The Private Wealth & Private Client Review

Fifth Edition

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EDITOR'S PREFACE

The first six months of 2016 have been characterised by turbulence for the world in general, and particularly for those holding significant private wealth. The key development of 2016 to date has been the publication of the 'Panama Papers'. The response to the publication from governments and the Organisation for Economic Co-operation and Development (OECD) has reinforced trends seen in prior years towards greater transparency and regulation in the domain of cross-border holding structures and in the context of beneficial ownership information.

i Panama Papers

Many have pointed to the irony surrounding the approach taken by the International Consortium of Investigative Journalists (ICIJ) in Washington in the context of its publication of the Panama Papers. The ICIJ's website sets out an elaborate procedure for whistle-blowers to provide information to them on a 'confidential' basis and the organisation has been resolute in its assurances that it will keep its sources confidential. So while the ICIJ argues for full transparency of information about the holding of private wealth, it does not consider that this standard should apply to those who provide information about wealthy families, even if the information is secured by unlawful means. Clearly, the Panama Papers have highlighted some issues concerned with offshore structures being used to provide a veil of secrecy to allow unlawful activity to go undetected and there is no sympathy for those whose unlawful acts have been exposed. Of deeper concern, however, is those who have sought to defend their privacy and yet have been accused of wrongdoing on a completely false basis – the case of Emma Watson who placed her home in the name of an offshore nominee to protect herself against stalkers serves to illustrate this trend. What has been striking from a UK perspective is the extent to which journalists from respected media organisations comment on issues relating to offshore structuring using language that is sensationalist in tone and frequently wildly inaccurate. The apparent furore over the former prime minster David Cameron's holding in an entirely conventional offshore fund structure established by his late father for third-party investors was reported by the BBC as an 'offshore fund trust'. The impression

one gained from this reporting was that the journalist concerned was merely including as many words in the article that he felt had negative connotations to achieve maximum effect, regardless of their technical inaccuracy.

While the Tax Justice Network asserts in a 28 June 2016 report that 'trusts become the preferred choice by tax dodgers, corrupt officials or money launderers' to avoid transparency, there is precious little evidence of the large-scale use of trusts that has been unearthed by recent revelations such as the Panama Papers. A perspective that will not be published in any newspaper in the context of the Panama Papers is to explain that the vast majority of offshore trusts are used by tax-compliant families for legitimate wealth structuring and intergenerational succession planning. However, we should not assume that this will silence those who oppose trusts as a matter of principle. The party line of the Tax Justice Network and others is that the reasons trusts escape frequent references in the context of scandals is because they are so effective in hiding wrongdoers and so are very difficult to detect. They clearly have no idea about the depth of scrutiny a family is subject to in terms of anti-money laundering or know-your-client procedures to establish a trust in a well-regulated offshore finance centre.

I do not suggest that we can afford to be complacent about the scope for misuse of offshore vehicles in any way, but it is essential we take every opportunity to explain to policymakers the entirely legitimate purposes for which the overwhelming majority of families employ trusts and similar structures as part of their succession planning and wealth structuring.

ii The Common Reporting Standard (CRS) update

We are now fully in the era of the CRS, which became effective on 1 January 2016. Certain aspects of the CRS are causing a degree of confusion in terms of implementation, especially in the trust arena. Many of the difficulties here stem from the basic conceptual framework, copied over from the Foreign Account Tax Compliance Act (FATCA), which treats a trust fund as a 'financial account'. The most notable 'glitch' in this framework is in identifying those persons connected with trusts who need to be reported on. When trustees self-report as reporting financial institutions, the concept of an 'equity interest' does not name protectors. Alternatively, if one turns to the parallel list for trusts that are passive non-financial entities, protectors are expressly named. The OECD's own position set out in a recent FAQ is that the protector should always be named, but the formal legal basis included in the CRS model treaty is doubtful. It is to be hoped that in the second half of 2016 it will be possible to obtain clearer guidance on many areas of ambiguity so that all parties are fully prepared for the first wave of CRS-related disclosure for the 2016 financial year, which will be required before May 2017.

One silver lining to this confusion and uncertainty on protectors is a renewed focus on the choice of an appropriate person to serve in a protector role. In some cases, families are electing to formalise governance processes around fiduciary holding structures and introduce independent professional protectors in place of close relatives or family friends whose understanding of their duties may have been somewhat limited.

There already appears to be a two-speed world in the context of CRS with an enthusiastic group of early adopters who have signed the Multilateral Competent Authority Agreement so as to be able to exchange information with as many nations as possible, while a more reticent group of nations plan to adopt CRS on a bilateral treaty-by-treaty basis. The EU and Crown Dependencies and Overseas Territories are in the first group, while notably the Bahamas, Hong Kong, Singapore and Switzerland are in the second.

There is an emerging trend of consolidation of offshore structures into single jurisdictions to reduce complexity and multiple service provider compliance. It will be interesting to

see which jurisdictions win out in this time of transition and, in particular, whether those international finance centres such as Jersey and Cayman that have placed themselves in the early adopter group will benefit from this stance. It is becoming apparent that many clients are keen to demonstrate their commitment to working in a transparent environment to forestall the type of ill-informed criticism unleashed in the wake of the Panama Papers.

iii Exchange of Beneficial Ownership Information (EBOI)

EBOI is the latest initiative being promoted by the G5 in Europe (the UK, Germany, France, Spain and Italy) and was a direct response to the Panama Papers' publication. EBOI builds on the same concepts that underpin the CRS and FATCA. The aim is, in parallel to the tax-related disclosure generated by FATCA and the CRS, to require the annual provision of beneficial ownership information on companies, trusts, foundations and similar legal arrangements or entities. The starting point is to require all jurisdictions that participate to maintain an accurate register in the hands of competent authorities to identify the beneficial owners of all such legal entities and arrangements.

