry of Finance points out that *"an arrangement is, in principle, a step or a set of steps whose result is the obligation to make payment which meets the condition indicated in the hallmark rather than the very payments which are the consequence of the implementation of the arrangement"*. The Ministry of Finance's officials argue (unofficially) that the very adoption of a resolution on dividend payment constitutes an arrangement and, therefore, as long as the amount of dividend exceeds the aforementioned threshold, such an arrangement may be classified as a reportable tax arrangement. This conclusion is based on a literal interpretation of the term *arrangement*, which means any action where at least one party is the taxpayer or which impacts or may impact creation (or lack thereof) of the tax obligation.

There are, however, some arguments in support of the standpoint that the dividend payment as such (resulting from an appropriate resolution) should not be classified as a reportable tax arrangement. First of all, dividend payment by a company is an economic transaction inherently linked with an investment in that company. The rules for taxing dividend income are laid down in tax regulations. The dividend payment resulting from a shareholders resolution has no features of a sophisticated tax engineering. It is not easy to find reasonable arguments in support of an obligation to report such activities. Although the MDR Guidelines issued by the Ministry of Finance explain that the reporting obligation is not applicable only to aggressive tax planning, this primary purpose of the MDR provisions should be taken as an important indication when interpreting these rules.

Bearing in mind that that the MDR Guidelines explain that a stand-alone payment may have to be reported as an element of a reportable tax arrangement, then the logical consequence is that the dividend payment itself does not constitute a reportable tax arrangement. It is, however, impossible to make a dividend payment without adopting a resolution beforehand. Consequently, the idea that a dividend payment itself is not a reportable tax arrangement, whereas a simple technical action necessary to make such payment constitutes a tax arrangement indeed, does not seem to be reasonable. What is more, if such a notion is acknowledged, the consequences may be far more reaching and result in qualifying as a reportable tax arrangement any payment which, by its very nature, must be proceeded by some kind of technical action, such as transfer order in case of e.g. interest payment.

The standpoint presented by the Ministry of Finance is not justified also when taking into consideration the scope of information obtained when such "tax arrangements" are reported. In the case of a dividend payment, such a notification would include nothing more than details of the payment resolution and the amount of the payment. Consequently, the tax authorities would not obtain any additional information other than that contained in tax returns and forms filed by taxpayers under the current provisions (e.g. IFT-2R reports, CIT-10Z or CIT-6R returns).

The dividend payment resulting from a shareholders resolution has no features of a sophisticated tax engineering. It is not easy to find reasonable arguments in support of an obligation to report such activities.

It seems that the idea behind identifying hallmarks that take into account income / revenue earned by non-residents and / or payments subject to withholding tax in Poland (Article 86a paragraph 1 point 1 letters b) and c) of the Polish Tax Ordinance Act) was to identify restructuring, such as changes in the shareholding structure aimed at obtaining tax exempt dividend payments in the future, instead of having to report dividend payments made under the existing shareholding structures. Reporting dividend payments within the existing shareholding structures, which were not modified after the deadlines specified in the MDR provisions, may be considered as

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against the substance and intended purpose of the interim provisions (which aim at excluding arrangements implemented prior to specified dates from the reporting obligation). It should, therefore, be expected that the Ministry of Finance will provide a clear solution to this problem in the new version of the MDR Guidelines.

Overeager promoters: a problem for taxpayers

The above example shows that qualifying a particular arrangement as a reportable tax arrangement may often be problematic, even in the case of a relatively simple business transactions, such as dividend or interest payments.

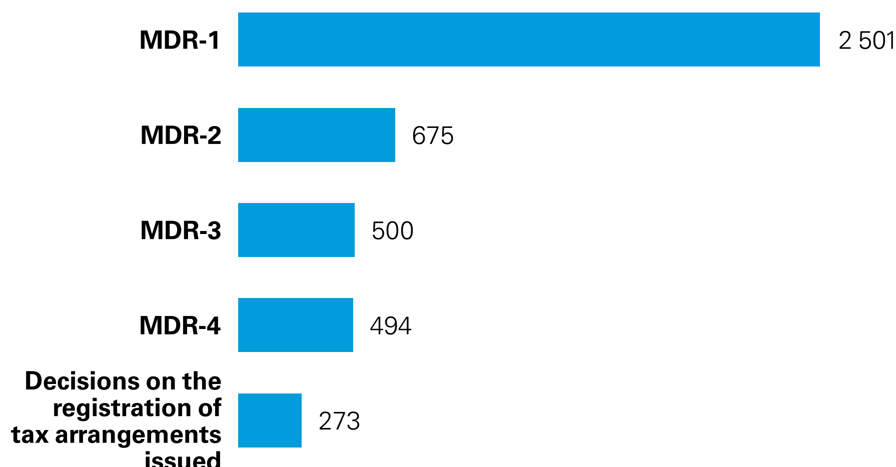
What is more, bearing in mind severe penalties for failure to comply with the reporting obligations, many businesses and *professionals* providing tax and legal advisory services, tend to take a cautious stand and unreasonably qualify many arrangements as reportable tax arrangements. This, in turn, means that the tax authorities are *overloaded* with reports on alleged tax arrangements, however, they are unable to examine all the reports within the deadline set by the MDR provisions, and, therefore, delays are growing (see below figure).

At the same, the promoters' activities may have far-reaching consequences for the taxpayers (users). Taxpayers who during the tax period (in case of VAT it will usually be a month) performed any action, being a part of a tax arrangement, or obtained a tax benefit as a result of such tax arrangement, must fulfil the reporting obligation by providing *information on the utilization of a tax arrangements* – MDR-3 form – to the tax authorities.

The aforementioned form, like all other MDR forms, must be submitted electronically (in the form of an XML file). In case of taxpayers, being legal persons, such XML file must be signed by all members of the management board and, additionally, sent to the tax authorities by one of its members (it is not possible to use a proxy for this particular reporting).

Many taxpayers may face a situation where a potential promoter incorrectly decided that the transaction, in which the client had been involved, constituted a reportable tax arrangement. If this is the case, there might be a doubt whether the user (taxpayer) should submit the information on the utilization of a tax arrangement (MDR-3 form). It seems that the user should be free to assess whether a particular arrangement indeed constitutes a reportable tax arrangement, and once it is decided that there is no reportable tax arrangement, the taxpayer should not be required to submit the aforementioned form. This conclusion is supported by the fact that the provisions requiring the user of a reportable tax arrangement to file the information on its utilization do not stipulate that such an information must be disclosed even if the user disagrees with the promoter's standpoint (such solution, however, is envisaged in the case of reporting the tax arrangement - Article 86c paragraph 2 of the Tax Ordinance Act). Secondly, if the user knowingly submits information on utilization of a tax arrangement, which, in the user's opinion, does not constitute a reportable tax arrangement, it could be viewed as making a false statement, whereas information on utilization of tax arrangement is submitted under penalty of perjury (Article 86j paragraph 7 of the Tax Ordinance Act).

Notwithstanding the above, taking into account the fact that the new provisions are unclear and there are no official guidelines issued by the Ministry of Finance regarding this issue whatsoever, the taxpayers (users) should exercise due care each time when assessing transaction which potentially may constitute a reportable tax arrangement.



