

THE TAX DISPUTES
AND LITIGATION
REVIEW

SEVENTH EDITION

Editor
Simon Whitehead

THE LAWREVIEWS

THE TAX DISPUTES AND LITIGATION REVIEW

SEVENTH EDITION

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PREFACE

The objective of this book is to provide tax professionals involved in disputes with revenue authorities in multiple jurisdictions with an outline of the principal issues arising in those jurisdictions. In this, the seventh edition, we have continued to add to the key jurisdictions where disputes are likely to occur for multinational businesses.

Each chapter provides an overview of the procedural rules that govern tax appeals and highlights the pitfalls of which taxpayers need to be most aware. Aspects that are particularly relevant to multinationals, such as transfer pricing, are also considered. In particular, we have asked the authors to address an area where we have always found worrying and subtle variations in approach between courts in different jurisdictions, namely the differing ways in which double tax conventions can be interpreted and applied.

The idea behind this book commenced in 2013 with the general increase in litigation as tax authorities in a number of jurisdictions took a more aggressive approach to the collection of tax, in response, no doubt, to political pressure to address tax avoidance. In the United Kingdom alone we have seen the tax authority vested with broad new powers not only of disclosure but even to require tax to be paid in advance of any determination by a court that it is due. The provisions empower the revenue authority, an administrative body, to compel payment of a sum, the subject of a genuine dispute, without any form of judicial control or appeal.

Over the past year, the focus on perceived cross-border abuses has continued with European Commission decisions against past tax rulings in Belgium, Ireland and Luxembourg, and the BEPS Project reaching a crescendo in the announcement of a 'diverted profits tax' to impose an additional tax in the United Kingdom when it is felt that a multinational is subject to too little corporation tax even in an EU context and a digital services tax in the United Kingdom introducing provisions that appear in principle to pre-empt the Commission's action in the area. The general targeting of cross-border tax avoidance now has European legislation behind it with the passage last year of the second Anti-Tax Avoidance Directive. The absence of much previous European legislation in direct tax has always been put down to the need for unanimity and the way in which Member States closely guard their taxing rights. The relatively speedy passage of this legislation (the Parent-Subsidiary Directive before it took some 10 years to pass) and its restriction of attractive tax regimes indicates the general political disrepute with which such practices are now viewed.

These are, perhaps, extreme examples, reflective of the parliamentary cycle, yet a general toughening of stance seems to be felt. In that light, this book provides an overview of each jurisdiction's anti-avoidance rules and any alternative mechanisms for resolving tax disputes, such as mediation, arbitration or restitution claims.

We have attempted to give readers a flavour of the tax litigation landscape in each jurisdiction. The authors have looked to the future and have summarised the policies and approaches of the revenue authorities regarding contentious matters, addressing important questions such as how long cases take and situations in which some form of settlement might be available.

We have been lucky to obtain contributions from the leading tax litigation practitioners in their jurisdictions. Many of the authors are members of the EU Tax Group, a collection of independent law firms, of which we are a member, involved particularly in challenges to the compatibility of national tax laws with EU and EEA rights. We hope that you will find this book informative and useful.

Finally, I would like to acknowledge the hard work of my colleague Joseph Irwin in the editing and compilation of this book.

Simon Whitehead

Joseph Hage Aaronson LLP

London

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POLAND

Sławomir Łuczak and Karolina Gotfryd¹

I INTRODUCTION

The Polish tax law system is characterised by tax regulations that are highly complex yet vague and volatile. The large volume of Polish tax acts has contributed further to the complexity of Polish tax law. It is noteworthy that the Polish tax authorities demonstrate a very pro-tax approach, which leads to high potential fees foreseen in cases of the committing of a tax crime or tax violation.

The Polish Ministry of Finance has worked on legislation that has the following aims: to improve the current patchwork system through the introduction of (still-too-vague) regulations; and to bring Poland in line with the current global trend to tighten the leaking tax system through the implementation of Council Directive (EU) 2016/1164 (the Anti-Tax Avoidance Directive (ATAD)). A large number of changes related to income taxes came into force on 1 January 2019, which will undoubtedly have an impact on the amount of tax disputes arising between taxpayers and the tax authorities.

Court proceedings involving Polish tax disputes are generally excessively lengthy, and may take up to four years to conclude. The tax authorities are not in favour of less adversarial procedures to resolve these tax disputes (such as mediation or arbitration). Under the current tax law system, tax litigation is rife; consequently, it is rather costly for taxpayers.

The main issue with Polish tax disputes is that although the administrative courts have determined judgments that are favourable for taxpayers, the tax authorities do not always follow these judgements. This causes legal uncertainty, as the tax authorities often present different conclusions to the administrative courts in relation to the same subject matter. This state of affairs has led to an increase in the number of tax disputes between taxpayers and the tax authorities.

The introduction of a new provision in the Tax Ordinance Act in 2015 that reflects the *in dubio pro tributario* principle has not proved to be of much assistance with this issue. The provision stipulates that if there is a dispute in relation to the interpretation of a given provision, it should be decided in favour of the taxpayer. However, the application of this provision remains a dead letter of Polish tax law.