The OECD is due to report back on the framework for potential implementation of EBOI in October 2016. What is increasingly apparent from the initial proposals is that their scope could well be significantly wider than the CRS framework. Where EBOI could widen the disclosure of information further is in requiring every single entity within a holding structure to have its own beneficial ownership register. If one takes, for example, the disclosure that relates to the holding structure ultimately held through a trust, the current rules under the CRS enable trustees that are themselves reporting financial institutions to take overall responsibility for reporting on the entire structure. If all underlying entities held within the trust are themselves reporting financial institutions or active non-financial entities (NFEs), only a single report is provided in relation to the trust as a whole. However, under EBOI, it may well be necessary to make multiple disclosures on all holding entities in a trust even though they have a common set of beneficial owners. The same rules could also apply for multiple layer holding structures ultimately held by individuals.

At inception, the proposals for EBOI are based around the idea of access being provided to 'competent authorities' such as regulators and law enforcement agencies. Predictably, there are already calls from NGOs for such registers to be made public. While many jurisdictions (for example, Jersey and Bermuda) have required beneficial ownership information on companies to be provided to them for many years, the effect of the EBOI proposals seems likely to require the creation of trust registers in many jurisdictions for the first time. It remains to be seen how these registers would work in practice. It is proposed that there will be an annual requirement to update the register to note any material changes. Potentially, this annual update will need to be provided in parallel to CRS and FATCA-type data, which tax authorities required by the end of May, with reference to the position as at the end of the prior calendar year.

iv Public registers of beneficial ownership

The UK's People with Significant Control (PSC) register has been operational since 30 June 2016. It will be interesting to see the approach taken by EU jurisdictions in implementing the Fourth Anti-Money Laundering Directive. The PSC register substantially implements that directive in the UK, although its terms are not completely aligned with the Fourth Anti-Money Laundering Directive.

It is already apparent, in considering the information to be provided for the PSC register, that the ultimate quest to name natural persons rather than entities can give rise to some unexpected results. As with the CRS, particular difficulties arise where a UK company is ultimately controlled by a trust. This is because in considering the application of the rules in a trust context, one does not name, for example, corporate trustees. One is required to look to individuals who control those corporate entities. This means that the information provided with respect to those natural persons is unlikely to have any meaningful connection with stated objectives of the legislation in providing greater clarity for third parties dealing with the company as to who, ultimately, influences its activities. It is also striking that in cases where the corporate trustee is owned by a listed group or controlled by a private equity firm, there may, in some circumstances, be no ultimate PSC required to be named.

If one contrasts the position here with that applicable to the French Trust Register, (ironically, made public on the same date, 30 June 2016), the information required to be made public under the French Register is extensive and, unlike the PSC register, requires one to provide details of the beneficiaries as well as the names of the trust. There is also a separate requirement to file a stand-alone 'event-based return' if the terms of a trust are modified in any way during the course of a calendar year.

The EU has recently published proposals to amend the Fourth Anti-Money Laundering Directive in the wake of the Panama Papers. In this context, it seems likely that the initial decision taken in 2015 not to require details of trusts to be placed on a public register will be reversed. If this proposal gains wider support (as seems likely), it will be interesting to see whether it will be modelled on the French register or will be more analogous to the UK PSC register.

iii Conclusion

In closing, it has never been more important for advisers to give balanced and considered advice to families on how best to structure their arrangements, not just in the light of prevailing family circumstances and tax considerations, but also in the knowledge of the likelihood that information about the holding structure will be subjected to greater regulatory, government and potentially public disclosure in the years ahead. The paradigm that currently prevails in Western Europe is markedly different from that applicable in Asia, the Middle East and Latin America.

It remains to be seen whether, in the long term, many international families who have compliant structures that are fully disclosed to tax authorities will favour the United States as a tax-favoured jurisdiction from which to administer their family structures. This is on the basis that with a thriving domestic trust industry, the US could well be seen as a reputable jurisdiction which protects families from unwarranted public intrusion into their personal affairs to a greater extent than traditional offshore finance centres if beneficial ownership registers do become public in due course.

John Riches
RMW Law LLP
London
August 2016

Chapter 30

POLAND

Sławomir Łuczak and Karolina Gotfryd[1]

I INTRODUCTION

Poland is a neutral jurisdiction to individuals of significant wealth, which means that Poland provides neither positive nor negative regulations for the wealthiest individuals. On the one hand, the lack of such taxes as wealth tax and exit tax, tax exemption for closed-end funds and relatively low tax rates makes Poland an attractive place to locate personal wealth. On the other hand, Poland conforms with current global trends aimed at closing the remaining loopholes in its tax system through the introduction of various regulations such as controlled foreign corporation (CFC) rules, general anti-abuse rules (GAAR), new transfer pricing documentation requirements and taxation of joint-stock partnerships. It is significant that Poland participates in the BEPS Project and implements the Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards the mandatory automatic exchange of information in the field of taxation. Poland has signed many double tax treaties (more than 80 conventions) and international agreements on the exchange of information on tax matters. These act as a deterrent to individuals who intend to locate their wealth in Poland.