Source: Information provided by the Ministry of Finance as of 19 August 2019

Michał Mrozik
Manager in the International Tax Team at KPMG in Poland

Natalia Stępień
Consultant in the International Tax Team at KPMG in Poland

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Limiting tax-deductible expenses of intangible services: the current trends in tax rulings and decided court cases

On January 1, 2018 the Parliament introduced Article 15e of the Polish Corporate Income Tax Act ("CIT Act"), which imposes limits on tax-deductible expenses incurred by Polish taxpayers on certain intangible rights and services for the benefit of related parties. Although they have been effective for over 18 months, introduced provisions continue to cause much controversy. This is triggered by both the lack of precision in the new provisions and the lack of clarity in their practical application that is based largely on pro-fiscal policy. The fact that nearly 900 individual tax rulings have already been issued on the application of the Article 15e of the CIT Act, combined with a number of cases pending before administrative courts, shows how serious the problem is. The official guidelines issued on April 23, 2018 by the Minister of Finance are of little help. The following article looks at the most important current trends in disputes between the taxpayers and the tax authorities over the application of the Article 15e of the CIT Act.

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Qualification of services based on the Polish Classification of Goods and Services ("PCGS")

One of the most frequent methods used by the Director of the Polish National Tax Information ("DNTI") when assessing whether particular expenses may be regarded as tax-deductible under the Article 15e of the CIT Act is to request applicants to specify PCGS codes for the services covered by taxpayers' enquiries made to DNTI. Such practice of the tax authorities should be assessed negatively. Requiring the purchaser of highly specialised and often comprehensive services from its group companies to specify PCGS code for service is, in fact, requiring it to do something that the purchaser is not statutorily required to do. In case of certain services, e.g. IT services, comprising various individual services, determining the PCGS code may be impossible, or the risk of a mistake (made by the taxpayer, of course) in the classification is very high. It may be the case that when taxpayer determines code of service, which is required in an application for an individual tax ruling, then even if the determination is approved by the tax authorities, the taxpayer cannot be sure that it will be protected by the tax ruling. It may also be the case that the taxpayer will not be able to rely on the tax ruling based on the PCGS codes determined by itself, as the tax ruling may only partially confirm the taxpayer's determination, and the invoices it receives from its related parties might be issued for the full service, instead of being divided into "sub-services".

A broad interpretation of tax-deductible services

One of the biggest points of controversy is the determination of certain IT services as cost limited services under the Article 15e of the CIT Act based on the PCGS classification. For example, taxpayer obtained tax ruling (dated 10 May 10, 2019, no. 0111-KDIB1-3.4010.40.2019.4.BM), where, when requested by DNTI, the taxpayer classified IT network management services as network management services (PCGS code 62.03.11.00). As result, the tax authorities determined that such

services were advisory services or management services. This practice leads to ridiculous situations, as the substance or nature of the service concerned no longer matters, and the tax-deductibility of the service is limited only because it is classified as falling within the scope of "management services" or "advisory services", which are listed within cost limited services.

There is also disagreement over the tax authorities' view that sales agency (intermediary) services fall within advertising, advisory or similar services, which are subject to cost-deductibility restrictions (tax ruling dated June 17, 2019, no. 0111-KDIB2-1.4010.136.2019.2.AR). In the tax authorities' classification of such expenses, which in many cases are crucial for certain distribution models (e.g. selling through network of foreign sales agents), it is surprising to note that DNTI does not understand that it is necessary to incur such agency expenses to be able to earn profits in such business models. Interestingly, if sales revenues are result of activities based on rights granted under licence, the tax authorities are virtually unanimous in accepting the fact that the licence fees incurred by the taxpayer are directly linked with the taxpayer's activities, with the exclusion of the limitations provided for in the Article 15e (under section 11 of such an Article). However, the tax authorities do not accept this exclusion in the case of agency (intermediary) services (tax ruling dated May 30, 2019, no. 0114-KDIP2-3.4010.97.2018.1.PS, repealed by the Judgement of the District Administrative Court in Warsaw of May 23, 2019, ref. no. III SA/Wa 1888/18). Equally, there can be no approval for DNTI' fairly common practice of ignoring the view established by case law regarding withholding tax cases as regards intangible services, or case law regarding the context of "similar services" (i.e. "services similar to eligible services").

Judgements of the administrative courts under the Article 15e – current trends

As the Article 15e of the CIT Act has been effective for over eighteen months and, in many tax rulings, the tax authorities have disagreed with taxpayers, numerous court cases dealing with these provisions have been issued.

Amongst cases considered by the administrative courts regarding certain types of expenses on group services, it is worth referring to few judgements concerning expenses which are quite frequently incurred by entities operating within groups of companies with centralised model of intra-group services.

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For example, in relation to IT services, District Administrative Court in Poznań repealed the tax authority's ruling and noted that the use of words such as "management" or "administration" in the name of service may not be decisive in classifying the service as one of the services listed in the Article 15e of the CIT Act (Judgement of the District Administrative Court in Poznań of March 13, 2019, ref. no. I SA/Po 991/18[1]).

There are also judgements which relate to purchasing (procurement) support services. However, there is no agreement among courts on this subject. Some of the judgments take the side of taxpayers by finding that such services are not subject to tax-deductibility restrictions (Judgement of the District Administrative Court in Poznań of February 6, 2019, ref. no. I SA/Po 900/18). However, there are also judgements which take an opposite side (Judgement of the District Administrative Court in Gliwice of April 10, 2019, ref. no. I SA/Gl 24/19).

There is no agreement among courts in the case of sales agency (intermediation) services (Judgement of the District Administrative Court in Kraków of November 14, 2018, ref. no. I SA/Kr 1006/18), favourable to taxpayers; versus Judgement of the District Administrative Court in Gliwice of July 4, 2019, ref. no. I SA/Gl 579/19).

Another interesting case law refers to special economic zones and the calculation of expense limits. In these cases, courts have held that the application of Article 7 section 3 subsection 1 of the CIT Act (which provides that tax-free revenue is not included in income calculation) means that when calculating costs for the purposes of Article 15e of the CIT Act, expenses on intangible services incurred as part of (assigned to) business activities carried out in special economic zones are not included (Judgement of the District Administrative Court in Wrocław of July 16, 2019, ref. no. I SA/Wr 356/19; Judgement of the District Administrative Court in Gdańsk of May 8, 2019, ref. no. I SA/Gd 439/19; Judgement of the District Administrative Court Gorzów Wielkopolski of January 16, 2019, ref. no. I SA/Go 521/18).

> As the Article 15e of the CIT Act has been effective for over eighteen months and, in many tax rulings, the tax authorities have disagreed with taxpayers, numerous court cases dealing with these provisions have been issued.

Conclusion

As practice shows the application of the provisions that limit tax-deductibility of expenses incurred on services purchased from related parties raises many questions and carries the risk of questioning taxpayers' settlements by the tax authorities. Such situation is not helped by DNTI's tax rulings, mostly following pro-fiscal policy and those based on non-exhaustive list of services subject to tax-deductibility limitations, which leads to long-lasting court cases. Moreover, there are not any judgements of the Supreme Administrative Court, which adds the discomfort for the taxpayers faced with two options: to continue struggling to prove they are correct or to follow "safe" strategy consisting in tax payment and subsequently claiming it back. It is important to note at this point that the only certain method for the taxpayers to secure their jeopardised expenses is the APA procedure. However, bearing in mind the draft law on the resolution of double taxation disputes and on advance pricing agreements addressed on August 29, 2019 to parliament's first reading, which also proposes changes to the CIT Act, in order to secure cost deductibility for 2018, the APA applications should be filed with the Head of the National Tax Administration by the end of 2019. It should be noted that the latest version of the draft law contains no provisions on simplified pricing agreements, therefore it is not very likely that such agreements will come into force in the nearest future.