When the taxpayers win a case, they may expect that will be granted 'bonuses' that include a refund of the erroneously charged tax with statutory interest, and a reimbursement of their judicial costs (however, the judicial costs are not high). Taking into account the significantly prolonged tax litigation proceedings, and the fact that the taxpayer is exposed to certain risks during the proceedings (especially regarding his or her company or business

¹ Sławomir Łuczak is a partner and Karolina Gotfryd is an associate at Sołtysiński Kawecki & Szlęzak.

activity), the above 'bonuses' are not satisfactory compensation. Although the taxpayer has a right to seek damages from the State Treasury in civil court, experience shows that not many taxpayers choose to do so (after already having spent many years in the tax offices and administrative courts).

II COMMENCING DISPUTES

i Tax audit

As a Polish tax law general rule, taxpayers in Poland pay their taxes on a self-assessment basis (by filing their value added tax (VAT), corporate income tax (CIT), personal income tax (PIT) or transfer tax return). A small number of tax obligations arise from decisions issued by the tax authority.

For the above reason, the practice of tax auditing is growing. The main purpose of a tax audit conducted at the tax authority's initiative is to examine the accuracy of taxpayers' settlements. A taxpayer must be notified by the tax authority that a tax audit is to be conducted. The tax audit is initiated no earlier than seven, and no later than 30, days from service of the tax audit notice. In certain circumstances, a tax audit may be conducted without prior notification (e.g., a fiscal or commerce offence has been committed).

In most cases, the tax audit is conducted at the audited taxpayer's registered office or another location where the business activity is performed, or at locations where documents are stored. Therefore, the audited taxpayer should be present while a tax audit is conducted.

The audited taxpayer has the right to actively take part in the tax audit. Particularly, the taxpayer may submit clarifications, present evidence or demand consideration of certain documents or witness hearing. The audited taxpayer should cooperate with the tax authority to allow it to perform its task effectively (e.g., provide access to documentation and necessary clarifications).

The tax audit must be conducted within the period indicated in the authorisation (i.e., a document authorising the tax authority to initiate a tax audit). According to the Business Freedom Act, the duration of all audits of a business entity conducted during a single calendar year cannot exceed the following:

- a* micro-enterprises: two business days;
- b* small enterprises: 18 business days;
- c* medium-sized enterprises: 24 business days; and
- d* large enterprises, 48 business days.

An audit is deemed concluded on the date of delivery of the audit report, which consists of a description of facts and a legal assessment of the case, but which does not constitute a tax liability. When the audited taxpayer does not agree with the audit report, it may submit reservations or clarifications within 14 days of service of the report. The authority is obliged to review the taxpayer's reservations and clarifications within 14 days of receiving them from the taxpayer. It should be noted that the taxpayer may not correct a tax return while a tax audit is being conducted. This right is suspended until the delivery of the tax authority's conclusion of a tax audit protocol where all irregularities are indicated. Tax proceedings may be commenced by the tax authority if the audited taxpayer does not correct the tax return.

ii Tax proceedings

The main aim of the tax proceeding is to settle a case by issuing a pertinent decision. To issue the pertinent decision, the tax authority will establish the case facts, collect the most important evidence and make the most appropriate tax assessment. In most cases, tax proceedings are initiated by the tax authority when a tax audit reveals irregularities on the side of the taxpayer (e.g., tax arrears, undisclosed income or improper tax return). Tax proceedings may also be initiated upon application of a taxpayer. There are two stages involved in tax proceedings: generally, at the first instance, the tax authority is the head of the tax office; and at the next instance (the upper instance), the tax authority is the director of the tax administration chamber. The date on which proceedings are initiated by the tax authority is the date that the taxpayer is served with the decision to initiate proceedings. A taxpayer has a right to actively participate at each stage of the proceedings (e.g., make demands, comment on the evidence and other materials in the case prior to issuance of a decision, inspect case files).

On the other hand, the tax authority may take all essential actions to clarify all facts during the proceedings and, when it is possible, should resolve the case at first instance. Moreover, the tax authority should provide a taxpayer with all necessary information and clarifications concerning the case.

As previously mentioned, the tax authority issues a proper decision at the end of the tax proceeding. However, within seven days of delivery of the notification from the tax authority and prior to the issuance of that decision, the taxpayer has a right to comment on the evidence and materials.

Every tax decision made at the first instance of proceedings may be appealed and heard at the upper instance (mostly by the director of the tax chamber). To appeal a tax decision, the appeal should be submitted within 14 days of the date of delivery of the decision. A decision is final if a taxpayer does not file an appeal within this time period, and the tax proceeding is then final.

In cases where an appeal is submitted to the upper instance, the upper instance tax authority will settle the case, and its decision will be final and enforceable. That final decision may be challenged by lodging a complaint to the (provincial) voivodship administrative court (further court proceedings are described in Section III).

iii Customs and tax audit

In addition to a tax audit, Polish tax law also recognises a customs and tax audit, which concerns more serious matters than tax audits conducted by tax offices. It may be conducted only at the initiative of a tax authority – the head of the customs and tax office (which acts more like a ‘tax policy’). A customs and tax audit differs from a tax audit because:

- a* it is started with no prior notification: namely, it starts with the delivery of the authorisation to perform it;
- b* the taxpayer has right to correct a tax return in the scope covered with the tax audit within 14 days of the date of the tax audit authorisation delivery; and
- c* the Business Freedom Act rules do not apply to it, namely there are no limits on simultaneous audits, no limits on the duration of audits and no possibility to file the opposition to the incorrect initiation or conduct of the audit.