II TAX

There are two types of tax obligation in Poland: unlimited and limited. Unlimited tax obligation is constituted when individuals with their place of residence in Poland are taxed on their worldwide income, regardless of where the income is earned. The limited tax obligation arises when individuals do not have a place of residence in Poland, and they are taxed solely on their income derived from Polish sources.

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A progressive income tax scale that is widely used in other EU countries, such as France, Sweden and the Netherlands, is applied to individuals in Poland. Tax rates vary depending on income earned, defined as: 'the total revenue minus tax deductible costs, earned in a given taxable year'. The Polish tax bands are relatively low: 18 per cent and 32 per cent. Poland is in ninth position in the ranking of progressive tax rates in EU countries regarding higher tax rates (32 per cent), and in 14th position concerning lower tax rates (18 per cent).[2] Nevertheless, according to statistics, only approximately 3 per cent of taxpayers pay the higher tax band of 32 per cent.[3] Most wealthy taxpayers optimise their profits using regulations intended for natural persons conducting business activity. These individuals are taxed according to the tax scale; however, at their request, they may tax their income at a 19 per cent flat-rate, which is dedicated to natural persons conducting a business activity. It may be assumed that the most affluent Polish taxpayers are self-employed in Poland for tax purposes.

The richest Poles often derive their income from capital gains (dividends, interests, profit on the sale of shares), which are not covered by social security contributions, and it is taxed with a 19 per cent flat-rate tax (whereas in Germany and Ireland it is 25 per cent and in Scandinavian countries it is more than 30 per cent). Income from capital gains is not counted in the overall income.

In many countries, high tax rates are connected with a high tax-free personal allowance; however, this is not the case in Poland, where the tax-free amount is the lowest in all EU countries (approximately €750).[4] It is worth stressing that the Polish Constitutional Tribunal recently issued a judgment (Case No: K 21/14) in which it stated that the level of tax-free amount is unconstitutional insofar as it does not provide a correction mechanism for the tax-free amount to ensure a minimum standard for living. An incredibly low level of tax-free personal allowance means that Poles pay taxes while earning a very low income. However, there is no indication that this amount will change in the near future.

A taxpayer's personal and family situation may be taken into account in the tax system, especially in relation to income tax, in the form of reliefs and tax exemptions.[5]

Poland, like most other EU countries, provides various tax credits, such as internet tax credit, tax credit for an individual retirement security account and a tax credit for charitable donations. Since the Polish tax system is in favour of families in many tax respects, a large part of tax credits concern a taxpayer's personal situation. Therefore, Polish income tax provides a child tax credit, joint taxation (with children) of single parents and joint-taxation of spouses, the aim of which is to ensure a family has a reduced financial burden. At this point it should be noted that the preferential treatment of families also appears in gift and inheritance tax, where the immediate family members of the testator are exempted from tax.

As of 1 January 2015, numerous amendments to the Polish Personal Income Tax Act relating to cross-border structuring entered into force, such as the introduction of CFC rules,

2 Statistics presented in PWC's Report: www.pwc.pl/pl/media/2016/2016-04-26-poziom-podatku-dochodowego-w-polsce-sredni-na-tle-innych-krajow-ue.html.

3 Information provided in the Polish Ministry of Finance statistics: www.finanse.mf.gov.pl/documents/766655/5008832/Informacja.

4 Statistic presented in PWC's Report: www.pwc.pl/pl/media/2016/2016-04-26-poziom-podatku-dochodowego-w-polsce-sredni-na-tle-innych-krajow-ue.html.

5 K Święch, *Pozycja rodziny w polskim prawie podatkowym*, Warsaw 2013, page 133.

new transfer pricing documentation requirements and comprehensive regulations regarding the provision of information on interest payments, implementing Directive 2014/48/EU of 24 March 2014. The above changes aim to close loopholes in the Polish tax system.

From an individual taxpayer's perspective, the most crucial change is the introduction of CFC rules that revolutionise international tax planning and optimisation. The Polish legislator's aim was to tax income derived by Polish tax residents from foreign companies when such income is not taxed in the company's country of residence or the tax is too low (lower than 14.25 per cent). Under new provisions, an additional income tax (19 per cent) is imposed on shareholders holding at least a 25 per cent direct or indirect holding in entities deriving their revenues mainly (more than 50 per cent) from passive income (i.e., dividends, interests, royalties, share disposals). CFC rules also affect taxpayers who are shareholders of entities that have a seat or place of management in a tax haven. Polish taxpayers who own CFCs will also need to keep a register of qualifying foreign entities and a record of transactions occurring in the foreign entities, and file a special annual return in Poland.

As for transfer pricing documentation, new provisions impose new requirements on taxpayers conducting related party transactions, which means more comprehensive information on related party transactions should be disclosed to the tax authorities. Under these new provisions, taxpayers are obliged to prepare more extensive transfer pricing documentation (in particular, local files are expanded). According to the new provisions, taxpayers whose annual revenues and expenses exceed €20 million in the preceding financial year are also obliged to provide Master file documentation that includes, among others, the group's capital structure, TP policy and detailed information on intellectual property. Additionally, the biggest Polish taxpayers with consolidated revenues exceeding €750 million are obliged to provide country–country reporting. It should be stressed that some changes in transfer pricing provisions are favourable for taxpayers whose revenues and expenses do not exceed €2 million in a given year, as they do not need to prepare transfer pricing documentation.

