



Deloitte Poland Tax News for Financial Institutions | November 2020

Anti-abuse clause (GAAR) is more likely to be applied by Polish tax authorities

Polish tax authorities have always tried to combat tax evasion and tax planning. Before July 2016, there was no general anti-abuse clause designed to prohibit taxpayers from implementing arrangements whose principal objective is to obtain a tax advantage.

A lot has changed since then: in July 2016 the general anti-abusive regulation ("GAAR") was adopted; in January 2017 the targeted anti-avoidance rules ("TAAR") regarding mergers, demergers and share for share exchanges were updated; in January 2019 an obligation to disclose taxable arrangements ("MDR" / DAC6) was introduced.

The year 2020 marked a breakthrough as Polish tax authorities have concluded 20 GAAR proceedings. As a result, charges of tax abuse were brought in 12 cases.

GAAR allows the tax authorities to eliminate tax benefits of transactions or actions if obtaining of such benefits is the main reason or one of reasons of undertaking them, and the conduct is artificial. In assessing whether a tax benefit should be deemed the main reason or one of the reasons of performing a transaction or an action, its economic rationale – as presented by the taxpayer – must be considered. In certain cases where the tax authorities apply the anti-avoidance regulations, additional tax liabilities may be imposed.

Three conditions should be met for GAAR to be applicable:

- obtaining a tax benefit must be the main purpose or one of purposes of the transaction (i.e. other commercial or economic rationale of the transaction / action, as indicated by a taxpayer, must be deemed immaterial),
- the tax benefit must contradict the subject or intention of a provision of tax legislation or of a tax law,
- the transaction must be performed in an artificial way (in a given case, a person acting reasonably in compliance with lawful goals other than obtaining tax benefits and with the law would not perform such a transaction).



It is worth mentioning that individual tax rulings issued by tax authorities do not protect taxpayers in case of a charge of tax law abuse based on GAAR.

During the first four years (2016-2019) following the implementation of GAAR, it seemed mainly to deter potential perpetrators, i.e. taxpayers and its advisors from designing or implementing aggressive tax planning. The deterrence effect was clearly visible: frequency of tax optimization cases dropped compared to the past. Please note that individual tax rulings issued by tax authorities do not protect against a tax law abuse charges.

The approach changed in 2020: the Polish tax authorities started to apply GAAR in practice, challenging provided business rationale of transactions concluded by taxpayers and arguing that their main goal or one of goals was to obtain a tax advantage. By the end of September 2020, the Head of National Revenue Administration (in Polish: Szef Krajowej Administracji Skarbowej) has concluded 20 proceedings regarding application of GAAR, issuing 12 decisions indicating tax law abuse. As a result of reclassifying or disregarding transactions, taxpayers were assessed extra taxes in the total amount of ca. EUR 20 000 000.

The GAAR proceedings are expected to be used by the Polish tax authorities in the future as well. Therefore, it is important to take preventive measures, such as the performance of proper tax analyses and documentation of business rationale underlying each transaction, restructuring or any other action.

Polish government is planning to introduce the VAT grouping scheme in 2021

On November 17, 2020, the VAT Committee of the European Commission discussed the proposition to implement VAT groups in Poland to allow treating certain related parties (legally separate entities) as a single VAT taxpayer (and, consequently, transactions concluded between them, within one VAT group, would be VAT-exempt). VAT grouping in Poland could be a game changer, especially for financial institutions that are trying to reduce the burden of non-deductible VAT incurred on outsourced services

VAT grouping provisions are present in most EU countries (e.g. in Germany, Austria, Sweden, Italy, Luxembourg or Malta), but so far have not been implemented in Poland.

In October 2020, the Polish Minister of Finance proposed to introduce VAT grouping in Poland (in force from 2021) on the following terms:

- the VAT group can only be formed by members of a tax capital group that has the status of a corporate income tax payer (CIT payer) as defined in the Polish CIT legislation. Therefore, to obtain the status of a VAT group, its members must be CIT payers;
- the VAT group is optional for businesses;
- intra-group supplies shall not constitute transactions for VAT purposes while supplies provided by an entity of the group to an entity outside that group shall constitute supplies performed by the group. Supplies provided by entities outside the group to an entity of the group shall constitute supplies provided to the group;

- the members of the VAT group are jointly and severally liable for VAT;
- for control purposes, the group has to keep records of intercompany transactions in electronic form that can be submitted to the tax authority upon request;
- the holding company is the entity that represents the VAT group and submits tax returns and pays VAT on behalf of the group;
- the scheme is not limited to certain sectors (it is available also for financial institutions).

The VAT group concept would open up new possibilities, currently unavailable to Polish entities. For example, currently many activities outsourced by banks or insurers are subject to 23% output VAT, as they do not qualify for VAT exemption applicable to financial or insurance services. As a result, input VAT, as a rule non-deductible in financial institutions, is a cost position. This discourages the use of outsourcing in the Polish financial sector.

If VAT groups are introduced in Poland, outsourcing services provided within a VAT group will be VAT-exempt and, accordingly, will cease to be a cost item in financial institutions. VAT grouping regulations may encourage banks or insurers to use outsourcing in order to optimize its operating costs.

January 1, 2021 as the proposed effective date of the new regulations, looks challenging. Most probably, it will be postponed.

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