

Polish Government publishes draft amendments to Tax Code including new GAAR provision

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At the end of December 2015 the Polish Ministry of Finance published a draft of the proposed amendments to the Tax Code (the Proposal). The most significant change is an introduction of a General Anti-Abuse Rule (GAAR), which is intended to prevent the creation and use of artificial legal constructs to avoid payment of tax in Poland.

- ▶ Currently the Proposal is subject to public consultation with comments due by 20 January 2016. After the public consultation and parliamentary action is completed (which is possible as soon as February or March 2016), the proposed law will - according to the current wording - enter into force in 14 days after its publication in the *Journal of Law*
- ▶ Consequently, it may be expected that GAAR will be introduced in Poland as soon as the first quarter of 2016
- ▶ The Proposal defines tax avoidance as an act (or series of acts) applied in order to receive a tax benefit, which in certain circumstances defeats the object and purpose of the tax act, provided the way of conduct in the particular case was artificial

According to the Proposal

- ▶ Conduct is considered artificial if, according to the existing circumstances, it would not be applied by an entity, which acts reasonably and is directed to lawful purposes other than the tax benefits contradictory to the object and purpose of a tax act. In order to assess if a particular act was artificial, the following factors should be considered:
 - Unjustified split of an operation
 - Involvement of intermediary entities without business substance
 - Elements directed to achieve a result identical or similar to the initial state of facts
 - Elements compensating or excluding each other
 - Economic risk exceeding the planned benefits other than tax benefits
- ▶ An act is considered artificial if it is applied in order to receive a tax benefit and other benefits of the act indicated by a taxpayer may be claimed not relevant

The Proposal includes some examples of tax planning practices, which could be potentially challenged based on the GAAR, such as tax planning with the use of hybrid instruments, use of entities from tax havens or use of "aggressive" debt instruments. However, the catalogue is not exhaustive.

The Proposal does not address the temporal application, however it can be expected that GAAR will be applied to tax planning mechanisms entered into both after and before the introduction of GAAR. However, it is expected that only tax consequences taking place after the introduction will fall under GAAR.

According to the wording of the Proposal

- ▶ If a tax benefit or a sum of tax benefits achieved by an entity from an artificial legal act (or series of acts) does not exceed PLN 100k, the GAAR will not be applicable.
- ▶ The Ministry of Finance will be the only authority to apply the GAAR. However, the Proposal introduces an additional council body that would opine on the applicability of the GAAR during the procedure conducted by the Ministry of Finance.
- ▶ Moreover, taxpayers who wish to safeguard their tax settlements against GAAR will be able to apply to the Ministry of Finance for a formal confirmation of non-applicability of GAAR in their specific case - following a disclosure of their intended course of action and assumed benefits, including tax ones. The fee for obtaining such opinion would be PLN 20k.
- ▶ Individual tax rulings issued with regards to artificial legal acts will not give protection to the taxpayer.

The inclusion of GAAR in the Polish system stems from the European Commission guidelines of December 2012 and for the most part follows the wording included therein. Accordingly, Poland is expected to join countries such as the United Kingdom and the Netherlands, among others, where careful analysis of the business substance will have to precede any business restructuring processes.

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