As already mentioned above, Polish tax law provides for neither wealth tax nor exit tax, and there is no indication that the Polish legislator will introduce these taxes in the near future.

III SUCCESION

The Polish law of succession is mainly regulated in the Polish Civil Code. However, specified provisions regarding the law of succession are also found in other statutory laws (e.g., banking law, labour law and the Code of Commercial Companies). The right to inherit is protected by the Polish Constitution, which states that everyone has the right of succession and this right is equally protected by the law.

The law of succession is based on legal principles, namely testamentary freedom and the protection of relationships between family members.[6]

The right to succession may result from two sources: the will or the statute (the Polish Civil Code). It should be noted that a will takes precedence over the statutory inheritance. A testate succession occurs when a testator (a person with full legal capacity) expresses his last

6 W Borysiak, Polish law of succession – general information, provided on the website: http://polishprivatelaw.pl/polish-law-of-succession-general-information/.

will through one of three forms of will. The first is the simplest: the will should be written entirely by the hand of the testator, who must sign and date it. The second may be made in the form of a notarial deed. The third is to make a will by declaring its content orally before a local government officer in the presence of two witnesses.

Statutory succession should be applied when no (valid) testament exists or the persons who were appointed as heirs in the testament disclaimed the testament or are unable to become heirs. There are four groups of heirs under Polish succession law. The range of these entities is determined by family ties, such as blood ties, marriage or adoption.

In the first group, the surviving spouse and descendants will inherit. Here, the principle that children and a spouse inherit in equal parts applies; however, the spouse's share cannot be less than one-quarter of the entire estate. In the second group, in the absence of descendants, the spouse and deceased's parents will inherit. In this case, the inheritance attributable to the spouse must correspond to half of the deceased's estate. If the deceased's parents have died, the inheritance attributable to this parent goes to the testator's siblings or, if the deceased's siblings have died, their children. The third group of heirs is entitled to the succession solely when there are no heirs in the first two groups. This category includes: the deceased's grandparents or, if they are also deceased, their children. The fourth group consists of children of the deceased person's spouse whose parents were not alive when the estate is opened. Last of all, the municipality in which the decedent last resided will inherit, or if the deceased's residence cannot be determined or is located abroad, the State Treasury.

Here, it should be indicated that the sequence of the inheritance and the range of the entities entitled to the succession presented above is a result of amendments to the Polish succession law from 2009. So far, provisions in scope of statutory succession have been rigorous and have prevented grandparents and their descendants from succession. Another key change is the testator's stepchildren's entitlement to the succession; however, they inherit only when their parents have passed away. The amendment was designed to strengthen family ties and limit the municipality's and State Treasury's access to the succession in a situation where a member of the testator's family is still alive.

It is noteworthy that heirs may either accept succession without the limitation of liability for debts (simple acceptance), or accept succession with the limitation of such liability (acceptance with benefit of inventory). Alternatively, heirs may reject the inheritance within a time limit of six months from the day when they became aware of their title to inherit. Until 2015, when no statement of intent was submitted within the prescribed time limit, heirs were deemed to have accepted the inheritance and were liable for debts without any limit. Such a state of affairs was evaluated as being socially unfair. Therefore, since 18 October 2015, provisions concerning liability for debts under succession have been changed to be analogous with the latest European codifications. According to the new regulation, if heirs do not do anything within a time limit of six months from the day they become aware of their title to inherit, their liability for debts will be limited to the assets of inheritance (acceptance with benefit of inventory).

A testator may appoint an executor to ensure that all the testamentary provisions will be properly conducted; however, the executor cannot be treated as a fiduciary or a trustee.

Polish law forbids mutual wills and contracts of inheritance, with the only exception to this rule being a contract of renunciation of inheritance, in which a person who belongs to one of the classes of statutory heirs renounces their statutory inheritance after the testator's death.

There have been no changes affecting personal property, such as developments on prenuptial agreements and same-sex marriages. Same-sex marriages are illegal in Poland; therefore, people in a same-sex relationship are not subject to intestate succession. However, there are no obstacles to prevent either party in such a relationship from drawing up a will that decides who will receive a party's estate. It should be noted that Polish succession law protects the closest relatives of a deceased person by forced share. Only descendants, a surviving spouse, and the deceased's parents have the right to a statutory portion.

Nevertheless, a person in a same-sex relationship can receive the right to a tenancy from the deceased partner. This was confirmed by the Supreme Court in its resolution (Case No. III CZP 65/12) of 28 November 2012, in which it was held that the person of the same sex who is connected through emotional, physical and economic ties with the tenant may receive the right to the tenancy from the deceased partner just as a wife or a cohabiting partner.

Prenuptial agreements do not change the rules for passing on inheritance, including the intestate succession rules, which are binding when the testator does not draw up a will. This means that spouses who have concluded a prenuptial agreement inherit from each other according to succession law principles. This agreement may affect the seizure of assets of the inherited wealth only (there is no succession of the couple's property, only the individual property of the deceased spouse).