Tomasz Lewicki
Senior Manager in the International Tax Team at KPMG in Poland

Przemysław Sołtysiak
Senior Consultant in the International Tax Team at KPMG in Poland

[1] This and the other judgments referred to in this article were not final at the time of writing.

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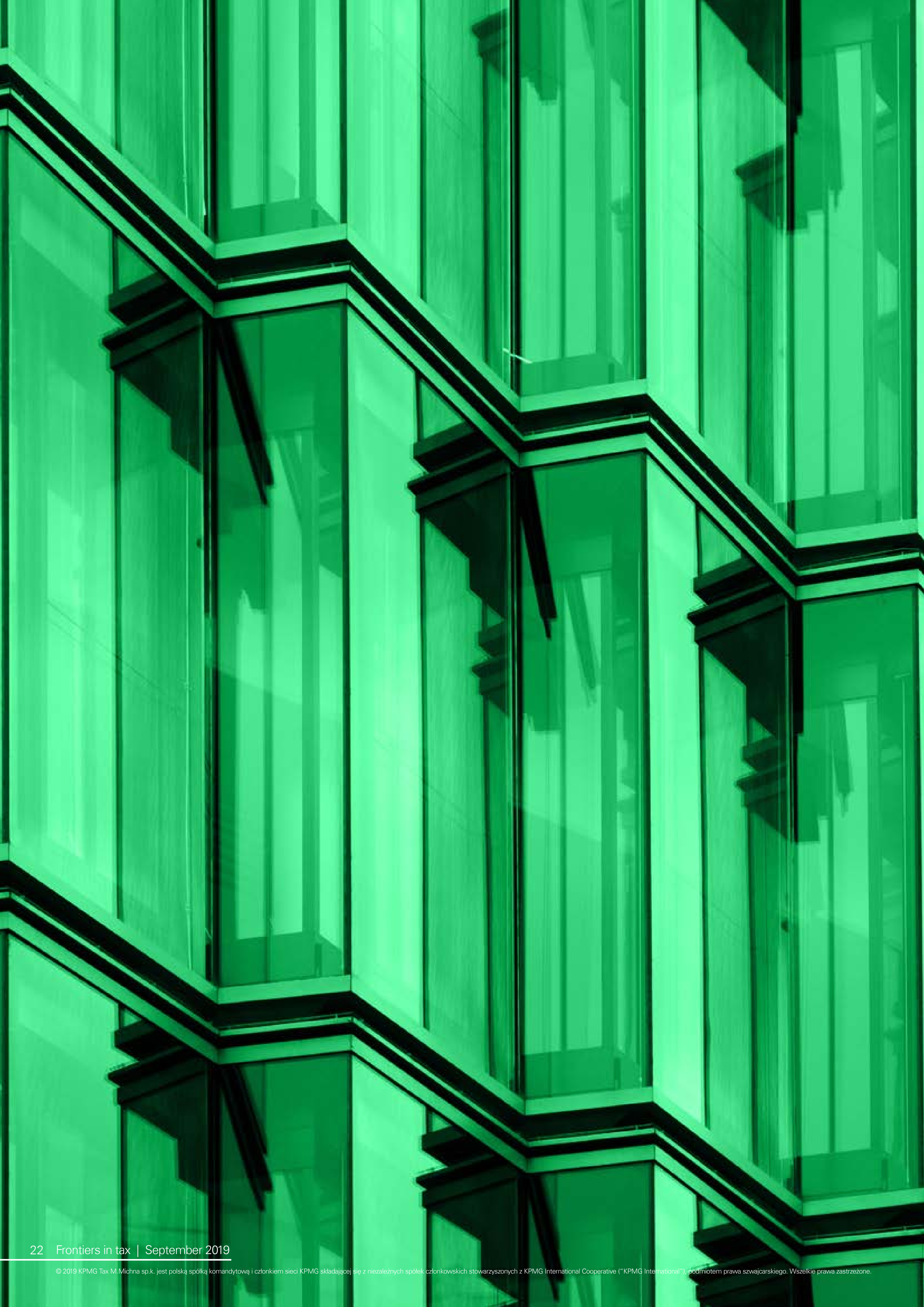

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The MLI Convention: selected aspects two years from the signing

The MLI Convention is a milestone in the process of implementing international measures aimed at preventing harmful tax practices. As the convention has been in force for more than two years, it is worth looking into some of its implications for taxpayers, especially because it has only recently become effective for cross-border tax settlements with certain countries.

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General provisions

The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("MLI" or "Convention") was signed in Paris on 7 June 2017.

It is an important document for Polish taxpayers earning foreign sourced income (as well as for non-residents earning Polish sourced income), as it significantly affects the scope of application of Polish DTTs concluded with other countries. On the practical side, MLI amends the rules set out in DTTs without technical modification of their provisions (meaning that the rules contained in MLI may be considered as so called *"meta-rules"*, which must be applied to the provisions of specific DTTs to "decode" the actual meaning of rules provided therein and at the same time take precedence over the DTT provisions).

There are two types of provisions in the Convention. The obligatory provisions, which constitute the so called minimal-standard, and the optional provisions. An example of the former are provisions aimed at preventing the abuse of DTTs by depriving the entities whose principal purpose was to obtain benefits stemming from the DTTs from an access to such benefits. The optional provisions of the Convention will amend only those DTTs where both contracting parties have mutually notified applicability of given provisions to the DTT.

Applicability of MLI to its parties

In order to apply MLI's provisions to given DTT, the parties to the DTT must:

- sign the Convention and
- deposit the instrument of ratification containing list of reservations and notifications ("Notification" or "Ratification") regarding given DTT. In other words, each state in its Notification should specify which provisions of the Convention should be applicable in relation to the other party to MLI (at the same time, being the other party to given DTT).