The customs and tax audit ends with the audit result. Within 14 days of the date of delivery of the result, the taxpayer may adjust the tax return covered by the audit. However, it should be noted that the draft amendment to the Act on the National Fiscal Administration assumes

that a taxpayer who will correct the declaration in accordance with the result of customs and tax control and pay the tax will not be able to submit a correction later, questioning the findings of these controls.

If no irregularities were found during the audit or the taxpayer corrected tax returns accordingly to the result, no tax proceedings are initiated. However, if irregularities have been found as a result of the audit and the tax return has not been corrected within the prescribed period, the audit is automatically transformed into a tax proceeding. Such tax proceeding, performed by the head of the customs and tax office, may result in a decision from which the taxpayer has right to appeal. The appeal is lodged within 14 days to the same body that issued the decision. The case is re-examined by the same authority and also ends with a decision, on which the taxpayer may file a complaint to the administrative court.

iv Rulings

An individual tax ruling is a very important tool for taxpayers in the Polish tax law system. The main aim of the ruling is to allow a taxpayer to apply to the tax authority for a ruling on whether any planned or actual taxpayer actions, arrangements or transactions comply with the law. As from 2016, an application for a tax ruling may be submitted jointly by two or more taxpayers participating in the same transactions or events. A tax ruling is binding for the tax authorities but not for the taxpayer. In other words, as a rule, tax authorities may not challenge tax settlements of a taxpayer following the letter of the ruling. Confirmation of a taxpayer's standpoint protects a taxpayer from criminal liability and from the obligation to pay interest on tax arrears in cases where the tax authority changes its point of view on that particular matter. Moreover, the biggest advantage of an individual tax ruling is that it may protect a taxpayer from paying tax in circumstances where the taxable event has not already taken place. If the taxpayer obtains an unfavourable tax ruling, they may appeal to the voivodship administrative court.

It is noteworthy that from 15 July 2016, the tax authorities will not issue rulings in cases where a potential transaction, action or arrangement raises a justified suspicion that it may be subject to the Polish GAAR or may constitute an abuse of law under the VAT Act. It should be noted that Polish tax authorities willingly make use of the above argument and refuse to issue a tax ruling relying on potential abuse of tax law. However, the taxpayer has a right to apply for a protective opinion regarding such planned transaction, action or arrangement. A protective opinion will be issued in cases where there is no danger of the GAAR's application. The fee for obtaining such opinion is far more costly than for obtaining an individual tax ruling (a tax ruling costs 40 zlotys, a protective opinion 20,000 zlotys).

The issuance of such opinion also takes much longer than the issuance of the tax ruling (approximately six months; a tax ruling is issued within three months).

From 2019 the tax authorities may revoke individual tax rulings obtained in the past if they were aimed at circumventing the law or they allowed optimisation measures to be taken in an artificial way or without economic justification and in consequence allowed the taxpayer to obtain a tax advantage. This means that in many cases the obtained individual tax rulings will no longer grant protection for taxpayers. Moreover, the subject of the request for interpretation cannot be the provisions to prevent tax avoidance, which relate, *inter alia*, to: GAAR, abuse of law in VAT, conduct of actual activity (CFC), measures limiting contractual benefits, specific anti-abuse rules (SAARs), etc.

III THE COURTS AND TRIBUNALS

According to the Polish Constitution, the Polish judiciary consists of two separate branches of courts: courts of general jurisdiction and military courts headed by the Supreme Court; and administrative courts headed by the Supreme Administrative Court. The structure of administrative courts consists of two levels: voivodship administrative courts as courts of lower instance and the Supreme Administrative Court as the court of upper instance. Administrative courts exercise control over administrative activities including decisions and certain administrative provisions, local laws, written interpretations of tax law issued in individual cases by directors of tax chambers and other acts or state administrative activities concerning powers or obligations arising from law. Administrative courts also hear complaints against the inactivity of the administrative authorities.

There are 16 administrative courts of lower instance and one Supreme Administrative Court, which has its seat in Warsaw. The Supreme Administrative Court is divided into three chambers: the Financial Chamber, the Commercial Chamber and the General Administrative Chamber. The Financial Chamber exercises supervision over the judicature of voivodship administrative courts on issues of tax liabilities and other money contributions to which tax provisions and provisions on execution of money contributions apply.² The Supreme Administrative Court supervises the operation of voivodship administrative courts as regards adjudication in a mode specified by relevant acts and in particular hears appeals against judgments of those courts.³

An important feature of the Polish administrative judiciary is its independence. Administrative court judges are appointed by the President. They exercise their functions independently, and are subject only to the Constitution and other relevant statutes. That supreme supervision over the administrative activities of the administrative courts is exercised by the president of the Supreme Administrative Court is of major importance.⁴ The administrative courts should not be dependent on the government administration in any way.

As regards tribunals, the Constitution lists the Constitutional Tribunal and the Tribunal of the State. These two Tribunals are separate organs remaining outside any structural, organisational or procedural associations with the court system in Poland. However, only the Constitutional Tribunal may, to a certain extent, deal with tax disputes, as it adjudicates on:

- a* the constitutionality of national legislation and international agreements;
- b* the compliance of national legislation with international agreements, whose ratification is required prior to approval by parliament;
- c* compliance with the Constitution of legal regulations issued by central state authorities, ratified international agreements and legislative acts;
- d* the constitutionality of the objectives or activities of political parties; and
- e* constitutional complaints.

