Transfer Pricing Alert

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Confusion over regulations on indirect tax haven transactions – Ministry of Finance presents new proposal

The position of the Ministry of Finance (MF) in relation to the mandatory reporting of indirect tax haven transactions is still unclear. This regards transactions entered into by the taxpayer, as a result of which the receivable is transferred to a 'beneficial owner' residing, established or managed in a tax haven.

The regulations in this respect, which have been in effect since the beginning of 2021, raise many questions in terms of interpretation and cause difficulties in their application in practice. Therefore, the MF issued draft tax clarifications on transfer pricing dated December 21, 2021. However, the document has not resolved all uncertainties regarding the application of the regulations, nor has its final version been published.

Subsequently, in June this year, a draft amendment to the existing provisions of the CIT Law was published and underwent public consultation, as a result of which many entities (taxpayers and advisors) submitted their comments on the proposed amendments to the regulations.

On August 22, 2022, the MF, by way of a response to the public consultation on the draft CIT Act CIT, referring to the submitted postulates, indicated that the latter remain invalid due to the planned repeal of the provisions on indirect tax haven transactions.

A draft act amending the current regulations was published on August 25, 2022. The MF is indeed planning to repeal the regulations on indirect haven transactions, to become applicable on January 1, 2021. In addition, the lawmakers intend to change the documentation thresholds for direct haven transactions. It is to take effect the day after the law is promulgated.

The latest announcement and the planned amendment have introduced another change in the MF's position toward indirect haven transactions, **adding to considerable confusion among taxpayers.**

The decision to refrain from fulfilling the (still binding) obligations should therefore be analyzed on a case-by-case basis, choosing the safest solution from the taxpayer's perspective.

Below you will find a reminder of the current regulations and a discussion of the planned amendments:

REGULATIONS APPLICABLE SINCE 2021	Pursuant to Article 11o of the CIT Act (and the corresponding provisions in the PIT Act), **an obligation to prepare a Local File** arises for transactions with value exceeding 500,000 PLN in a tax year, if the beneficial owner of receivables resulting from such transactions has a residence, seat or management board in a tax haven For the purpose of determining the obligation to prepare local transfer pricing

documentation for indirect haven transactions, the lawmakers introduced a **presumption** that the 'beneficial owner' has a residence, seat or management board in the tax haven if the other party to a transaction entered into by the taxpayer performs settlements with an entity with a seat or management board in the tax haven during the tax year or fiscal year.

In addition, indirect tax haven transactions entail a statutory **requirement for the taxpayer to exercise due diligence** in identifying the circumstances giving rise to the obligation to prepare documentation.

PROPOSED AMENDMENTS

In June 2022, a **draft amendment to the CIT Act** was released, introducing changes to the Polish Deal regulations, as well as to the **provisions on direct and indirect tax haven transactions.**

The MF's proposed amendments addressed the following in particular:

- determining new documentation thresholds (so-called materiality thresholds) for direct and indirect haven transactions
- clarifying that the provision applies to the beneficial owner of the receivable resulting from the transaction
- clarifying that in the case of domestic transactions (where the payer and recipient of the receivable are subject to domestic jurisdiction) – the documentation obligation for indirect haven transactions is to be borne solely by the entity receiving the receivable
- removing the presumption of residency of the beneficial owner in a tax haven
- eliminating reporting obligation in certain cases.

It is worth noting that, according to the MF' s announcements, the adoption of the amendments by the Council of Ministers was planned for the third quarter of 2022.

MINISTRY OF FINANCE'S LATEST PROPOSAL

During the next phase of the legislative process, the above-described draft amendments to the CIT Law were subjected to public consultation.

The latest publication by the Ministry of Finance, presenting the Ministry's position on the comments made, hints at the planned repeal of regulations on indirect tax haven transactions.

Shortly after the MF's publication, a draft act amending the existing regulations was published on the website of the Government Legislation Center, **which includes the repeal of Article 11o (1a) and (1b) – in the part concerning the reporting of indirect tax haven transactions**. This means that these provision are soon to disappear from Polish law. The amendment to these regulations is scheduled to become effective as of January 1, 2021.

In addition, it should be pointed out that as part of the draft act, the **MF** also made reference to **direct tax haven transactions**, for which the **materiality thresholds are to be raised** to PLN 2,500,000 for financial transactions and

PLN 500,000 for other transactions, respectively (compared to the current threshold of PLN 100,000).

Another change in the MF's approach to transactions with tax havens is reflected in the draft act. We will keep you informed on further developments in the lawmaking process.

This document was prepared for informational purposes only and is of a general nature. Every time before taking actions on the basis of the presented information, we recommend obtaining a binding opinion of TPA Poland experts.

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