Natural persons are the only taxpayers of inheritance tax. Inheritance tax is imposed on acquisitions as a result of inheritance of property (moveable and immoveable) located in Poland, and property rights exercised in Poland, including money. Tax is also applied to the acquisition of property located outside of Poland and rights exercised abroad if at the time of the deceased's death, the beneficiary was a Polish national or had a permanent place of residence in Poland. If neither the deceased nor the beneficiary were Polish citizens or had permanent residence in Poland at the moment of death, inheritance tax is not levied.

Payers of inheritance tax are grouped into three categories depending on their relationship with the testator. The first group consists of the spouse, descendants (children, grandchildren, etc.), ascendants (parents, grandparents, etc.), sons-in-law, daughters-in-law, siblings, stepfathers, stepmothers and parents-in-law. The second includes descendants of siblings (niece, nephew, etc.), siblings' spouses, siblings of spouses, the spouse's siblings' spouses, other descendants' spouses siblings of parents (aunties, uncles, etc.) and stepchildren's descendants and spouses. Finally, the third group includes other acquiring parties, including unrelated parties.

Determining the base and the rate of Polish inheritance tax depends on the specific tax group the testator belongs to and on the minimum tax-exempt amount. Currently, tax-exempt amounts are as follows: for acquirers from tax group 1 – 9,637 zlotys; for tax group 2 – 7,276 zlotys and for tax group 3 – 4,902 zlotys. Tax on inheritance applies to the acquisition of ownership of assets over the tax-free amount.

The table below presents the rates of Polish inheritance tax.

Taxable base		Tax scale
Above	*Up to*	
1) from acquirers in group I		
–	10,278 zlotys	3%
10,278 zlotys	20,556 zlotys	308.30 zlotys plus 5% of the surplus over 10,278 zlotys
20,556 zlotys	–	822.20 zlotys plus 7% of the surplus over 20,556 zlotys
2) from acquirers in group II		
–	10,278 zlotys	7%
10,278 zlotys	20,556 zlotys	719.50 zlotys plus 9% of the surplus over 10,278 zlotys
20,556 zlotys	–	1,644.00 zlotys plus 12% of the surplus over 20,556 zlotys
3) from acquirers in group III		
–	10,278 zlotys	12%
10,278 zlotys	20,556 zlotys	1,233.40 zlotys plus 16% of the surplus over 10,278 zlotys
20,556 zlotys	–	2,877.90 zlotys plus 20% of the surplus over PLN 20,556 zlotys

The taxpayer has 14 days from the day the decision of the revenue office determining the tax rate (unless it was collected earlier by the notary) has been delivered to pay the inheritance tax.

Poland is unique among tax jurisdictions across the world for exempting the testator's immediate family members from inheritance tax. This is aimed at accumulating the family's wealth across generations, and therefore the provisions of inheritance tax give preference to the family. The beneficiaries need to report the acquisition to the competent head of their tax office within six months from the day the tax obligation has arisen.

IV WEALTH STRUCTURING & REGULATION

For wealth structuring, Polish taxpayers commonly use regulations and structures available in Poland and as well as in foreign countries. However, trusts and private foundations are unknown to the Polish legal system, and therefore they are not widely exercised in Poland. This is not the case, however, for the wealthiest taxpayers, who willingly benefit from foreign foundations and trusts located in countries that provide these regulations, such as the United Kingdom, the Netherlands and Luxembourg. Optimisation structures in Poland are established by using closed-end funds and partnerships – especially limited partnerships.

Closed-end funds are legal persons, operating pursuant to the Polish Investment Fund Act, which enjoy corporate tax exemption (without any additional conditions). It means that they are not taxed at 19 per cent. Entrepreneurs or companies may transfer various assets, such as shares, immoveable property, bonds, and other financial instruments into closed-end funds and then they may make transactions with those assets within the funds. Income from such transactions is not taxed directly. Investors or entrepreneurs are obliged to pay tax only when fund certificates are decomitted. The 19 per cent flat-rate tax on the income from capital gains is collected by the tax remitter (i.e., the closed-end fund). Therefore, this structure is used more and more frequently in succession, as private wealth may be easily and promptly transferred through the fund (e.g., a seriously ill owner of several companies may contribute shares to the fund and pass funds certificates on to his or her heirs).

Using closed-end funds leads to changes regarding how an owner exercises control over conducting business. A closed-end fund is managed and represented by the Investment Fund Association (IFA), which is a joint-stock company authorised by the Polish Financial Supervisory Commission to manage the fund. This means that the IFA concludes all agreements on behalf of a closed-end fund. Moreover, the IFA represents a closed-end fund at

the general meetings of companies that belong to the fund. An entrepreneur may participate actively in taking key decisions for the fund when the IFA grants him a proxy. Nevertheless, owner control of the fund is possible through the general meeting of investors, which plays a similar role to the shareholders' general meeting. An entrepreneur as an investor has an impact on the fund's statutes, which is a key component in the fund's operation.

From an individual's perspective, the main objective of establishing a closed-end fund is the loss of the owner's direct control over the assets transferred to the fund. Nevertheless, a closed-end fund is a good way of consolidating a business when an owner of many companies transfers his or her shares into a fund.

