Tax&Legal Highlights

Poland

New VAT rates. Draft act published

The expected draft act on VAT rates has been published on the Governmental Legislation Centre website.

What is this all about?
The expected draft act on VAT rates has been published on the Governmental Legislation Centre website (https://legislacja.rcl.gov.pl/projekt/12317902). The draft act concerns amendments to the VAT Act and Tax Ordinance. The planned amendments involve introducing new tables determining which goods and services are to be taxed with 5% VAT or 8% VAT. Further, they provide for introduction of so-called binding rate information, thanks to which taxpayers will be certain that the VAT rates applied are correct.

What changes are projected?

From Polish Classification of Goods and Services (PKWiU) to Combined Nomenclature (CN)
The classification of goods for VAT purposes shall not be handled with PKWiU as before, but in principle, we will be used the Combined Nomenclature (CN). Thus, each time VAT regulations refer to statistical classification, the one

arising from CN will be binding, as opposite to the current solution referring to PKWiU.

The above principle is limited to goods. Classification of services will continue to be based on PKWiU.

New VAT rates: goods

The amended Act shall replace certain appendices to the VAT Act with new ones. Appendix 3 and Appendix 10 are the most important ones to be replaced. This means new tables listing goods charged with 8% VAT (Appendix 3) and with 5% VAT (Appendix 10) will be introduced.
The new tables include less items than the old ones (the current Appendix 3 includes 105 items, while the new one only 17; the current Appendix 10 includes 35 items, while the new one 22), meaning that the new tables include much bigger groups to make the classification of goods for VAT purposes easier.

New VAT rates: services

The above tables include also changes regarding services. The amended Appendix 3 and 10 shall define services charged with 5% and 8% VAT, respectively.

Classification of most services shall follow PKWiU, with certain ones being classified in a descriptive manner (without reference to any PKWiU group).

The number of service items has increased (from 45 to 54 items in Appendix 3).

Binding rate information

Along with the new rate tables, the binding rate information shall be introduced (BRI), which is to help taxpayers make sure that the VAT rates applied to their goods or services are correct.

BRI shall be issued upon a motion of a taxpayer or a client, based on the Public Procurement Law. The motioner is to provide a detailed description of a commodity or service in order to receive a decision indicating its classification based on CN or PKWiU. A motion can be accompanied with documents regarding the commodity or service in question (photos, plans, workflows, catalogues, certificates, manuals, etc.).

A BRI issued for a taxpayer shall be binding for tax authorities with regard to the case. Additionally, BRI issued for other taxpayers (published in Biuletyn Informacji Publicznej) shall have a protective effect, similar to that of individual tax rulings.

A motion for BRI shall cost PLN 40. According the draft, a motioner will be obliged to pay a charge for research or analyses, if necessary. BRI shall be issued within three months and published in Biuletyn Informacji Publicznej to be available for other interested parties.

Changes regarding reverse charge and joint and several responsibility
The amendments assume a comprehensive transition from PKWiU to CN in terms of VAT on goods, which means the change will include not only the VAT rate tables, but also the scope of the reverse charge and of "sensitive" goods, to which the principle of joint and several buyer's responsibility is applicable. Consequently, the former Appendix 11 to the VAT Act (the reverse charge goods) and Appendix 13 (among others "sensitive" goods) shall be replaced by new ones, referring to CN instead of PKWiU.

What is the effective date of the amendments?
The Act shall come into force on 1 April 2019. As of that date, binding rate information can be motioned for.

On 1 April 2019, based on a special transition provision, the 5% rate shall be applied to selected goods and services, among others books, brochures, leaflets and similar materials, children books, printed musical notes and other printed materials, maps, atlases and publications issued in the electronic form.

The rates arising from the new tables shall be applied to goods and services performed beginning from **1 January 2020.**

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Mandatory reporting of tax-planning schemes. Change of Polish tax law provisions

The amendment to Polish tax provisions adopted by Polish Parliament on 26 October 2018 introduces into the Polish Tax Ordinance Act mandatory reporting of so-called tax-planning schemes (Mandatory Disclosure Rules – MDR). The amendment imposes new obligations not only on advisors (attorneys-at-law, legal counsels, tax advisors), but also on their clients.

The amended provisions are to enter into force on 1 January 2019, but tax-planning schemes will have to be disclosed retroactively if the first activity related to implementation of the given scheme was performed after 25 June 2018 (cross-border schemes) or after 1 November 2018 (domestic schemes).

What is subject to mandatory disclosure?
Mandatory disclosure concerns tax-planning schemes which have or may have an impact on tax liability and which at the same time meet criteria indicated in the amended provisions - different for cross-border schemes (of

which mandatory disclose results from the EU DAC6 Directive) and for domestic schemes (not covered by the Directive). In case of domestic schemes, obligation to report will cover schemes irrespectively of taxes they concern (among others, will cover schemes referring to CIT, PIT or VAT).

