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## Tax avoidance clause

### Tax Alert

Dear Readers,

**On 22 March 2016, a draft act amending the Tax Regulations Act and some other acts (hereinafter: "Draft") was submitted to the Sejm. The Draft provides for the introduction into the Polish legislation of a clause against tax avoidance. The proposed amendments are likely to come into force within the next two, three months.**

According to the Draft content, Tax Regulations Act will be supplemented with Section III A (Art. 119a-199zf) containing regulations on countering tax avoidance. The essence of the proposed regulation will be Article 119a §1 of Tax Regulations Act which stipulates that **tax avoidance, which is artificial action consisting in the performance of an act primarily in order to achieve a tax advantage, contrary to the subject and purpose of the tax law provision, does not result in the achievement of a tax advantage.**

New regulations assume that in case of tax avoidance, tax consequences shall be determined based on such state of affairs that could have occurred had a relevant act been performed. The relevant act is an act that could be performed if the taxpayer had acted reasonably and pursued legitimate goals, other than the achievement of a tax advantage. Should in the course of the proceedings a party indicate a relevant act, the tax consequences shall be determined based on such state of affairs that would occur if such an act was performed. If however, according to the circumstances, the achievement of a tax advantage was the only goal of a party, the tax consequences shall be determined based on such state of affairs which would occur if the act had not been performed.

#### Artificial method of operation

Pursuant to the content of Art. 119c §1 of the Tax Regulation Act, a method of operation shall be considered artificial if the existing circumstances indicate that it would not have been applied by an entity acting reasonably and pursuing legitimate goals, other than the achievement of a tax advantage contrary to the tax act. The following circumstances shall be taken into account during the assessment of the method of operation:

- unjustified division of operations,
- involvement of intermediaries, despite the absence of economic justification,
- elements leading to a status identical or similar to the status existing prior to the act,
- elements that cancel one another out or that compensate for one another,
- economic risk that exceeds the expected benefits other than tax benefits to such an extent that it should be considered that a reasonably acting entity would not have chosen such method of operation.

## Acting in order to achieve a tax advantage

According to the new regulations, acts performed by a taxpayer shall be deemed to be performed primarily in order to achieve a tax advantage in the case when other economic goals specified by the taxpayer prove to be of little importance. In such case, a tax advantage shall be:

- the absence of tax liability, postponement of such tax liability or reduction in the value of such tax liability or the occurrence or overestimation of a tax loss,
- the occurrence of overpayment or the right to tax refund or the increase in the amount of the overpayment or refund.

## Conditions of non-compliance with the tax avoidance clause

The provision of Art. 119a of the Tax Regulations Act shall not apply (pursuant to Art. 119b of the Tax Regulations Act):

- if the tax advantage or the sum of achieved benefits does not exceed PLN 100,000.00 in the reference period,
- to the entity which has obtained a hedging opinion on the acts – within the scope of the opinion, until the date of repeal or amendment of the hedging opinion,
- to the entity whose application for a hedging opinion has not been handled within the time limit referred to in Art. 119zb of the Tax Regulations Act – within the scope of the application, until the date of the amendment of the hedging opinion,
- to tax on goods and services as well as to fees and non-tax budget receivables,
- if the application of any other provisions of the tax law allows for counteracting tax avoidance.

Tax on goods and services remains beyond the tax avoidance clause, however, the amendment introduces changes also in the Act on VAT (hereinafter: "Act on VAT"), inter alia by introducing the concept of the abuse of rights in Art. 2(35) of the Act on VAT. The abuse of rights is defined as performing taxable acts as part of transactions that despite their compliance with formal conditions laid down in the provisions of the act were intended to achieve tax advantages, contrary to the purpose of these provisions.

## Tax proceedings in case of tax avoidance

The minister responsible for public finances (hereinafter: "Minister of Finance") shall initiate tax proceedings or, by a decision, shall take over in whole or in part tax proceedings or audit procedures to conduct them further if a decision in connection with tax avoidance may be issued, concerning:

- establishment or determination of the amount of tax liability,
- determination of the amount of tax loss,
- acknowledgement of overpayment or determination of the amount of overpayment or tax refund,
- liability of the taxpayer for the tax not collected by the withholding agent,
- liability or powers of heirs.

By taking over the audit procedure, the Minister of Finance shall also initiate tax proceedings. In the decision on the takeover of the procedure, the Minister of Finance shall specify the extent to which it was taken over and shall deliver it to the party and to the body that previously conducted the procedure. Takeover of the procedure shall not affect the validity of actions taken by the tax authority or tax audit authority.