The Tribunal of the State adjudicates cases in which persons who occupy (or have occupied) the highest positions of state are charged with violating the Constitution or other legislative acts. Therefore, tax matters lie outside of the scope of its actions.

² A Skoczylas, M Swora, *Administrative Judiciary in Poland in search of fairness and efficiency – overview*, p. 118: rtsa.ro/tras/index.php/tras/article/viewFile/359.

³ Ibidem.

⁴ Article 12 of the Law on the System of Administrative Courts.

The right to lodge a complaint to the voivodship administrative courts is available to any person who has a legal interest therein, such as a public prosecutor, ombudsman and societal organisations (mostly non-governmental organisations), within the scope of their statutory activities and in matters concerning the legal interests of other persons, provided such an organisation has participated in administrative proceedings. However, it is a necessary precondition for lodging a complaint that the complainant has exhausted the means of review in the proceedings before a tax authority.

Complaints against decisions and rulings (and other administrative acts) should be lodged within 30 days of the decision to the voivodship administrative court via the tax authority that issued the decision or ruling in the last instance. When a complaint is lodged, the administrative authority is under an obligation to turn it over to the court with the relevant files and to prepare a response within a period of 30 days of the date of its lodging. The authority analyses the possibility of granting the complaint in whole (a 'self-inspection procedure'). The complaint is not particularly formalised, since it only has to meet the requirements of a letter in the court proceeding. The voivodship administrative court first examines the formal and legal correctness of the complaint. The complaint will be rejected when the court finds that there are formal obstacles preventing it from hearing the case. When the court finds no formal or legal deficiencies in the complaint, it will examine it. The court may dismiss the complaint, overturn a decision in full or in part or confirm the invalidity of a decision in whole or in part.

The voivodship administrative court rules within the limits of the case but is not bound by the claims or statements stated in the complaint or the legal grounds raised by the party (i.e., a taxpayer or a tax authority). Consequently, the court will independently assess the correctness of the action or decision of the tax authority and assess the tax authority's compliance with the law. Generally, an administrative court may not alter a decision or rule on merit⁵ (i.e., issue a decision instead of the tax authority), but it may instruct a tax authority to re-examine a case.

Often the ruling is issued at the first hearing. The administrative court hears cases on the basis of the file of documents provided by the public authority.

A judgment of the voivodship administrative court may be challenged by a complaint to the Supreme Administrative Court (signed by an attorney, an attorney-in-law or a tax adviser). A cassation appeal is lodged via the voivodship administrative court that issued the judgment within 30 days of service of the judgment together with a justification. The cassation appeal may only be based on strictly defined grounds, namely the violation of substantial law owing to an erroneous interpretation or incorrect application of law; or a breach of procedural regulations, if that infringement could have seriously affected the outcome of a particular case. The cassation appeal cannot be based on any irregularity in the proceedings, but only on the infringements that could possibly affect the decision content.

As a rule, a case before the administrative court should be completed as soon as possible. However, the reality is slightly different. Obtaining a hearing date largely depends on the court's location. In small cities, a date for an oral hearing is set within two or three months, but in larger cities the date may be set significantly later than this. A taxpayer lodging a complaint at the voivodship administrative court in Warsaw or Krakow will likely wait for

5 Since 15 August 2015, the voivodship administrative court has right to rule in certain situations.

approximately one year⁶ before the case is considered. A backlog of hundreds of thousands of cases in the Supreme Administrative Court (as it is the only upper administrative court in Poland) causes long delays of up to 18 months in obtaining a hearing date.

The administrative extraordinary measures that may be invoked against final tax decisions are the repeal, amendment or annulment of a decision, as well as the reopening of proceedings. Annulment applies when, for example, a decision was issued by a non-competent authority, without a legal basis or in gross breach of law. Reopening is possible in cases where facts of the case were determined on the basis of false evidence or the taxpayer did not participate in proceedings by no fault of its own.

The levels of appeal are as follows:

- a* administrative procedure: the body of first instance is the head of the tax office; the body of second instance is the director of the tax administration office; and
- b* procedure before an administrative court: the bodies of first instance are the voivodship administrative courts; the body of second instance is the supreme administrative court.

IV PENALTIES AND REMEDIES

Under the Polish tax law system, a taxpayer may be subject to both criminal and administrative liabilities at the same time. Criminal penalties are imposed solely by criminal courts, whereas administrative tax penalties are imposed by the tax authorities.

Most criminal tax acts are punished by a fine and, in more serious cases, by imprisonment – usually accompanied by a fine. A forfeiture is an accessory measure. The fine for tax offences is imposed in daily units. The number of day units is between 10 and 720, and the day unit may vary between approximately €15 and €6,000. The personal and financial situation of the defendant (the taxpayer) should be taken into account by the court when determining the punishment. Imprisonment terms range from five days to five years. Fiscal contraventions are punishable by fines that may not exceed 10 minimum monthly wages (approximately €4,200).

Tax evasion (Article 54 of Penal Fiscal Code) is committed by a taxpayer who evades taxation (non-disclosure of a taxation object to the tax authority or diminution of taxable base and tax). The fine for this penalty is up to 720 day units or imprisonment for up to five years (both are the highest penalties provided for in the Penal Fiscal Code).