Subject to reporting will be a wide scope of information concerning the scheme, i.a. its detailed description, applied tax law provisions as well as the expected value of tax benefit. Disclosed schemes will be assigned a so-called NSP - number of the tax-planning scheme.

In which cases will domestic schemes be subject to mandatory disclosure?

Domestic schemes will be subject to mandatory disclosure if the beneficiary of the scheme will be a qualified entity (revenues, costs or assets of the beneficiary or of its related party exceed EUR 10m, or the scheme concerns items or rights of market value exceeding EUR 2.5m), and at the same time:

1. the main or one of the main benefits that the beneficiary expects to derive from the scheme is a tax advantage (understood very broadly - generally as any reduction in tax liability or postponement in its creation), and additionally the scheme fulfills criteria of at least one of the so-called "generic hallmarks" (broad and imprecise set of features, including i.a. situations when documentation and/or structure of the activities does not need to be substantially customized for implementation depending on the beneficiary, there is an undertaking to comply with a condition of confidentiality as concerns the way in which the scheme can secure a tax advantage, schemes where the intermediary is entitled to receive a success fee, etc.), or

2. regardless of what is the main benefit of the scheme (tax or non-tax-related) - if it meets at least one of numerous other criteria - for example:

(i) has an impact on deferred part of income tax or on deferred tax assets or provisions which is materially relevant to the entity from accounting perspective and this impact exceeds PLN 5m per year,

(ii) concerns non-withholding of tax in the amount exceeding PLN 5m per year, which withholding tax would have been levied if double taxation treaty or tax exemption would not be applied.

When will cross-border schemes be subject to mandatory disclosure?

Cross-border schemes will be subject to mandatory disclosure, regardless of whether the beneficiary is a qualified entity, in a situation when:

1. the main or one of the main benefits that the beneficiary expects to derive from the scheme is a tax advantage (understood analogously as in case of domestic schemes) and additionally the scheme fulfills criteria of at least one of the so called "generic hallmarks" (the set of these conditions is to some extent narrower than with respect to domestic schemes), or

2. regardless of what is the main benefit of the scheme - if it meets at least one of numerous different criteria listed in the amendment, for example:

a) the scheme involves tax-deductible cross-border payments to related entities located in tax havens,

b) the same income or property benefits from method of elimination of double taxation in more than one state,

c) there is a non-transparent structure of legal ownership or it is difficult to determine the beneficial owner,

d) the scheme involves a transfer of "hard-to-value intangibles".

Who will be obliged to report?
Mandatory disclosure obligation will as a rule burden the intermediary (understood as each person which develops, offers, makes available, implements or manages the implementation of the arrangement – in particular a tax advisor, legal counsel or attorney-at-law), and in specific situations the beneficiary (the person to whom the scheme is made available, who is prepared for its implementation or performed an activity related to implementation of the scheme). In addition to the above, in a situation when the scheme will not be reported neither by the intermediary nor by the beneficiary, the mandatory disclosure may additionally burden a so-called supporting entity (a broad definition including i.a. each person who has undertaken to provide assistance, support or advice regarding development or implementation of the scheme - for example a notary public).

Mandatory disclosure rules are different for the so-called standardized schemes (repetitive, possible to be implemented or made available to more than one beneficiary without the need to change essential assumptions of the scheme) and for non-standardized schemes.

What obligations will be imposed on beneficiaries?
The beneficiary will be obliged to report the scheme when:

1. the given scheme is subject to disclosure, and the beneficiary has not been informed by the intermediary that the scheme has already been reported (as described in justification to the discussed amendment – e.g. in cases when the beneficiary has developed and implements the arrangement on his own and does not cooperate with any intermediary);

2. with respect to non-standardized schemes, if the beneficiary will be informed that the intermediary will not disclose this scheme (as it would violate the professional secrecy obligation binding the intermediary, from which the beneficiary did not release it) - in such case, the intermediary shall provide the beneficiary with specific data that is subject to mandatory disclosure.

In the above situations, the beneficiary will report within 30 days from the day following the day in which the scheme will be made available, from the day following the day of preparation for implementation of the scheme or from the day of performing the first activity related to implementation of the scheme - depending on which of these events occurs first. Making available of the scheme is understood very broadly and includes i.a. providing the beneficiary with information about the arrangement in any form, including by e-mail, phone or in person.

Regardless of the obligation to report (which will usually burden the intermediary), in each situation when the beneficiary will apply a scheme, it will be obliged to provide the Chief of National Fiscal Administration with so-called information on application of the tax-planning scheme, within the deadline for filing the tax return concerning the settlement period in which the beneficiary performed any activities that are part of the scheme or obtained a tax benefit resulting therefrom. The disclosed information will include i.a. the NSP of the scheme and the amount of the tax benefit resulting from the scheme, obtained in the given settlement period. Therefore, each application of a tax-planning scheme will be compulsorily disclosed by the beneficiary to the fiscal administration.