Until 2014, the use of a joint-stock partnership was possible for tax optimisation purposes; however, the Polish legislator became aware of this well-known trend and decided that joint-stock partnerships are subject to corporate income tax. This has an impact on closed-end funds that cannot locate their assets into partnerships other than joint-stock partnerships. The change of these partnerships' legal status means that there is no possibility for closed-end funds to benefit from tax exemptions as operational activity cannot be managed by other transparent partnerships (limited partnerships and registered partnerships) that do not issue securities. Thus, there is no such entity in the Polish legal system that could perform this function. In such case, it is necessary to use foreign entities (such as Luxembourg, the Special Limited Partnership (SCSp) or Cypriot AIF) that may issue securities to the closed-end funds. Such entities are tax transparent and become an interface between a closed-end fund and a Polish operating company in the form of a registered partnership or a limited partnership. Consequently, the tax transparency of Polish operating companies and foreign entities leads to tax optimisation where operating profit is tax-exempt in Poland (under the specified provisions of double tax treaties) or is taxed at the level of an investor.

The biggest disadvantage of such structures is the cost for setting up foreign entities (such as AIF and SCSp).

Income tax exemptions for foreign closed-end funds (located in the EU or EEA) were aimed at putting Polish and foreign closed-end funds on an equal footing. According to Polish provisions, these funds need to meet certain conditions to benefit from exemption. There have been diverging tax authorities' interpretations of such conditions, mostly to the disadvantage of foreign funds.

Therefore, granting tax exemptions for foreign closed-end funds is an exception rather than the rule. Taxpayers should rely on administrative courts that find in their favour and give hope for the reversal of the current negative trend in the tax authorities' rulings. In cases where such positive judgments are upheld, foreign closed-end funds are a good alternative to Polish funds because of the less complicated structure and lower costs.

Imposing corporate income tax on joint-stock partnerships that were tax-transparent forced taxpayers to find other ways to find tax optimisations. Limited partnerships (LPs) turned out to be an effective alternative. An LP is a very popular form of conducting business as it enables the partners' liability to be limited and is not subject to corporate income tax. It should be clarified that LPs are entities without a legal personality and they are created by two types of partner: a partner whose liability for the company's obligations is unlimited and who conducts the company's affairs and represents it in all issues before third parties, and a partner with limited liability who is obliged to a fixed amount, which does not need to reflect the partner's contribution to the LP.

To connect benefits from limited liability (not only for tax arrears purposes) with the tax advantages resulting from the tax transparency of partnerships, it is worth considering the establishment of a hybrid company, such as a limited liability company limited partnership.[7]

The general partner in this entity is a limited liability company that conducts the company's affairs and represents it, and therefore its liability is unlimited (in practice, it will be limited exclusively to the company's assets because of its legal nature). A limited partner is a natural person who can also be a shareholder of a general partner.

Tax burden optimisation for income tax is carried out through an appropriate profit distribution between general and limited partners. To achieve a measurable benefit in the tax law area, profit distribution should be done in a way that the profit of the general partner is considerably lower than the profit of the limited liability partner (e.g., unlimited liability partner – 1 per cent and limited liability partner – 99 per cent).

This interesting hybrid is a type of partnership that is neither a taxpayer of corporate income tax nor personal income tax. This means the partners in a limited partnership (natural persons) should pay personal income tax. The taxpayer's income from participating in a partnership is determined proportionally to the right to a share in the partnership's profit. This income is cumulated with general income subject to the progressive tax rate. The taxable person may tax its income from non-agricultural activity according to the linear rate of personal income tax at 19 per cent.

As for a limited liability company, it is a capital company and therefore it is double taxed, which means that taxes are paid both by the company (19 per cent on income earned) and the shareholders (19 per cent from dividends); hence, why a general partner's profit should be reduced to the minimum.

While discussing different ways of tax optimisation, issues regarding the general anti-avoidance rule in Poland should not be omitted. The fate of this clause in Poland seemed to be tortuous, but eventually the Polish government enacted a GAAR, which came into force on 15 July 2016.[8] The general anti-avoidance rule was created as a new tool that the tax authorities may apply to reclassify business operations where a taxpayer was demonstrated to have obtained substantial tax profits through tax-avoidance strategies. Achieving 'tax benefit' through artificial arrangements prejudges the possibility of applying the anti-abuse rule. The term 'tax benefit' should be understood as: 'reducing, avoiding or postponing the taxpayer's tax liability, creating a tax payment surplus or an entitlement to a tax refund, or increasing the amount of tax payments surplus or tax refund'. To decide whether a legal arrangement is artificial or not, various factors should be taken into account, such as excessively complex transactions. It should be noted that when a taxpayer obtains a 'tax benefit' that does not exceed 100,000 zlotys in a given settlement period, the GAAR will not be applied.

7 M Jamroży, et al, Spółka osobowa prawa handlowego. *Aspekty prawno-podatkowe, optymalizacja podatkowa*, Warsaw 2012, page 315.

8 GAAR was originally introduced in the 2003 Tax Ordinance Act and this provision continued to be applied until May 2004 when the Polish Constitutional Court held that the GAAR provision was unlawful because it did not meet the constitutional requirements of appropriate legislation and repealed this rule. Since then, the Polish tax law system did not have a general anti-avoidance rule until this year; however, some attempts in the past were made to introduce this clause with regards to closing remaining loopholes in Polish tax law.