Tax fraud (Article 56 of Penal Fiscal Code) is committed by a taxpayer who diminishes the value of his or her tax by filing a tax return with misleading or false information. The penalty is the same as in the case of tax evasion.

Regarding specific tax fraud, an improper return of tax already paid (Article 76 of Penal Fiscal Code) is the most common tax fraud in VAT cases (i.e., carousel fraud). The penalty is the same as for the above-mentioned tax criminal acts. For delays in the payment of tax already collected from the taxpayer by the tax collector (Article 77 of Penal Fiscal Code), the penalty is up to three years of imprisonment. It must be noted that Poland was particularly affected by the activities of organised crime groups extorting VAT in the carousel frauds, with usage of ‘blank invoices’ detected totalling 19.7 billion zlotys in 2013, 33.7 billion zlotys

6 Information confirmed by the Warsaw Voivodship Administrative Court in a telephone conversation.

in 2014 and 81.9 billion zlotys in 2015.⁷ In 2017 new, tightened criminal provisions were introduced. As of 1 March 2017, individuals who falsify invoices may be held liable pursuant to new Criminal Code provisions.

According to them (Article 270a, Article 271a and 277a of Criminal Code), the following acts are subject to criminal liability:

- a* falsifying invoices, issuing fabricated invoices with regard to data that might affect the amount of tax liability of the level of any refund;
- b* provision of false information in the invoices in order to gain tax advantages; and
- c* the use of a fabricated invoice in place of authentic ones.

The severity of penalties for those crimes depends on the value resulting from such 'blank invoices', reaching up to 25 years of imprisonment when exceeding 10 million zlotys.

Administrative penalties in Polish tax law are not legally defined in any legal act.⁸ A characteristic feature of administrative penalties is that their function is only prevention. Administrative penalties do not play the role of repression or punishment that criminal penalties do. Polish tax law recognises many examples of administrative penalties, such as higher (sanction) tax rates or an additional tax obligation, for example:

- a* a higher tax rate under the Polish Inheritance and Gift Act: when a taxpayer evades inheritance and gift tax, and only declares the tax base and gift during an audit, tax proceedings, fiscal control, or control activities, the level of the tax rate payable by that taxpayer is always 20 per cent (instead of 7 to 20 per cent); and
- b* the higher tax rate under the Polish Personal Income Tax Act will apply to income or revenue from undisclosed sources. Since the Polish Constitutional Tribunal, in a judgement of 29 July 2014,⁹ found this regulation too vague, the Polish legislator has amended the provisions concerning undisclosed source of income to be more precise. Concealed income means income that is covered by disclosed sources, including revenues disclosed by a taxpayer, but that has been declared in the incorrect amount; or income from undisclosed sources, including revenues from sources not declared by a taxpayer.

Tax obligations with respect to income not obtained through disclosed sources or revenue from undisclosed sources arise on the last day of the fiscal year in which that income was gained. When a tax authority, during tax control proceedings, determines a source and an amount of undisclosed income, the taxpayer will be taxed in accordance with the regulations related to the source of that income. Additionally, the taxpayer will be obliged to pay penalty interest and will incur penal sanctions. In cases where it is not possible to determine the source of the above-mentioned revenues, income not covered by disclosed sources or revenue from undisclosed sources will be taxed a flat rate income tax in an amount of 75 per cent of the tax basis (much higher than regular PIT tax rates, i.e., 18 and 32 per cent).

7 Statistics of the Supreme Audit Office: <https://www.nik.gov.pl/aktualnosci/nik-o-przeciwdzialaniu-wyludzaniu-vat.html>.

8 A Nita, A Światłowski, 'Administrative versus penal sanctions in Polish tax law – The dual system or two systems?', p. 198: www.vestnik.vsu.ru/pdf/pravo/2016/01/2016-01-22.pdf.

9 No. P 49/13.

Regarding VAT, an additional tax obligation applies when:

- a* the taxable person violates the obligation to keep a record of the turnover and amounts of the output tax. An additional tax liability is 30 per cent of the tax charged upon the acquisition of goods and services; however, this additional tax liability is not determined in the case of natural persons who, in respect of the same act, bear liability for a fiscal contravention offence or fiscal offence;
- b* a taxable person incorrectly settles VAT, for example, lowers the VAT amount due, settles a higher VAT refund than amount due, reduces a higher output tax amount than amount due, does not submit a tax return and does not pay the VAT liability amount. An additional tax liability is 30 per cent of the amount by which the tax liability was understated or overstated or of the amount by which the tax difference refund amount; however, this additional tax liability may be reduced to 20 per cent when the given taxable person corrects or submits a proper tax return and pays the tax liability amount or returns the undue refund amount; and
- c* the incorrectness mentioned in point (b) above results in full or in part, from the reduction of the output tax amount by the input tax amounts resulting from 'blank invoices' – an additional tax liability is 100 per cent in the part concerning the input tax amounts.

One of the key changes coming into force in 2019 is the introduction of additional tax liability related to tax avoidance, application of measures limiting contractual benefits, SAARs, incorrect withholding tax (WHT) statement or transfer pricing regulations. The tax authority, when issuing a decision applying these provisions, will determine an additional tax liability corresponding to a fraction of the tax advantage found in the proceedings (i.e., in the range of 10 to 80 per cent of the tax benefit).