The abovementioned information will be submitted under penalty sanction for perjury for making a false statement and will be signed by a taxpayer being a natural person, and in the case of taxpayers being legal persons - by all members of the taxpayer's managing body.

What are the sanctions for non-reporting?
The amendment foresees fines for failing to fulfill obligations related to reporting of the tax-planning schemes. The court may also order, in such cases, a penal measure of prohibition to perform specific business activity.

In the case of intermediaries, entities that employ intermediaries or that actually remunerate intermediaries, the revenues or costs of which exceeded in the previous financial year PLN 8m, the provisions impose an obligation to implement a so-called internal procedure determining the rules of conduct in the field of reporting. The amendment also introduces fines up to PLN 2m (in specific situations – up to PLN 10m) in case of non-implementation of internal procedure by obliged entities.

It should be noted that taking into account the broad definition included in the amendment, entities obliged to implement internal procedure will include not only tax advisors, legal counsels or attorneys-at-law, but in specific cases also other entities (i.a. banks or financial institutions, but also companies having internal tax departments).

When will the reporting obligation come into force?
The relevant provisions are to enter into force on 1 January 2019, whereas the reporting obligation will be partly retroactive – obligation to report will also cover schemes with regards to which the first activity related to their implementation was performed:

1. in the case of domestic schemes – after 1 November 2018,

2. in the case of cross-border schemes – after 25 June 2018.

Information about retroactively disclosed schemes will have to be reported by the end of June 2019 (if the disclosing entity will be the intermediary) or by the end of September 2019 (if the disclosing entity will be the beneficiary).

Can services be "paid for" with personal data? Analysis by EDPS

Social digitalization enforcing new business models based on the processing of personal data, made available by consumers in exchange for digital contents or services, provides substantial challenges, not only with regard to consumer rights, but also their privacy. EU bodies see the need to revise the current regulations and fill gaps in the existing consumer rights protection system. Therefore, intense works are being carried out to prepare "A New Deal for Customers" legal package.

Referring to the current discussion on consumer-related regulations, European Data Protection Supervisor (EDPS) issued Opinion 8/2018 addressing amendments to Directive 2011/83/EU on consumer rights, among others in relation to the proposed approach to personal data monetization. Importantly, the key assumption of the presented opinion is the need to sufficiently protect consumer rights and to prevent dishonest market practices through ensuring compatibility of regulations protecting consumer rights with those regarding personal data protection.

The amendment assumes extending the scope of the Directive by new classes of contracts, i.e. "contracts for the supply of digital content which is not supplied on tangible medium" and those regarding provision of digital services not only for cash consideration, but also "where the consumer provides or undertakes to provide personal data to the trader". Therefore, under the Directive, consumers disclosing their personal data in exchange for digital services are to be provided the same protection as those paying cash.

According to the European Commission, in light of the growing value of personal data for entrepreneurs, such services as ability to store the data in cloud or use social media cannot be treated as free of charge. Consumers should have the same right of being informed or withdrawing from the contract, regardless of the form of payment required (in cash or in personal data). Further, EDPS has indicated that presentation of services whose provision requires disclosure of personal data as free of charge is misleading, as it ignores actual consequences on the side of consumers as a result of providing their personal data and distorts the decision making process, thus adversely affecting both consumers and competitors.

EDPS points out that although personal data are frequently treated as a commodity (and therefore monetized), EU legislation should not consider them only as a form of "payment", since the proposed legislatory approach may reduce their role to a means of exchange, thereby ignoring their key importance for the protection of person's fundamental rights. Personal data protection is the key component of the right to privacy. At the same time, definitions included in the draft amendments and treating personal data as "currency" are misguided, turning the attention away from their true nature.

As far as protection of data owned by parties to contracts on provision of so-called "free services" is concerned, EDPS stresses the necessity to comply with GDPR. Possible fraud related to the treatment of personal data as a currency is another important issue EDPS has addressed. There is a risk of misinterpreting GDPR, among others assuming that the necessary legal basis to process consumer data is provided if a contract on provision of digital services is performed. Actually, the data

can be processed only upon data owner's consent. Consequently, EDPS indicates the need to enable consumers to execute their rights arising from GDPR and thus determines the relation between consumer rights and the data protection right. Data controller is obliged to allow data owner's withdrawal of the consent to process their data at any time. Also, the provisions of the consumer law cannot be interpreted in a manner limiting the rights of data subjects, indicating the fact that a 14-day period allowing withdrawal from a contract should not limit their right to withdraw the consent for their personal data protection at any time.

