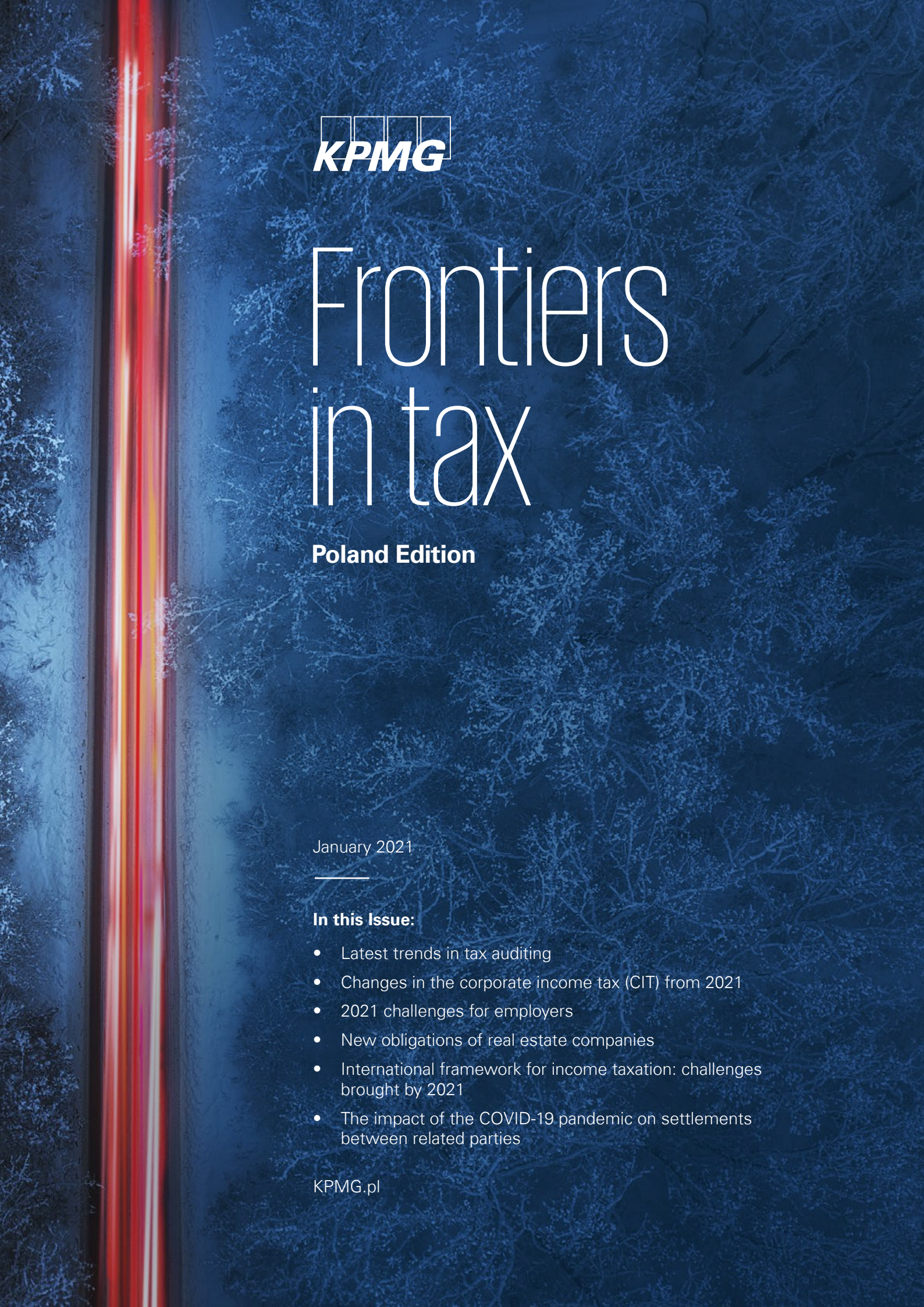

Frontiers in tax

Poland Edition

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In this Issue

Introduction

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Dear all,

This issue of Frontiers in Tax comes at an unprecedented time. Apart from the provisions adopted already in 2019, the passing year brought a raft of amendments at an unprecedented scale, massively impacting the business landscape we operate in. Thus, 2021 is to pose many challenges in terms of tax regulations. Practice will show whether, as announced by the legislator, the introduced changes will simplify tax settlements, or whether, considering the scope of the amendments and their pace of introduction, the results will be quite the opposite.