V TAX CLAIMS

i Recovering overpaid tax

An overpayment may arise when undue tax was paid (e.g., although there was no obligation to make a payment, such payment was made) or the payment amount was higher than required. In most cases, an overpayment arises when a taxpayer made an error in tax returns or actual payment. However, it is also possible that the tax authority wrongly assessed the tax duty of a taxpayer. In those situations, a taxable person has a right to ask the tax authority for refund of any overpaid tax.

As a general rule, a tax authority is obliged to determine the tax overpayment after a taxpayer submits a request (e.g., a taxpayer questions the tax remitter's right to withhold tax). When specific tax provisions provide that the taxpayer should submit a tax return, the taxpayer must submit a request to the tax authority to determine the tax overpayment together with an amended tax return. The procedure concerning a tax overpayment usually ends with the tax authority's decision, but it is also possible for the tax authority to refund the overpayment without issuing a decision. Depending on the source of overpayment, the time frame for reimbursement ranges from 30 days to three months. However, in practice this period is extended, and the whole procedure may last longer.

There are two situations when a taxpayer is obliged to calculate the amount of overpaid tax. These are where:

- a* the value of overpaid tax is proved when a taxpayer submitted a tax return (this applies to both corporate and income tax returns and excise tax returns); and

- b* a taxpayer files a separate motion or application for an overpayment reimbursement in cases where an overpayment arose as a consequence of judgments of the European Union Court of Justice or the Polish Constitutional Tribunal (e.g., where a judgment holds that there is no tax duty).

When a taxpayer assesses overpaid tax, the tax authority may verify that amount. If the tax authority does not challenge that overpayment, it should reimburse the overpaid tax within 30 days.

The overpayment, with applicable interest, is credited *ex officio* towards any tax arrears, including interest for late payment, and any current tax liabilities of a taxpayer. In the above situations, the overpayment is refunded to the taxable person (into the person's bank account or in cash). The taxpayer may also request that the overpayment be credited in whole or in part toward his or her future liabilities. It should be stressed, however, that when other tax proceedings (such as audits) are carried out with respect to the same tax, the overpayment procedure is suspended. The taxpayer's right to seek a refund of an overpayment expires five years after a determination of overpayment.

The overpayment is connected with the issue of interest. In certain cases, when the tax authority is responsible for the overpayment, the taxpayer may demand interest. It should be noted that interest is due only when the overpayment arose as a consequence of a tax authority's decision that was amended or repealed by another decision or by a judgment of the administrative court. Interest for overpayment is the same as it is for tax arrears.

ii Claimants

Tax complaints, claims or appeals may be filed only by the taxpayer on whom the tax is imposed. Tax imposed on a taxpayer cannot be challenged by another person unless that person has succeeded to the rights and liabilities of the taxpayer (i.e., tax succession). This situation may arise in the case of a merger or the split up of a company. The tax liabilities of the absorbed or split company are inherited by the 'new' company. In the case of a tax group, each member of the group is subjected to tax and is obliged to file an individual tax return.

VI COSTS

There is a distinction between administrative fees and costs in tax proceedings. As a rule, the tax authorities do not have influence on the fees to be charged; they are most often determined on the basis of the Act of 16 November 2006 on stamp duty. Conversely, costs in tax proceedings are fixed by the authorities on the basis of the expenditure incurred in connection with the conduct of the proceeding.

Costs related to the conduct of tax proceedings are regulated in the Polish Tax Ordinance Act. As a rule, the costs of proceedings before the tax authorities are incurred by the State Treasury, voivodship, county or district, which leads to the conclusion that these costs will not apply to a controlled taxpayer (during a tax audit or control proceedings). These concern, in particular:

- a* travel expenses and other receivables of witnesses;
- b* expert and translator costs;
- c* costs of inspections; and
- d* costs of delivering official letters.

The tax authority may also include other expenses directly related to resolving the case in the costs of proceedings.

The tax authority refunds the above costs of the proceedings upon request. A request for a refund of travel costs incurred should be submitted to the tax authority conducting the proceedings before the issuing of a decision on the merits, otherwise the claim will be lost.

It should be noted that the above-mentioned costs are borne by the State Treasury when proceedings are initiated *ex officio* or when a party was mistakenly summoned to appear. This condition is always met in cases of tax audit and control proceedings, which are always initiated *ex officio*. Tax proceedings may be initiated *ex officio* or on application by a party. In the latter case, the party bears its own costs.

The Tax Ordinance Act provides a derogation from the general rule that the State Treasury incurs the cost of proceedings before the tax authorities. A taxpayer is charged with costs incurred in its interest, or at its request, but not arising from a statutory obligation of the authorities conducting the proceedings. The likelihood of costs arising that satisfy such conditions is low. It should be noted that the tax authority is obliged to gather and consider evidence. Costs in this regard are not charged to the taxpayer.

The taxpayer is also charged with costs:

- a* for preparing copies or excerpts;
- b* for the appearance of participants in the proceedings at a hearing that did not take place as a result of an unjustified appearance of the party who submitted an application to conduct a hearing;
- c* resulting from concealing or failing to submit evidence by the prescribed deadline;
- d* resulting from the provision of false explanations or false testimony; and
- e* for translations of documents provided by the taxpayer into the Polish language.

In principle, parties bear their own costs for their involvement in proceedings before the administrative courts. However, a court may award legal aid to a party if such party applies for it prior to or during proceedings. Legal aid takes the form of an exemption from court fees or the appointment of an attorney, an attorney-at-law, a tax adviser or a patent spokesperson.