The Opinion points out that consumers are data subjects whose position is threatened if control over their own data is limited by actions performed by stronger entities. Moreover, as stressed by EDPS, personal data protection is guaranteed both by GDPR and by the Charter of Fundamental Rights and Treaty on the Functioning of the European Union.

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Key amendments to the waste law in 2018

Awareness regarding environmental obligations of business becomes increasingly important. New competencies of Inspectorate of Environmental Protection and high fines for non-compliance with environmental regulations provide additional incentives to undertake necessary measures.

Additional obligations of waste collecting and processing entities

In September 2018, an important amendment to the Act on Waste of 14 December 2012 came into effect (the act amending the Act on Waste and certain other acts of 20 July 2018; Journal of Laws of 2018, item 1592). Amendments to the waste law affect mostly entities whose business activities require a waste collection or processing permit.

In such cases, waste management may take place **only on sites owned, used under perpetual usufruct or leased by the waste holder**. Both in case of use and lease, a notarized deed is required. Additionally, such sites **should be included in a local zoning or land development plan**.

Permits for waste collection and processing shall be issued only to entities not previously fined for certain offences, including for an environmental offence, and with regard to whom no decision cancelling such permit was issued over last ten years (the restrictions include also shareholders and management board members of waste management entities).

One of the crucial changes involves **obliging the waste holder** who must obtain a waste collection or processing permit **to provide financial collateral to cover possible costs of removing the waste from locations not intended for such purposes and costs of fulfilling a replacement obligation of removing waste and redressing adverse effects of business operation and environmental damage should**

a permit be canceled. The collateral amount shall be calculated as the maximum total mass of all kinds of waste to be kept at the same time in a collection site, expressed in Mg, multiplied by a rate for 1 Mg of the waste (pursuant to the draft regulation, the rates shall range from PLN 100 for neutral waste to PLN 600 for hazardous waste).

This article discusses only selected aspects of the amendments. The amending act introduces a series of other restrictions and obligations regarding waste managers, such as the obligation to implement a visual control system in the waste collection site and additional important duties regarding fire prevention.

The amending act includes detailed transitional provisions. The key one obliges the current holders of waste collection or processing permits, waste generation permits for collection or processing and holders of integrated permits to file motions for their update to comply with the new regulations within one year of the amending act effective date, i.e by 5 September 2019.

Entities carrying out operations without the required waste collection permits or non-complying with permit terms may be fined with an amount of PLN 1,000,000. Twice as much may be charged for a recurring offence.

New register of waste holders

In 2018, a new register of waste holders was established, divided into first marketers of products, first marketers of products in packaging and waste managers (henceforth the "**register**"). The centralized register is maintained by Province Marshalls and publicly available at https://bdo.mos.gov.pl/web/. The register includes businesses whose operations generate waste, including first marketers of cars, electronic and electric appliances, batteries, lubricant oils, pneumatic tyres, packaging or packaged products. The obligation to register may apply to importers, entities purchasing goods in intra-Community transactions and waste transporters.

The above activities do not need to be performed on a continuous basis or as a core business to give rise to the registration obligation. A **one-off promotion campaign involving giving out products with batteries, or purchase of products in outer packages for further distribution may be sufficient to oblige an entity to register.**

Based on our practice, lack of precision in environmental obligations often gives rise to uncertainty regarding the obligation to register. Sometimes a through analysis of a factual status solves the problem. Otherwise, we recommend requesting a binding ruling from a competent body. It is important to carry out evaluation on case-by-case basis, since **according to new regulations, carrying out business operations without being registered is punishable with a fine of up to PLN 1,000,000**.

Apart of the register entry, carrying out business operations that generate waste results in other obligations, such as ensuring recycling of the marketed waste. Failure to fulfil the obligation results in payment of so-called product fee, which may be charged in arrears for several years.

New competencies of Inspectorate of Environmental Protection and high fines for non-compliance with environmental regulations

In September 2018, a number of amendments to the Act on Inspectorate of Environmental Protection (the act amending the Act on Inspectorate of Environmental Protection and certain other acts of 20 July 2018, Journal of Laws of 2018, item 1479) came into effect. Along with new, toughened environmental regulations, **competencies of the Inspectorate of Environmental Protection have increased.** It is empowered to carry out both planned and non-planned inspections, e.g. if pollution is suspected. Drones can be used for inspection purposes. **Non-planned inspections may be carried out around the clock, also without a prior notice**. Those who hinder such procedures are subject to a fine of up to PLN 100,000. During an inspection, Provincial Inspector of Environmental Protection **may issue a decision suspending business operations** that put at risk human health or life, or pose environmental hazard.

Along with the amendments extending the empowerment of the Inspectorate, additional fines for a breach of statutory obligations have been introduced to several environmental acts, or the existing fines have been increased.

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