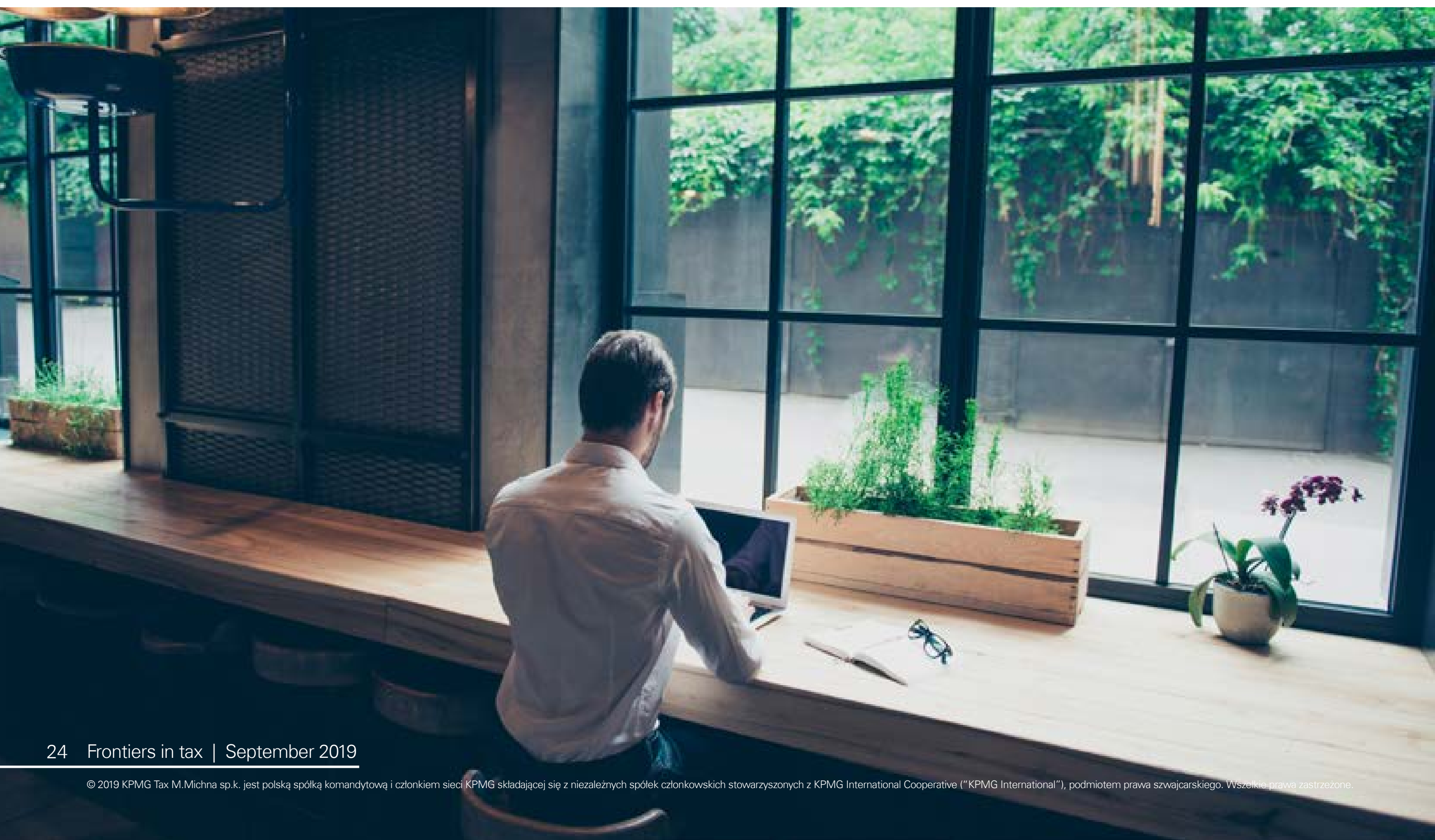
It is worth mentioning that the effective date of entry into force of the Convention's provisions on withholding tax, e.g. on dividend payments, is different from such date applicable to other types of taxes. In practice, such other taxes are primarily corporate income tax or personal income tax on income (revenue) not being taxed at source. Currently, in the case of withholding tax, the Convention already applies to Poland's DTTs, i.a., with Australia, Austria, France, Israel, Japan, Slovakia, Slovenia and the UK, whereas with respect to other taxes with Austria and Slovenia.

On the practical side, Poland's tax treaties concluded with some economically significant countries will not be modified by MLI at all. This refers to e.g. DTTs with the Netherlands, Germany or the United States.

Practical implications of certain provisions of the Convention for taxpayers

a. Dual resident taxpayers

If an entrepreneur may be regarded as tax resident by more than one country, both countries will need to reach an agreement on the entrepreneur's tax residency. Previously, in case of disagreement over the tax residency, the rule was that the resident's place of effective management or the place of registered seat in particular state was decisive (so called "tie-breaker" rule). Under the MLI provisions, during the process of reaching of an agreement, the parties must take into account, among other things, the place of effective management and / or the



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place of registered seat. If there is no agreement, the taxpayer will not be able to benefit from the given DTT.

b. Change of the method of elimination of double taxation

As rule, there are two methods of elimination of double taxation in the Poland's DTTs, namely the exemption with progression method and the tax credit method.

Poland has opted for so called 'option C' provided for in the Convention which assumes replacing the exemption with progression method with the tax credit method.

c. Withholding tax on dividend payments

To benefit from the reduced withholding tax rate or WHT exemption provided for in DTT, taxpayer must have held shares, voting rights or similar interests in dividend-paying company for at least 365 days. In its Notification, Poland provided list of the DTTs in which these provisions will be incorporated. For example, as of 1 January 2020, this principle will apply to Poland's relations with France. The list does not include DTTs which already provide for different holding period as requirement for preferential tax treatment.

d. Real estate clause

The real estate clause in DTT serves to modify the rules for taxing the alienation of shares in company whose assets consist mainly of real estate. This clause is departure from the general rule contained in the OECD Model Convention which states that the sale of shares is subject to tax in the seller's country of residence. In the case of DTTs containing this clause, MLI states that for real estate clause to apply it will be sufficient if - within 365-day period before the transaction - given company qualifies as real estate company even once (under the Polish domestic provisions the general rule was to test the real estate company status on the last day of the month preceding the transaction).

Additionally, MLI has expanded the meaning of the term "income from alienation of shares" so as now it should include also income earned from alienation of other similar rights in companies or other entities (e.g. interests in partnerships).

It is important to add at this point that regardless of the above, bilateral negotiations between Poland and the Netherlands are underway to renegotiate the respective DTT in order to include the real estate clause (as stipulated above, for now DTT between Poland and the Netherlands is not covered by the provisions of MLI).

e. Permanent establishment

Although one of the objectives of the Convention is to prevent application of artificial measures leading to non-recognition of permanent establishment in given state, Poland did not decide to adopt the MLI provisions governing this matter. At the same time, Polish government expressed its intent to cover this issue in bilateral negotiations of particular DTTs.

> Following the adoption of the Convention, the provisions of Poland's DTTs have been (and will continue to be) modified. The Convention is being notified by an increasing number of states, which means that the scope of its applicability is growing.

Conclusions

Following the adoption of the Convention, the provisions of Poland's DTTs have been (and will continue to be) modified. The Convention is being notified by an increasing number of states, which means that the scope of its applicability is growing.

Given the above, each transaction that may have certain cross-border tax implications should be examined carefully in the light of potential impact of MLI on its classification and treatment under tax law.

Mariusz Kułagowski
Manager in the International Tax Team at KPMG in Poland

Piotr Prandecki
Consultant in the International Tax Team at KPMG in Poland

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Calculation of the limit of debt financing costs under Article 15c of the CIT Act in practice: what difference do the most recent judgments by district administrative courts make?

Anyone who has read Article 15c of the CIT Act that has been effective since 1 January 2018, and which implements the ATAD[1] provisions, is aware that the simplicity of its wording resembles the description of the degree of a consanguinity with a distant cousin. Although more than 18 months have passed since the amended provision became law, questions continue to be asked about its application as regards determining the so-called safe harbour limit, i.e. the upper limit of debt financing costs that can be treated as fully tax-deductible. The controversies between taxpayers and the Director of the Polish National Tax Information over this matter has led to disputes before district administrative courts, which finally take the side of taxpayers.