The Polish legislator has specified two regulations regarding the reimbursement of court proceeding costs at first and second instance. At first instance, the applicant recovers the costs if it wins the case. Costs are not awarded to the tax authority whose action or failure to act is the subject of complaint by the taxpayer, even if the voivodship administrative court dismissed an action brought by the taxpayer (i.e., the case has been successfully completed for the tax authority). The reimbursement of court proceeding costs at the second instance (i.e., at the Supreme Administrative Court) is regulated differently. In that case, the principle of equality is applicable, which means that the unsuccessful party bears the costs of the proceedings.

VII ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution is not widely used in disputes between taxpayers and the tax authorities. There are no general provisions pertaining to the mutual agreement procedure (MAP) in the Polish Tax Ordinance Act. The MAP is present only within bilateral tax treaties between countries.

Polish law on proceedings before administrative courts provides only one specific procedure in proceedings before the administrative courts: mediation. Mediation is allowed only when an appeal has been filed with the administrative court, and may be conducted at

the request of a complainant or the authority. It is also possible that mediation is initiated *ex officio*. The deadline for filling a request for mediation is the date of the hearing. As a rule, mediation should be conducted during a single court session. If the mediation ends in failure, and the parties fail to agree on a common position, the case will be resolved through the standard procedure (i.e., it will be referred to a hearing).

When a dispute is effectively settled at mediation, there are two possible outcomes: the court proceeding is discontinued because of the withdrawal of the appeal, or the mediation arrangements may provide an obligation for the administrative authority to verify its decision.

The administrative authority, within the scope of the performance of the mediation, is free to choose how it will proceed. Therefore, a complainant has no influence on the application of such arrangements. Nevertheless, it is possible to file an appeal to a voivodship administrative court against the act or measures taken by authority as a result of the mediation within 30 days.

However, mediation is not a widely used mechanism in the administrative judiciary. Compared with the number of appeals filed with the voivodship administrative courts between 2004 and 2013, mediation proceedings represented 0.4 to 0.1 per cent thereof.¹⁰ In 2014, 10 cases were initiated following the mediation procedure, but only four cases (in the area of tax law and custom law) were settled under that procedure.¹¹

Although alternative dispute resolution is not used in Polish tax disputes, rulings are a well-developed part of the tax authorities' practice. A taxpayer may request a tax ruling concerning the current factual status or future events. The tax authorities should issue such rulings within three months of the date of receipt of a request.

VIII ANTI-AVOIDANCE

Polish law does not provide rules that distinguish between permissible and impermissible tax avoidance. The judiciary has stated that it is practically impossible to determine a clear distinction between when taxpayers avoid taxation in a legal or an illegal way. Each time the judiciary is faced with such a decision, it should be made on the basis of the factual circumstances of a given case and the elements of the particular tax structure. In a judgment of 24 November 2003 in the *Optimus* case, the Polish Supreme Administrative Court formulated an argument that whenever the legal system allows a taxpayer to choose from several legal constructions to achieve an economic goal, a selection of the most favourable tax options cannot be treated as the avoidance of tax law.¹²

The Polish tax law system provides tax neutrality for economic events such as a merger or division of companies or exchange of shares. However, the Polish legislator has laid down one condition that such operations should be carried out for valid commercial reasons, and that the main objective or one of the main objectives cannot be tax avoidance or tax evasion.

10 This statistic was presented in a letter of the Polish Ombudsman to the Polish Minister of Finance of 1 April 2016, Ref. No. V 511.126.2016.KB: www.sprawny-generalne.brpo.gov.pl/pdf/2016/4/V.511.126.2016/699841.pdf.

11 Ibidem.

12 Supreme Administrative Court, 24 November 2003 (Case No. FSA 3/03).

The fate of a GAAR in Poland seems to be tortuous, but the government finally enacted an anti-abuse rule that came into force on 15 July 2016.¹³ The GAAR was created as a new tool for the tax authorities to reclassify business operations where a taxpayer has obtained substantial tax profits through tax avoidance strategies. Achieving a ‘tax benefit’ through artificial arrangements prevents 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 determine whether a legal arrangement is artificial, various factors should be taken into account, such as excessively complex transactions. It should be noted that from 2019 one of the significant changes to the GAAR is the removal of the negative premise of the GAAR clause when the tax benefit is less than 100,000 zlotys. It means that from 1 January 2019 tax authorities may verify and challenge any activity regardless of the expected value of the tax benefit.

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 was created as a collegiate body independent of the tax authorities. At the request of the taxpayer or the competent authority, the Council issues non-binding opinions on whether the GAAR should be applied in any given case. Moreover, the taxpayer may apply to the Minister of Finance to issue an opinion that prevents the application of the GAAR. The cost of this opinion is 20,000 zlotys. From 2019 any action aimed at obtaining a tax benefit will be subject to GAAR unless the tax benefit is non-significant in comparison to other economic benefits resulting from the action. In addition to the above, any action undertaken for non-genuine economic reasons, other than obtaining a tax advantage that in given circumstances defeats the object or purpose of the applicable provision of the tax law, will be deemed artificial. GAAR will be no longer applicable only as a last resort when other measures (i.e., SAARs) fail. So far, GAAR has been rather used for dissuasive purposes, namely:

- a* the Ministry of Finance issued several warning letters in which it was stated that GAAR may be used for certain transactions and structures; or
- b* to deny a taxpayer a tax ruling or an opinion that prevents the application of the GAAR.