The clause will allow the tax authorities to ignore artificial legal arrangements, which means taxpayers may be obliged to pay the avoided tax with default interest and become exposed to criminal fiscal liability. To protect taxpayers from the tax authorities' discretionary powers, the Council for Tax Avoidance Matters, a collegiate body independent of the tax authorities, was created. The Council issues non-binding opinions on whether the GAAR should be applied in a given case or not, at the request of the taxpayer or the competent authority. Moreover, the taxpayer may apply to the Minister of Finance to issue an opinion, which disallows the application of the GAAR. The cost of this opinion is 20,000 zlotys.

The Polish GAAR will be applicable as *lex generalis* to other specific anti-avoidance rules. The Polish Ministry of Finance states that the GAAR should be applied only as a last resort when other measures (i.e., specific anti-abuse rules) fail.

The Polish legal system covers money laundering in criminal law provisions, securities law, banking law and certain provisions of a *lex specialis* nature (including EU legislation).[9] Criminalisation and preventing money laundering is based on the Penal Code (in particular, Article 299), the Act of 16 November 2000 on counteracting money laundering and financing terrorism, the Act of 28 October 2002 on the Acts prohibited under the Punishment Act, and the Act of 31 January 1989 on banking law.

The definition of 'money laundering' in Polish law is wide, as it covers not only funds from an illegal activity but also legal funds that are 'hidden' from taxation.

The Act on counteracting money laundering sets out obliged entities' duties related to preventing money laundering and financing terrorism. This Act implements Directive 2005/60/WE of the European Parliament and of the Council of 26 October 2005. The new Directive (EU) 2015/849 preventing money laundering has not been implemented yet.

In the provisions of the Act, it may find information such as: the definitions of 'obliged entities', and 'beneficial owner'; competent authorities responsible for counteracting money laundering and financing terrorism; obliged entities' responsibilities; principles for providing information to the General Inspector; the procedure for suspending transactions and blocking accounts; specific restrictive measures against persons, groups, and entities; controlling obliged entities; protecting and disclosing collected data; and pecuniary penalties and penal provisions.

Besides credit and financial institutions, obliged entities are: auditors, external accountants, tax advisers, notaries, and other independent legal professionals such as attorneys and legal advisers. The personal scope of this Act also covers an entrepreneur (both natural and legal person) conducting a transaction exceeding the equivalent of €15,000 who is obliged to register such transaction. This obligation also occurs when a transaction is carried out by more than one single operation but the circumstances indicate that they are linked and that they were divided into operations of less value with the intent to avoid the registration requirement.

The Act on counteracting money laundering sets out several duties of obliged entities, which include registering any transaction exceeding €15,000, keeping specified records, carrying out ongoing analyses of conducted transactions, conducting risk assessment for money laundering, and financing terrorism and applying financial security measures.

9 K Nowicki, Ł Woźniak, Prawne regulacje dotyczące prania brudnych pieniędzy (in:) J Grzywacz, et al, *Pranie brudnych pieniędzy*, Warsaw 2005, page 75.

Poland is not a member of the Financial Action Task Force (FATF); however, it is involved in the group's activities. Poland not only replies to the questionnaires sent by FATF's experts, but also participates in the meetings of the working parties (i.e., FATF and MONEYVAL).[10]

V CONCLUSIONS & OUTLOOK

It may be assumed that there is a regressive tax regime in Poland, as taxes for the most affluent people are lower than in other Western countries, whereas for the poorest, higher. Poland does not have a national tax policy for the richest individuals; most wealthy Poles tax their wealth outside the territory of Poland in countries that provide more advantageous tax treatment, such as Luxembourg, Cyprus and the Netherlands.[11] Poland has begun its battle to prevent tax avoidance and tax evasion through introducing numerous regulations designed to combat this negative phenomenon. It would not be an exaggeration to say that Poland is becoming a less tax-friendly country, which consciously limits the possibility of tax optimisation.

For several years, there has been a trend in Europe to close remaining loopholes in national tax law to prevent aggressive tax planning, tax avoidance and tax evasion: from the flagship project of the OECD – BEPS (Base Erosion and Profits Shifting) to the work carried out by the Commission in the area of Anti-Avoidance Package and domestic regulations of particular countries.

The Ministry of Finance has not conducted an analysis concerning the estimation of the scale of BEPS from the results of Supreme Chamber of Control's report.[12] So far, BEPS Action Plan has had little influence on Polish domestic tax law.

Nevertheless, significant changes have been made in Polish tax law recently. As of 1 January 2015, numerous amendments to the Polish Personal Income Tax Act have entered into force. Changes include: the introduction of CFC rules, strengthening thin-capitalisation rules and the introduction of a number of new transfer pricing documentation requirements. However, only the transfer pricing provisions reflect the OECD's recommendations provided for in the BEPS Project and they remain in-line with the guidelines included in the Final Report of Action 13.

In contrast, the BEPS Project has had a huge impact on Polish tax treaty law. In its answer to the letter of 8 February 2016 concerning the impact of BEPS on treaty policy, the Polish Ministry of Finance stated that the Ministry is actively engaging in the BEPS project,

10 Information provided on the Polish Ministry of Finance's website: www.mf.gov.pl/documents/764034/1002265/FATF.notatka.08.08.2014.pdf.

