

## Tax aspects of the amendment to Poland's Code of Commercial Companies for cross-border reorganisations

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**As at 15 September 2023, the amendments to the Code of Commercial Companies have brought with them an element of novelty to the landscape of cross-border reorganisations. Said novelty involves the introduction of a certificate of compliance of the cross-border reorganisation with Polish law. The certificate is to be issued by the competent registration court, and the responsibility of applying for it lies with the management board of a Polish company participating in a cross-border reorganisation.**

The application submitted to the registration court will also include a request to the Head of the National Fiscal Administration (KAS) seeking their opinion on the reorganisation in question. The registry court is obligated to forward this request to the tax authority. The opinion on a cross-border reorganisation, issued by the Head of KAS, will apply to cross-border mergers, cross-border divisions, and cross-border conversions. According to the explanatory memorandum to the draft amendments to the CCC, the Head of KAS will, prior to issuing an opinion, conduct an examination of a given reorganisation. This examination is intended to assess whether the aforementioned reorganisation leads to tax avoidance or abuse of tax law, as well as to determine whether a cross-border reorganisation might impede tax enforcement proceedings. If enforcement proceedings are pending against a Polish entity participating in a cross-border reorganisation, the Head of KAS may refuse to issue the tax opinion.

The aim of the opinion issued by the Head of KAS is:

- to assess whether there is a reasonable prospect that a cross-border reorganisation may:
  - a. constitute tax avoidance activity or an element of tax avoidance activity (Article 119a of the Polish Tax System Act);
  - b. be the subject of a decision issued by means of measures limiting contractual benefits, that is to say, in principle, concerning the so-called LOB (limitation of benefits) clauses contained in certain double taxation agreements;
  - c. constitute an abuse of the right referred to in Article 5(5) of the Act on Goods and Services;
- to confirm that the Polish company's liabilities to tax authorities or non-tax budget receivables of a public law nature are satisfied or secured.

In order for the Head of KAS to issue such an opinion, the taxpayer will have to attach a number of documents to the request. These documents specifically include:

- data identifying the applicant and an indication of the entities involved in the reorganisation;
- a comprehensive description of the activities, along with an indication of the existing capital ties between the entities involved in the reorganisation (relevant provisions of the Income Tax Acts on transfer pricing will apply to the description of these ties);
- an indication as to whether the transaction was subject to mandatory MDR reporting, the basis for said reporting, or an explanation of the factual or legal reasons why reporting was not carried out;

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- an indication of the purposes that the activity is meant to serve and the economic or business justification for the activity;
- a determination of the tax implications resulting from the activity, including tax benefits;
- an indication of other tax benefits, which are dependent on the completion of the cross-border reorganisation;
- the identification of activities, other than reorganisation activities, that have been planned, commenced, or carried out, on which the obtainment of the aforementioned tax benefits is dependent;
- a certificate of no tax arrears issued pursuant to Article 306e §1 of the Tax Ordinance Act, in which the tax office issuing the certificate will include information on whether there are any tax proceedings conducted with respect to the taxpayer leading to disclosure of any tax arrears and determining their amount, or whether enforcement proceedings are underway with respect to the taxpayer also with reference to other non-tax obligations of the applicant;
- a declaration by the members of the management board, made under pain of criminal liability, on any real property that the taxpayer has in Poland.

Moreover, the company will also submit to the registry court a certificate from the Social Insurance Institution (ZUS) specifying the number of insured persons and confirming that there are no arrears in the payment of contributions. The taxpayer will also submit a decision on assigning a tax scheme number to the reorganisation. Taking all of this into account, the scope of documents and circumstances that the Head of KAS will have to examine will be extremely broad. The Head of KAS will have one month to issue its opinion, but in particularly justified cases this deadline can be extended by three months. In view of the extensive scope of the assessment to be carried out by the Head of KAS, the number of documents to be provided, and the fact that the applicant will probably also receive a number of questions and requests for clarification in the course of these proceedings, it appears that extending said proceedings by three months will likely become the rule, rather than the exception. The opinion will be subject to a fee of 50% of the minimum wage.

The opinion or the refusal to issue an opinion will be sent by the Head of KAS to the registry court, which will then decide whether to issue a compliance certificate of the cross-border reorganisation with domestic law. However, the Head of KAS will have the right to choose to refuse to issue a tax opinion on a cross-border reorganisation. Head of KAS will do so if he believes that the reorganisation in question may be designed to avoid taxation or to abuse the law. The existence of unsatisfied or unsecured tax arrears or non-tax budget receivables may also be grounds for refusing to issue the opinion. The refusal by the Head of KAS to issue an opinion on cross-border reorganisation will be appealable to the Provincial Administrative Court.

Given the scope of the analysis to be carried out by the Head of KAS, it is to be expected that the one month deadline for the issuance of an opinion will be exceeded, even despite the fact that the Ministry of Finance will most likely provide a template for such a request. Practice will show whether, in the course of work before issuing the opinion, the Head of KAS will consult with the Minister of Finance, the General Inspector of Financial Information (GIIF), the Director of National Fiscal Information or the head of the tax office under whose jurisdiction the applicant falls, as is their right. As a consequence of the above, it appears that the implementation of this new type of tax opinion may lead to taxpayers forsaking the separate submission of their individual requests for binding tax law rulings to the Director of National Fiscal Information.

We address the tax aspects of the changes related to domestic reorganisations in our article published on 6 November 2023.

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