[1] Council Directive (EU) 2016/1164 of 12 July 2016

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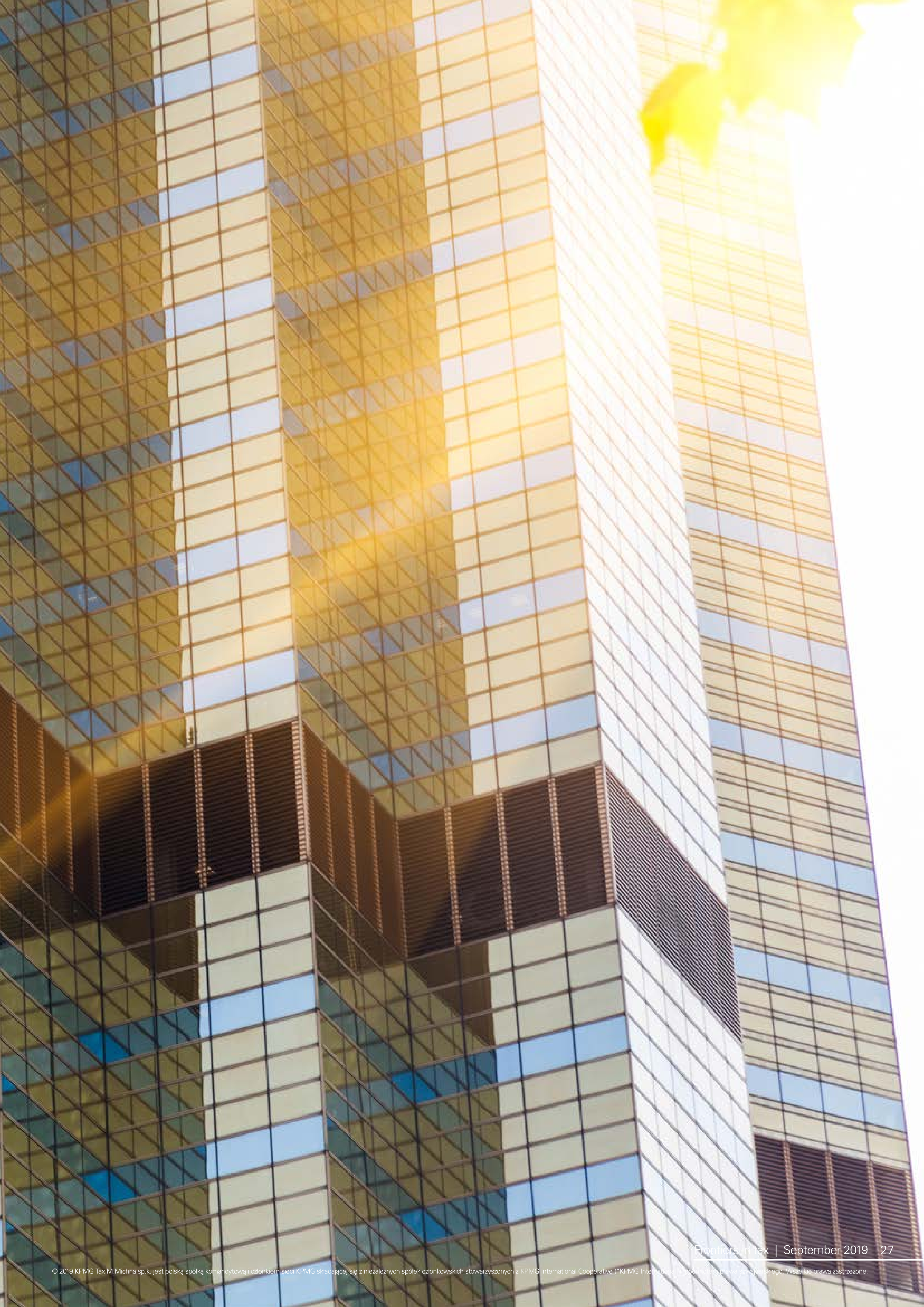

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Two approaches

The approach of the Director of the Polish National Tax Information ("NTI") is that the amount by which debt financing costs exceed interest income may be recognised as tax-deductible costs in a given tax year up to the higher of:

a. PLN 3 million, in accordance with Article 15c(14)(1) of the CIT Act or

b. 30% of EBITDA, in accordance with Article 15c(1) of the CIT Act

(the expression "30% EBITDA" will be used for simplicity, but should be understood to mean 30% of "tax EBITDA", calculated in accordance with Article 15c(1) of the CIT Act).

However, district administrative courts tend to agree with the approach adopted by taxpayers, i.e. in accordance with the literal rule of interpretation of Article 15c of the CIT Act, which reads that:

a. the limitation of the tax-deductibility of debt financing costs does not apply where such surplus does not exceed PLN 3 million;

b. if the amount by which debt financing costs exceed interest income is higher than PLN 3 million, then the tax-deductible costs that may be recognised in a tax year must not exceed PLN 3 million plus 30% EBITDA.

This is an important difference, because the view held by courts allows taxpayers to recognise in a given tax year as much as PLN 3 million more in debt financing costs as tax-deductible expenses, as compared to NTI Director's approach presented in tax rulings, which means over half a million zloty less corporate income tax to be paid by the taxpayer.

But first – the surplus

Before looking into the most problematic aspect of calculating the limit of debt financing costs for tax-deductibility purposes, the first question to be asked is whether the amount of the tax-deductible debt financing costs exceeds the interest income in a given tax year. It is the amount of the surplus, not the amount of debt financing costs as such, that is the basis for excluding debt financing costs from tax-deductible expenses.

In practice, if the tax EBITDA is negative and debt financing costs exceed the PLN 3 million limit many times, it does not mean that any amount of such costs will be excluded from tax-deductible costs in the tax year concerned. The starting point for the applicability of the limitation provided for in Article 15c of the CIT Act is the amount of the surplus of the debt financing costs over interest income. For example, if debt financing costs amount to PLN 10 million and interest income is PLN 12 million, there will be no excess and, therefore, the limitation will not apply in that case.

An entity that continues to incur debt financing costs needs to monitor its 30% EBITDA on an ongoing basis, if its debt financing costs exceed its interest income at any time during a tax year and, as a result, the entity needs a basis for calculating the part of its debt financing costs which must not be recognised as tax-deductible costs. However, 30% EBITDA is not the only basis for limiting the tax-deductibility of debt financing costs, as the literal interpretation of the relevant provisions of the CIT Act indicates that the limit does not apply to that part the excess of debt financing costs over interest income which does not exceed PLN 3 million. And it is this PLN 3 million limit that is where the shoe pinches.

The dispute over PLN 3 million

In an individual tax ruling dated 16 April 2019[2], the NTI Director concluded that the cost limitation does not apply to

The starting point for the applicability of the limitation provided for in Article 15c of the CIT Act is the amount of the surplus of the debt financing costs over interest income. For example, if debt financing costs amount to PLN 10 million and interest income is PLN 12 million, there will be no excess and, therefore, the limitation will not apply in that case.

[2] The NTI Director's individual tax ruling of 16 April 2019, no. 0111-KDIB2-3.4010.90.2019.1.LG

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an excess of up to PLN 3 million. But if 30% EBITDA is, for example, PLN 4.5 million, then any excess of the debt financing costs over interest income as compared to 30% EBITDA must be excluded from tax deductible costs. If, however, 30% EBITDA is lower than PLN 3 million, the surplus of the debt financing costs over interest income may be recognised as tax-deductible cost up to PLN 3 million.