IX DOUBLE TAXATION TREATIES

A fundamental source of interpretation of international agreements, such as double taxation treaties, is the Vienna Convention on the Law of Treaties, which was ratified by Poland in 1990. According to Article 31(1) of the Convention, the Treaty is to be interpreted in good faith, within the ordinary meaning to be given to the provisions of the Treaty and in light of its subject matter and purpose.

¹³ GAAR was originally introduced in the 2003 Tax Ordinance Act, and 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 has not had a GAAR until 2016; however, some attempts were made in the past to introduce this clause with regard to closing remaining loopholes in Polish tax law.

When interpreting double taxation treaties, it is important not to lose sight of the OECD Model Tax Convention. While the Convention is not a source of law, it plays an essential role regarding the interpretation of double taxation treaties that are based on the provisions of the Convention. The Supreme Administrative Court has stated that both the OECD Model Tax Convention and the Commentary to the OECD Model Tax Convention may constitute a context in the sense of Article 31 of the Vienna Convention on the Law of Treaties.¹⁴

X AREAS OF FOCUS

The Polish Vice Minister for Finance, Piotr Walczak, in an interview with the Polish Press Agency¹⁵ stated that in 2018, in addition to fraud in VAT, the priority of customs and tax control was the CIT tax, in which aggressive tax optimisation and transfer prices are used primarily to avoid taxation. In both cases, various types of financial instruments relating to the tax systems of several countries were used. In the area of interest in customs and tax audits were also gambling games and trade in goods with foreign countries (customs controls). In 2017, fuels, electronics, precious metals and rapeseed oil were controlled. The Vice Minister of Finance admitted that the Ministry of Finance will continue the activities that it had carried out so far, that is, first, to reduce the number of inspections of micro and small businesses. The number of inspections carried out by tax offices in 2017 decreased by 23.1 per cent compared to 2016. The Ministry of Finance mainly aims at controlling large entities – where there are potentially the largest depletions.

As for combating VAT fraud (mostly VAT carousel), the Ministry of Finance is continuing to combat this negative phenomenon by using more sophisticated tools and methodology. Thanks to this, the amount of VAT carousel is decreasing. It should be noted that the administrative courts also support the tax authorities in combating unfair taxpayers. The application of the principle of good faith and due care by the taxpayer in his or her contacts with trade partners is rather strictly interpreted by the administrative courts. However, the main problem with VAT fraud is that, in their fight against fraud schemes, the tax authorities reach all companies in the supply chain regardless of whether they knew or could have known about the fraud actions performed by their trade partners. For this reason, tax audits and fiscal audits may potentially affect every taxpayer.

Many tax rulings concern the newest regulations in Polish tax law, such as CFC rules, amended thin capitalisation rules and the tax treatment of widely used cash pooling agreements. The Polish Ministry of Finance is mainly concentrating on closing remaining loopholes in the Polish tax system and combating tax evasion and tax avoidance; therefore, due to a large number of changes in income taxes, the tax authorities may start using the GAAR much more broadly.

¹⁴ Supreme Administrative Court, 19 June 2009 (Case No. II FSK 276/08).

¹⁵ Interview provided on the website of the Ministry of Finance https://www.mf.gov.pl/ministerstwo-finansow/dla-mediow/wywiady/piotr-walczak/-/asset_publisher/P3qp/content/w-2018-r-jednym-z-priorytetow-kontroli-skarbowej-walka-z-agresywna-optymalizacja-w-cit-polska-agencja-prasowa-30-grudnia-2017-r?redirect=http%3A%2F%2Fwww.mf.gov.pl%2Fministerstwo-finansow%2Fdla-mediow%2Fwywiady%2Fpiotr-walczak%3Fp_id%3D101_INSTANCE_P3qp%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-2%26p_p_col_count%3D1.

XI OUTLOOK AND CONCLUSIONS

As previously mentioned, Polish tax law is frequently amended. As such, Polish taxpayers must be prepared for numerous changes in the tax law area every year. 2019 will bring many significant changes in Polish tax law aimed at combating tax evasion and tax avoidance. The key changes in Polish tax law in 2019 are as follows.

i Income taxes

Owing to the fact that the Ministry of Finance's aim for 2019 is to increase the collection of income taxes and tighten the tax system, as of 2019 the following main changes will be introduced into the Polish tax system:

- a* exit tax (the tax on transfer of assets abroad or change of tax residency of the taxpayer), not only for individuals but also for legal entities;
- b* a completely new mechanism of settlement of WHT in relation to payments exceeding 2 million zlotys;
- c* a 4 per cent additional tax for wealthy individuals – the so-called 'solidarity tax';
- d* a 5 per cent preferential PIT and CIT rate on incomes or gains from intellectual property rights resulting from research and development works (Innovation Box);
- e* further changes to CFC regularions;
- f* taxation of profits from virtual currencies (cryptocurrencies);
- g* tax schemes reporting (mandatory disclosure);
- h* limiting costs of cars in business activity; and
- i* deemed deduction of hypothetical interest (notional deduction – maximum of 250,000 zlotys in the tax year) on equity used for reinvestment purposes.

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