11 Information provided in the article: Czy najbogatsi Polacy odprowadzają dochody do rajów podatkowych?, available on the website: www.totalmoney.pl/artykuly/173464,konta-osobiste,czy-najbogatsi-polacy-odprowadzaja-dochody-do-rajow-podatkowych,1,1.

12 Information provided in the Report of the Supreme Chamber of Control: Wystąpienie pokontrolne, Nadzór organów podatkowych i organów kontroli skarbowej nad prawidłowością rozliczeń z budżetem państwa podmiotów z udziałem kapitału zagranicznego, Warszawa 2015, page 10. See: www.warszawa.kskarbowa.gov.pl/documents/3864021/4464296/NIK+05092014.pdf.

which has been assessed as an important initiative to prevent the loss of tax revenues at national and international levels.[13] This approach would seem to be supported by the actions taken by the Polish Ministry of Finance.

During the period 2012–2015, Poland concluded seven new double tax treaties, eight protocols amending double tax conventions and 15 agreements on the exchange of information on tax matters. According to the Polish Ministry of Finance, the main objectives of the above-mentioned are to limit the use of double tax treaties; to reduce opportunities for aggressive tax planning; to strengthen control mechanisms through an effective exchange of tax information; and to extend the list of types of income generated in a state where it will be covered by a credit method and it will be taxable in that state. The Polish Ministry of Finance stated that it recommends implementing selected solutions of the BEPS Action Plan. The Polish Ministry of Finance will propose new BEPS provisions concerning: the principal purpose test (PPT); permanent establishment with the anti-avoidance rule; the tie-breaker rule; or hybrid entities to its treaty partners. Because of the wide scope of work undertaken in the BEPS Project, the analysis evaluating proposed measures that should be introduced into the Polish tax system or in double tax treaties concluded by Poland are still in hand.

The Ministry of Finance explained that Poland is a member of the Developing a Multilateral Instrument to Modify Bilateral Tax Treaties OECD ad hoc group that developed during the course of the BEPS project, and whose objective is to speedily and consistently implement the proposal of new treaty provisions using the multilateral instrument. The Polish Ministry of Finance sees this initiative as an extremely important and effective means of combating tax avoidance and tax fraud, and, therefore, Poland volunteered to participate in this group in April 2015.

Given the fact that the final outcomes of BEPS were recently published, it may take some time to determine the speed and to what extent Poland adopts the legislative and tax convention changes which BEPS proposes. At this moment, it is too early to see or to predict the effectiveness of the above-mentioned measures.

The OECD puts emphasis not only on the BEPS Project, but also on the automatic exchange of tax information between Member States. According to the OECD's plans, by the end of September 2017 at least 45 jurisdictions (i.e., the Early Adopters Group), including Poland, will exchange information about the bank accounts of individuals.[14] At the end of May 2016, the draft of the Act on the Automatic Exchange of Tax Information with the Other States,[15] which adapts Polish law to the requirements of the Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards the mandatory automatic exchange of information in the field of taxation, was published on the Government Legislation Centre's website. The Act's main purpose is to bring together issues concerning the exchange of tax information in a single Act, including the implementation of automatic exchange of information on tax matters, also in respect of individual tax rulings at cross-border level and the Advance Pricing Agreement. The Act specifies, among others: the principles of mandatory automatic exchange of information in the field of taxation; the disclosure obligations of

13 A response to the request for access to the public information lodged by the author to the Polish Ministry of Finance on 8 February 2016 (PK2.824.16.2016).

14 Information provided on the website: www.oecd.org/tax/transparency/global-forum-AEOI-roadmap-for-developing-countries.pdf page 4.

15 The draft Act is at the public consultation stage.

financial institutions regarding the exchange of information on bank accounts; the scope of exchanged information; the procedure for the notification; rules concerning reporting obligations; and the principles of due diligence of the financial institutions that are obliged to report. The draft Act also provides regulations enabling the automatic exchange of tax information with third countries (outside the EU) under the Common Reporting Standard (CRS) procedure. It should be stressed that Poland concluded a separate agreement on the exchange of tax information with the United States (the Foreign Account Tax Compliance Act – FATCA). FATCA entered into force as of 1 December 2015 and its main aim is to impose an obligation on Polish financial institutions to obtain and exchange information with the tax authorities about US residents and citizens in Poland.

Appendix 1

ABOUT THE AUTHORS

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Sławomir Łuczak graduated with a law degree from University of Poznan. He joined SK&S in 1998 and become a partner in 2007. He previously gained experience in a recognised French audit firm. He has broad experience in international tax law and in representing clients in tax and customs matters before the tax and customs authorities and administrative courts. He advises also on tax issues in relation to restructuring projects and consolidation. He is a member of the International Fiscal Association (IFA), Association Européenne d'Etudes Juridiques et Fiscales (AEEJF) and Regional Council of Attorneys in Warsaw.

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She graduated with law degree with honours from Warsaw University Law School. She studied for one semester at Cologne University Law School. She took part in numerous tax law seminars and summer tax schools at Jagiellonian University in Cracow, and at Vienna University of Economics and Business. She participated in the EUCOTAX (European Universities COoperating on TAXes) Wintercourse 2016 in Vienna and her area of research was 'SAAR – in a post BEPS world'. She is a finalist of the 'Eye on tax' competition 2015, organised by EY. She gained experience in legal practice at international law firms in Warsaw and London.

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