The NTI Director stressed that the excess of debt financing costs must not be reduced by PLN 3 million, and the amount of PLN 3 million may only increase the limit calculated using the specified formula, i.e. it may be the upper limit if 30% EBITDA is lower than PLN 3 million. This approach, disadvantageous to taxpayers, had already been presented in individual interpretations issued in 2018.[3] In such interpretation, the taxpayer tried to argue that the purpose of Article 15c(14)(1) of the CIT Act was to apply the limit to the surplus of the debt financing costs over PLN 3 million. The taxpayer's opinion is that this provision does mean that the surplus of the debt financing costs up to PLN 3 million should not be included in the calculation of the limit of debt financing costs for tax-deductibility purposes. However, the NTI Director seems unyielding.

The view of the district administrative courts

This negative trend in the NTI Director's tax rulings has been weakened by the recent judgements of the district administrative courts, which take the side of taxpayers. The first judgment in support of taxpayers' arguments was issued by the District Administrative Court in Wrocław on 13 November 2018, ref. no. I SA/Wr 833/18[4], which cancelled the negative tax ruling of the NTI Director. Subsequent court judgments also challenged tax authorities' tax rulings and held that it is the excess of debt financing costs over PLN 3 million plus 30% EBITDA that must not be recognised as tax-deductible expenses.

In its most recent judgment of 6 June 2019 (ref. no. I SA/Rz 253/19), the District Administrative Court in Rzeszów held that the meaning of Article 15c(14) of the CIT Act is that the tax-deductibility limit of debt financing costs did not apply to such costs if the surplus did not exceed the amount of PLN 3 million. This limit applies only to the surplus of the debt financing costs over PLN 3 million. The court concluded that a different approach was not supported by the literal, functional, systemic or historical interpretation of that provision.

It is stressed in the judgments that the NTI Director may not rely on the ATAD provisions if the consequences of its application by the Director are disadvantageous to taxpayers and against the provisions of the Directive. It is especially important given the fact that the limit indicated in Directive is higher than implemented to Polish law and amount up to EUR 3 million.

Patience is necessary

However, the above judgments are not final. The final decision will be taken by the Supreme Administrative Court, and it will take some time.

The application of Article 15c of the CIT Act as it is currently drafted is not easy for taxpayers. Starting from the calculation of the excess of debt financing costs over interest income, moving on to 30% EBITDA (whose calculation is different from that of the economic ratio), all the way to the calculation of the limit of debt financing costs that may be fully recognised as tax-deductible costs. Things are not made easier by tax authorities or district administrative courts, with their opposing opinions.

However, bearing in mind the literal rule of interpretation of the analysed provisions and the most recent judgments of district administrative courts, there is some hope that the Supreme Administrative Court will accept taxpayers' advantageous interpretation of Article 15c of the CIT Act.

Krystyna Szlęzak
Senior Manager in the International Tax Team at KPMG in Poland

Joanna Wójcik
Consultant in the International Tax Team at KPMG in Poland

[3] Cf. the NTI Director's individual tax ruling of 2 July 2018, no. 0114-KDIP2-2.4010.226.2018.1.AM

[4] Cf. judgments issued by the same court on 4 April 2019 (ref. no. I SA/Wr 14/19 and I SA/Wr 7/19), the District Administrative Court's in Poznań judgment of 12 December 2018 (ref. no. I SA/Po 699/18), and the District Administrative Court's in Gdańsk judgment of 8 May 2019 (ref. no. I SA/Gd 287/19)

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Transfer Pricing adjustments in multinational enterprises: yet another challenge for taxpayers

In recent years, unfavourable decisions issued by tax authorities and lack of uniform approach in the judgments of administrative courts increased uncertainty around the tax implications of transfer pricing adjustments. New regulations that have been effective as of 2019, envisioned and designed as a solution to this growing uncertainty, might now be a source of new challenges for taxpayers.

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Scope of transfer pricing adjustments

Transfer pricing adjustments (profitability adjustments) are applied by multinationals and groups of companies to adjust the transfer prices in transactions between related entities so that they are at arm's length level. Such adjustments are usually based on analyses of comparative data (benchmarking analysis) performed.

Typically, taxpayers undertake adjustments to transfer prices after the end of their tax year, when they have knowledge of any circumstances that might have affected the profitability of their intra-group transactions during the given year. Such circumstances may include exchange rate fluctuations or the actual cost of the transaction (if, for example, the cost was only estimated or assumed (cost budgeting) during the year.

Although the adjustment mechanism is commonly used by groups of companies, and the possibility of making such adjustments is indicated in the OECD Guidelines (i.e. compensating adjustment), the rules governing the recognition of such adjustments for CIT purposes and determining the moment of recognition had not became part of the Corporate Income Tax Act until the beginning of 2019.

The uncertainty of the tax implications resulting from application of this mechanism in previous years will affect taxpayers for quite some time, even after implementation of the new rules.

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Approaches adopted by Polish tax authorities and administrative courts

Depending on the economic effect ("direction") of the TP adjustment (i.e. either 'plus' or 'minus'), the final amount of corporate income tax liability may be either increased or reduced as a result of increasing or reducing the taxable revenue or costs.

As transfer pricing adjustments are made typically after the end of the tax year, taxpayers may document such adjustments in a variety of ways and different approaches to recognise them in their accounting books. A transfer pricing adjustment can be recognized in the books of the financial year, which it relates to - both through posting a reserve (accrual) as well as posting the document itself, which may still be issued in the year, to which it refers, or after year-end.

All such circumstances regarding the methods of recognizing transfer pricing adjustments in accounting books and their documentation had to be considered by taxpayers when determining the moment of recognition of these adjustments for income tax purposes. Before the new regulation was introduced, the tax implications of transfer pricing

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adjustments were determined by general rules contained in the Corporate Income Tax Act as regards both the right to recognise adjustments for CIT purposes as such and the moment of their recognition (under provisions on corrections of costs or revenue, or under the general rules of the Corporate Income Tax Act).

Under the general rules of the Corporate Income Tax Act, tax authorities have, in recent years, developed an approach unfavourable for taxpayers in this respect especially in the case of transfer pricing adjustments documented with a single document, where adjustments are made with respect to a particular period, and not to specified with particular transactions.

In relation to such documented transfer pricing adjustments, where they led to an increase in the tax base, the comments of the tax authorities were limited to the issue of the correct moment of their recognition for CIT purposes. In this regard, the tax authorities departed from the provisions on the moment of recognition of corrective documents and indicated that such TP adjustment should be recognized at the time the taxpayer receives payment.

Where a transfer price adjustment resulted in reduction of the tax base, tax authorities stated that since it was impossible to link the adjustment to a particular transaction, there was no causal link between the adjustment and the taxpayer's revenue and, as such, the adjustment must not be recognised as a cost for CIT purposes.

According to tax authorities, an exception to the above may be applied in situations where a TP adjustment is reflected in an APA (advance pricing agreement).

The controversy over whenever transfer pricing adjustments may be recognised for tax purposes is also affecting taxpayers operating in special economic zones. For such taxpayers, the tax authorities' approach was that the revenues from transfer pricing adjustments should not be recognised as tax exempt revenues since such adjustments are not expressly specified in the permit to operate in a special economic zone.

The approach adopted by tax authorities in individual tax rulings has, to some extent, been corrected by administrative courts finding that it is not acceptable that invoices documenting transfer price adjustments should be regarded, depending on the tax implications, as linked with the taxpayer's business activities (the 'plus' adjustments) or without such a causal link (the 'minus' adjustments).