## Hedging opinion

The draft act introduces the institution of a hedging opinion which will constitute an alternative procedure for institutions of individual interpretations. The tax authority issuing hedging opinions will be the Minister of Finance. The application can be submitted jointly by a number of interested parties, and it may refer to the completed, commenced as well as planned action.

The hedging opinion will be issued without undue delay, however not later than within 6 months from the date of the receipt of the application by the Minister of Finance, provided that the circumstances presented in the application indicate that there are no grounds to apply Art. 119a of the Tax Regulations Act. A fee in the amount of PLN 20,000.00 shall be charged on the application for a hedging opinion.

At the same time, as regards the issue of individual interpretations, the body issuing them (from 1 July 2016,

instead of the Minister of Finance, on whose behalf heads of tax chambers act, interpretations will be issued by the Director of the National Tax Information Office) will be able to refuse to issue an interpretation regarding those elements of the status quo or a future event which will constitute tax avoidance. In the course of handling the application for an individual interpretation, in case of any doubts whether a future event or status quo constitute tax avoidance, the body issuing the interpretation will be entitled to ask the Minister of Finance for an opinion.

### **Council for Counteracting Tax Avoidance**

The Draft Act provides for the establishment of the Council for Counteracting Tax Avoidance (hereinafter: the "Council"), which is an independent advisory body with regard to the applicability of Art. 119a of the Tax Regulations Act in individual cases. Council will be appointed by the Minister of Finance for a four-year term.

During the tax proceedings initiated in connection with tax avoidance, the Minister of Finance may consult the Council with respect to the validity of Art. 119a of the Tax Regulations Act. The opinions of the Council are to be issued in writing, along with justifications, without undue delay, however not later than within 3 months from the date of receipt of the case files. If the Minister of Finance fails to request an opinion during the proceedings, a party to the proceedings shall be entitled to an application for the opinion submitted in the appeal against the decision.

The Council's opinion on the applicability of Article 119a of the Tax Regulations Act shall not constitute a hedging opinion, as referred to in Art. 119w of the Tax Regulations Act. It shall also not be binding for the Minister of Finance, who, nevertheless, shall be obliged to respond to the opinion in the decision issued.

### **Transitional provisions and entry into force**

Pursuant to the Draft, the act is to enter into force upon the expiry of 30 days from the date of its announcement. Provisions on the tax avoidance clause shall apply only to the acts performed upon the entry into force of the planned amendments, whereas the precise moment of performing the act shall be decisive. It will not be significant if the act constituting tax avoidance was preceded by any other activities that took place before the clause entered into force. According to the explanatory memorandum to the act, a taxpayer will be required to cease the continuation of tax avoidance in connection with the use of the "artificial mechanisms of operation" created before the entry into force of the regulations discussed herein.

To sum up, tax avoidance is a threat to budgetary balance and public finance stability; it also constitutes a violation of the constitutional principle of universality of taxation. The purpose of the introduced clause is to organise the tax law system, to set the limits of acceptable optimization and to strengthen the independence of the tax law over the civil law. At the same time, the tax avoidance clause proposed in the Draft is composed of imprecise terms, whose interpretation may lead to unauthorised legislation on the part of tax authorities. It appears that, in particular at the beginning of the operation of the clause in its present form, it will cause disputes between taxpayers and tax authorities.

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Should you wish to discuss the above mentioned amendments in detail, feel free to contact us:

**Piotr LISS**

Tax Partner

Tax advisor (10240)

E: [piotr.liss@rsmpland.pl](mailto:piotr.liss@rsmpland.pl)

M: + 48 696 488 369

**RSM Poland**

Droga Dębińska 3b  
61-555 Poznań, Poland

[www.rsmpland.pl](http://www.rsmpland.pl)

[office@rsmpland.pl](mailto:office@rsmpland.pl)

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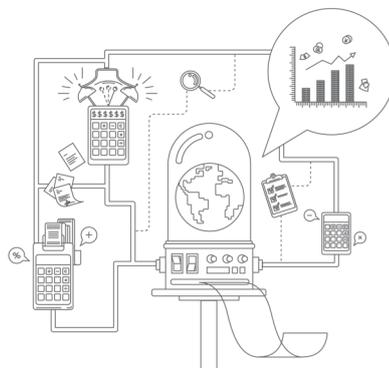
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