

# Tax avoidance provision

This briefing discusses the Act Amending the Tax Ordinance Act<sup>1</sup> and Certain Other Acts, adopted by the Parliament on 19 May 2016 (the "Amendment") and introducing, inter alia, provisions concerning tax anti-avoidance (the "Provision"). The Amendment also establishes a new regulatory agency, the Tax Avoidance Board, created as an authority to issue opinions on matters of tax avoidance. In addition, the Amendment, among other things, extends the list of decisions which can be issued by the minister in charge of public finance (the "Minister of Finance") to include so-called "security opinions", which provide taxpayers with security against a relevant action being deemed an act of tax avoidance (in a form similar to current individual tax rulings).

The Amendment will come into force 30 days after publication (i.e. most likely at the end of June 2016).

## Key assumptions of the Amendment

- The Provision covers "artificial" acts undertaken solely or primarily for the purpose of obtaining a tax advantage.
- If the Provision is applied, the tax consequence of a given act will be determined: (i) based on the actual state of affairs that would have occurred, had an appropriate act been effected (instead of the artificial act), or (ii) ignoring the artificial act.
- Pursuant to the Amendment, the Minister of Finance may issue so-called "security opinions" confirming that a relevant act does not constitute tax avoidance.
- The Provision will apply to tax advantages obtained after the Amendment comes into force even if pursuant to a structure put in place before the amendment comes into force.

## Tax avoidance provision

Under the Amendment, any act that satisfies all of the following conditions will be considered tax avoidance:

- it was effected primarily for the purpose of obtaining a tax advantage which, in the given circumstances, is an advantage contrary to the subject and purpose of tax law; and
- the party that carried out the act acted in an artificial manner.

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<sup>1</sup> Tax Ordinance Act of 29 August 1997 (consolidated text: Journal of Laws of 2015, item 613)

The Amendment defines an artificial manner of acting as one which, according to an assessment applied based on the circumstances, would not be undertaken by an entity acting reasonably and guided by lawful purposes other than the obtaining of a tax advantage contrary to the subject and the purpose of the tax law. In analysing whether a taxpayer is acting in an artificial manner, the occurrence of the following, among other things, should be considered:

- unjustified splitting of operations;
- engaging intermediaries even though there is no economic or commercial justification for doing so;
- elements leading to a state of affairs identical or similar to the initial state of affairs;
- elements that are mutually exclusive or mutually compensatory; and
- an economic or commercial risk arises that exceeds the expected benefits from the action taken other than tax advantages to such an extent that it must be deemed that an entity acting reasonably would not have chosen such manner of action.

A tax advantage includes:

- avoidance of a tax liability, or occurrence thereof in a lower amount, as well as a deferral thereof;
- creation or overstatement of a tax loss; and
- creation of an overpayment or a right to a tax refund, or an increase thereof.

At the same time, the Amendment does not specify who should benefit from the tax advantage. This may mean that the tax authorities, if the Amendment comes into force in its present form, will have grounds to question also acts that result in a third party obtaining a tax advantage (that is, persons other than those carrying out the act).

The following situations are exemption from the tax avoidance Provision:

- the tax advantage or the sum of tax advantages obtained by the relevant entity in respect of a single act or a series of related acts does not exceed PLN 100,000 in a single settlement period (and, in the case of acts effected by the same entity, or effected between the same entities, the amount of tax advantages is calculated by adding up the tax advantages resulting from all such acts), and, in the case of taxes which are not settled periodically – if the tax advantage in respect of an act does not exceed PLN 100,000; or
- the advantage concerns an entity that has obtained a security opinion – to the extent covered by that opinion, until the date of its annulment or amendment (if applicable); or
- the advantage relates to an entity whose application for a security opinion has not been examined by the specified time limit – to the extent to which the application relates (subject to the above); or
- the advantage obtained relates to tax on goods and services (i.e. VAT), and certain other charges; this is because the amendment to the Act on the Tax on Goods and Services also provides for a tax avoidance provision with regard to VAT; or
- the tax avoidance can be counteracted by applying other tax law provisions.

If tax avoidance is ascertained, the tax consequences of the relevant act are determined based on the state of affairs that would have existed if an "appropriate act" had been effected (as opposed to the inappropriate tax avoidance act). An "appropriate act" means an act that could have been effected in the relevant circumstances by an entity acting reasonably, guided by legal aims other than the obtaining of a tax advantage contrary to the subject and purpose of tax law. This method of determining the tax consequences of the relevant act (as referred to in the first sentence of this paragraph) concerns an act effected primarily with the aim of achieving a tax advantage. Other consequences are contemplated by the Amendment where circumstances indicate that achievement of a tax benefit was the only aim of carrying out the act. In such a situation, the tax consequences are determined in such a way as if the act had not been carried out.

## Security opinions

The Amendment introduces a new instrument called a security opinion, for which application should be made to the Minister of Finance. The Minister may, however, refuse to issue one if it relates to a situation of tax avoidance. In such a case, the applicant may appeal to an administrative court.

An application for a security opinion, which the Minister of Finance has six months to examine, will not suspend verification procedure, a tax inspection, or tax or inspection proceedings being conducted by fiscal inspection authorities. A non-refundable fee of PLN 20,000 is payable on an application for a security opinion.

## Transitional provisions

The tax avoidance clause will apply to tax advantages obtained after the Amendment comes into force. This means that generally it will also apply to tax structures created before the Amendment comes into force, but only with regard to the tax consequences that arise after the Amendment comes into force.

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