This approach, however, is not presented consistently in Polish administrative courts' judgements, as some recent judgments have shared the view of tax authorities. For example, the District Administrative Court in Poznań ('*Wojewódzki Sąd Administracyjny w Poznaniu*') expressed in its judgment at the end of 2018 that '*the purpose of incurring a cost to adjust operating margin down a level previously adopted is not to maintain or secure a source of revenue, but only to adjust the margin to a previously agreed level. Such a cost cannot be linked with any potential revenue*.'

It is worth stressing that the view adopted by tax authorities has failed to consider the general purpose of making transfer pricing adjustments, i.e. the statutory tax-law requirement that transactions with related parties must be transactions of arm's length nature and following the arm's length profitability requirement. In fact, tax authorities have only interpreted the general rules of the Corporate Income Tax Act regarding the tax-deductibility of costs.

The new regulation

At the beginning of 2019, the Corporate Income Tax Act has been amended to include provisions regarding transfer pricing adjustments. These provisions allow such adjustments to be recognised in the year to which they relate, even if they are 'minus' adjustments, but only if all the requirements set out in the Corporate Income Tax Act are met. These include, in particular, the obligation to specify the circumstances justifying such adjustments for corporate tax purposes, e.g. changes of material circumstances affecting the terms agreed during the year and having to rely on historical data for transfer price calculations because actual data becomes available at the end of the tax year.

The new provisions also require taxpayers to comply with new administrative obligations, including, in particular, the obligation to obtain, from the other party in a transaction, a statement confirming that the other party has made a mirroring transfer price adjustment.

With the new regulation imposing many new obligations on taxpayers and with the controversy over the recognition of transfer pricing adjustments in previous years, taxpayers are set to face new transfer pricing adjustment challenges which, in some cases, may be resolved only on the basis of international mutual agreement procedure between the tax authorities in different countries.

Katarzyna Szymańska
Manager in the International Tax Team at KPMG in Poland

Maciej Preiss
Consultant in the International Tax Team at KPMG in Poland

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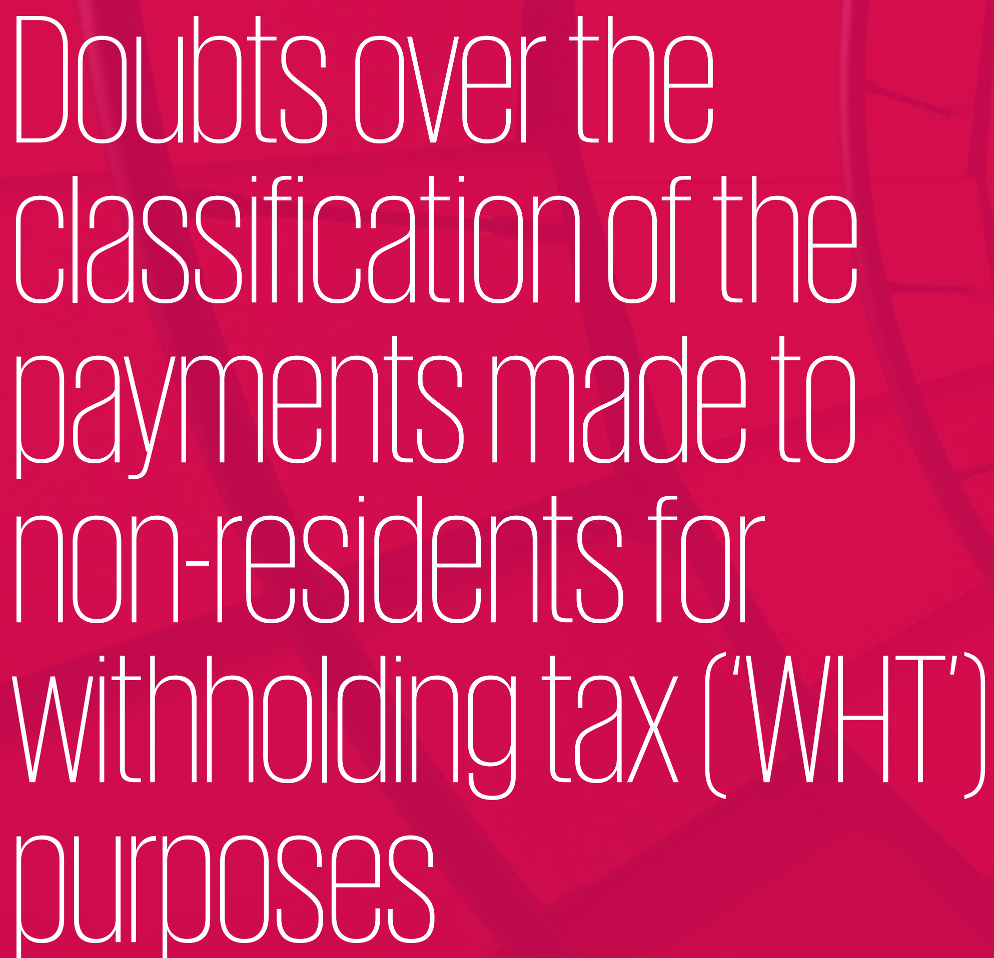

Doubts over the classification of the payments made to non-residents for withholding tax ('WHT') purposes

In 2019 WHT has been one of the most frequently discussed topics among the entrepreneurs making payments to the foreign contractors.

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The amended definition of *beneficial owner*, introduction of the obligation to exercise due care when verifying conditions for the application of the preferential WHT rates or, finally, the envisaged entry of new mechanism for WHT collection as of 1 January 2020 mean that the entities making such payments are required to review their methodologies in respect of WHT. This is even more important given the sanctions for incorrect WHT settlements, including penalty interest, the additional tax obligation or penalties imposed under the Criminal Tax Code. The first step required to settle WHT correctly is to identify all payments to be subject to WHT under Polish domestic law. The question and doubts around proper classification of a given payment for WHT purposes is not new, what may be demonstrated by the number of individual tax rulings issued by the Ministry of Finance.

> As part of their international business transactions, Polish taxpayers often make payments to foreign recipients for rental of shipping containers, pallets and other facilities for storage or transportation of products.

Insurance as a service of similar nature to a guarantee

It is a common business practice to acquire insurance policies either directly from a foreign insurance company or an agent (intermediary) or from a Group entity which concludes an insurance policy with the insurer at the central level on behalf of and for related companies and then recharges its costs.

Almost until the end of 2016, tax authorities did not recognize similarities between an insurance and a guarantee to such an extent which would lead to a conclusion that insurance might be treated as services of similar nature and thus subject to WHT (cf. the tax ruling of Tax Chamber in Katowice, dated on 5 October 2015, no. IBPB-1-3/4510-385/15/AW; the tax ruling of Tax Chamber in Poznań dated on 8 March 2013, no. ILPB4/423-433/12-2/MC).

However, as it appears from the currently forming line of interpretation, insurance is regarded as being of similar nature to a guarantee, thus subject to WHT under the CIT Act (e.g. the tax ruling of NTI Director dated on 15 June 2018, no. 0114-KDIP2-1.4010.164.2018.1.PW, the judgement of Administrative Court in Rzeszow dated on 11 April 2017, ref. no. I SA/Rz 119/17 (final, no written justification available). According to that approach, insurance service in terms of purpose and function is the same as a guarantee service, as the insurer somehow guarantees that the case defined in the insurance contract it will perform a certain service (the payment of compensation will occur).

In addition to many doubts as to whether insurance actually meets the criteria for being considered as similar to guarantee the question also arises as to whether the intention of the rational legislator was to impose withholding tax on insurance services. In the case of article 15e(1) of the CIT Act, which applies from 1 January 2018 and concerns the limitation of deductibility of expenses related to some services, insurance is expressly listed in this Article. It is worth mentioning that the wording of article 15e(1)(1) is analogous to the wording of article 21(1)(2a) of the CIT Act and the catalogue of listed services in both articles is very similar.

Hosting services

As part of their businesses, some taxpayers acquire hosting services in order to have specific volume of a computer server's storage capacity at their disposal, to store their databases, software etc.

In order for payments for such a service being properly classified for withholding tax purposes, a comprehensive assessment of the nature and scope of service is necessary. If the service involves only data storage, without any act of transforming of the input data to obtain the output data in a different, specified format, then - according to the tax authorities - such a service should not be considered as data processing.

However, there are numerous doubts concerning the classification of a server as an industrial equipment. For example, the tax authorities seem to interpret the term of an industrial equipment very broadly as they understand the word *industrial* as indicating that the equipment is to be used commercially in production,

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trading or scientific activities, i.e. regardless of its use in industrial production (the tax ruling of NTI Director from 8 April 2019, no.: 0114-KDIP2-1.4010.23.2019.1.PW, the tax ruling of the NTI Director from 14 February 2019, no.: 0114-KDIP2-1.4010.534.2018.1.AJ). However, a different understanding is presented by some administrative courts in their judgments, where the term *industrial equipment* is understood as equipment which is used for mass production purposes e.g. the judgment of Administrative Court from 6 February 2019, ref.no. I SA/Go 537/18 (not final), the judgement of the Supreme Administrative Court from 10 April 2019, ref.no. II FSK 1120/17 (written justification is not available yet). Thus, a conclusion may be drawn that the definition of industrial equipment will not be fulfilled in the case of a server rental if it is not associated with a strictly industrial device involved in the production process.

Fees for the rental of storage containers, shipping containers and pallets

As part of their international business transactions, Polish taxpayers often make payments to foreign recipients for rental of shipping containers, pallets and other facilities for storage or transportation of products.

Unfortunately, also here the differences in the understanding of the term *industrial equipment* do not help to correctly classify them for WHT purposes. For example, a shipping container that is used as storage space for tools or by workers to protect themselves from rain will not be considered as industrial equipment (e.g. the Supreme Administrative Court's judgment dated on 5 June 2018, ref.no. II FSK 1477/16). However, containers designed to be used for transportation and storage purposes meet the definition of industrial equipment (e.g. the Supreme Administrative Court's judgment dated on 24 August 2018, ref.no. II FSK 2151/16). In turn, some tax authorities define an industrial equipment by focusing more on the set of mechanism that constitutes such a device and consider that if a rented container used to provide appropriate storage and/or transport does not contain any mechanical and/ or electrical components, e.g. such as a gearbox, then the container will not be classified as industrial equipment (e.g. the tax ruling of NTI Director dated on 16 June 2019, no. 0111-KDIB1-1.4010.200.2019.2.NL).

Conclusions

As the above examples show, the first step in the process leading to correct withholding tax settlements may be very difficult on the practical side. The situation is even more difficult due to changing or inconsistent interpretations of specific terms by the tax authorities. To make sure that the withholding tax settlements are correct, taxpayers have no choice but to identify all the uncertain areas and prepare relevant arguments to support their approach (taking into account previous individual tax rulings and court judgments) or to apply for an individual tax ruling, even if the dispute with tax authorities over the classification of payments may need to be resolved by an administrative court.

Renata Pilarska
Senior Manager in the International Tax Team at KPMG in Poland

Anna Dziedzic
Supervisor in the International Tax Team at KPMG in Poland

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KPMG Publications

The KPMG analyses and reports are an output of our expertise and experience.
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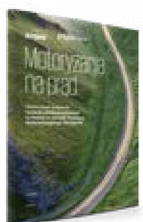
25 years of Polish-French partnership. French investment projects in Poland

KMPG's report headed "25 Years of Polish-French Partnership. French Investment Projects in Poland" was prepared to mark the 25th anniversary of CCIFP (the French-Polish Chamber of Commerce). The report is the second edition of a publication that provides detailed information on French companies' investment projects and development plans. The report is based on a survey of 40 companies (CCIFP members) with majority interests in them held by French investors, but with operations in Poland.

Retail Trends 2019. Global Consumer & Retail

This report looks at the main trends affecting the retail sector. Emphasis is placed on how certain retailers take on challenges and remain competitive.



Electricity-powered vehicles. Evaluation of the Support for the Development of E-Mobility as part of the Low-Emission Transport Fund

The report headed "Electricity-Powered Vehicles. Evaluation of the Support for the Development of E-Mobility as part of the Low-Emission Transport Fund" is a result of a study based on online surveys and telephone interviews among PSPA (Polish Alternative Fuels Association) members and other companies potentially interested in the support described in the draft version of the Low-Emission Transport Fund regulation. The study included 84 organisations.

The future of HR 2019: In the Know or in the No. The gulf between action and inertia

KPMG International's report headed "The future of HR 2019: In the Know or in the No. The gulf between action and inertia" provides information on the future of HR in the face of digital transformation. The report is based on a study carried out in July and August 2018 among more than 1,200 HR managers in 64 countries. About half of the respondents represent organisations that employ more than 5,000 people.

A quarterly report by PZPM (Polish Automotive Industry Association) and KPMG in Poland, headed "The Automotive Industry. Q2/2019 Edition"

Report is a part of a series of quarterly reports on current trends in Poland's automotive industry seen as the automotive market, industrial manufacturing and automotive financial services. The analysis in the report is based on the latest vehicle registration, market and other statistics. The report is a joint initiative of the Polish Automotive Industry Association and KPMG in Poland.

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Contact

Michał Niżnik

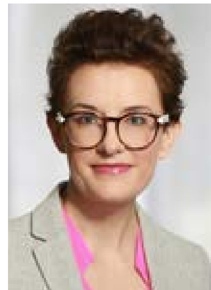
Tax Partner
International Tax Team
at KPMG in Poland
E: mniznik@kpmg.pl

Marcin Rudnicki

Tax Partner
International Tax Team
at KPMG in Poland
E: mrudnicki@kpmg.pl

Karolina Dębska

Director
International Tax Team
at KPMG in Poland
E: kdebska@kpmg.pl



Sabina Sampławska

Director
International Tax Team
at KPMG in Poland
E: ssamplawska@kpmg.pl

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00-189 Warszawa	31-323 Kraków	60-829 Poznań	50-382 Wrocław	80-219 Gdańsk	40-028 Katowice	90-127 Łódź
T: +48 22 528 11 00	**T:** +48 12 424 94 00	**T:** +48 61 845 46 00	**T:** +48 71 370 49 00	**T:** +48 58 772 95 00	**T:** +48 32 778 88 00	**T:** +48 42 232 77 00
F: +48 22 528 10 09	**F:** +48 12 424 94 01	**F:** +48 61 845 46 01	**F:** +48 71 370 49 01	**F:** +48 58 772 95 01	**F:** +48 32 778 88 10	**F:** +48 42 232 77 01
E: kpmg@kpmg.pl	**E:** krakow@kpmg.pl	**E:** poznan@kpmg.pl	**E:** wroclaw@kpmg.pl	**E:** gdansk@kpmg.pl	**E:** katowice@kpmg.pl	**E:** lodz@kpmg.pl

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