The long-awaited Estonian CIT, portrayed as an all-accessible, simplified tax solution for small and medium businesses, turned out to be a complex and limiting scheme. Further developments in this regard should be carefully analysed.

Moreover, amendments providing for extending CIT obligations to limited and general partnerships, imposing the obligation to prepare and publish a report on the executed strategy and limiting settlement of tax losses on reorganizing activities, which have never been put out to wider consultation, were adopted 30 days before the effective date, thus not giving taxpayers sufficient time to prepare.

What is more, 2021 is to supplement Polish legal framework with new provisions on hybrid mismatches and obligations of real estate companies and is to bring OECD's Guidance on the transfer pricing implications of the COVID-19 pandemic.

These and other changes, being of key importance to the market, will be discussed in this issue of our magazine. Undoubtedly, other amendments and new regulations are soon to follow. We will keep you informed on every development.

I wish you a pleasant read!

Latest trends in tax auditing

The primary goal behind tax audits is to verify whether taxpayers correctly perform their duties arising under applicable tax law provisions. Thus, settlements made by taxpayers are scrutinized and if tax authorities find that the taxpayer has failed to fulfil their obligations, steps are taken to verify the declared tax amounts.

In principle, the audits carried out by the authorities focus on particular performance areas, covering general aspects, but also complex considerations related to fulfilment of tax duties. In fact, particular focus is placed on all types of reorganizing and restructuring proceedings, which are often perceived as a tool for achieving beneficial tax consequences or unjustified savings. Special attention is also paid to controlled transactions. Furthermore, tax dealings are often tested against the General anti-avoidance rule and 'minor anti-avoidance clauses', which may be used by tax authorities to challenge tax neutrality of transactions carried out by taxpayers, such as mergers lacking economic grounds. Therefore, with experience gained by the tax authorities, the audits performed are getting more specialized and subject specific.

Clearly, 2020 has been exceptional, because of the COVID-19 pandemic and the constraints it imposed, also on tax authorities, forcing them to adopt remote and digital ways of working. For instance, Anti-Crisis Shield 4.0. introduced an additional provision, under which, with the consent of the entrepreneur, a tax audit or individual control activities may be performed by the authority remotely, e.g. by means of electronic communication. Due to the COVID-19 outbreak and the limitations it placed on the tax authorities' activities, a raft of tax reliefs consisting in spreading liabilities into instalments or deferring tax payments was put in place. It should be noted, however, that the context and terms of application of some aid schemes may in the future be subject to tax inspections, in particular against the legitimacy of granting the support.

Apart from adjusting the scope of audits carried out, the Ministry of Finance also undertakes activities aimed at increasing the transparency of taxpayers. Hence, in addition to the obligation to submit SAF-T files and MDR reports, which has been in place for some time, the largest taxpayers will now be required to submit a report on the executed tax strategy. Additionally, the National Revenue Administration implements the so-called "cooperation program" aimed at the largest taxpayers and relying on the transparency principles. All the amendments have the same goal, i.e. improving transparency of tax settlements made by businesses, so that the tax authorities are kept up to date with the most relevant, settlement-related information.

Having said all of that, one should keep in mind that the simplest way to successful completion of a tax audit is to be thoroughly prepared. Even at the stage of performing a transaction, the taxpayer may use the assistance of advisors, as well as examine the applicable provisions and rulings, so that the tax consequences thereof are properly considered. In particular, it is possible to apply for an individual ruling securing the taxpayers against their tax settlement being challenged in the future. Once the auditing proceedings are launched, the taxpayer should try to identify the issues of interest to the authority and explain, by all evidence available, that the settlements are correct. All these actions combined should prevent tax settlements from being challenged, and even if the auditing activities eventually end in a dispute and the taxpayer is required to pay the tax arrears, they will not be found guilty of a fiscal crime.

> In addition to the obligation to submit SAF-T files and MDR reports, which has been in place for some time, the largest taxpayers will now be required to submit a report on the executed tax strategy.

One may only wonder what the next year is to bring. There is little doubt that the first half of the year will pass in the shadow of the coronavirus, which will surely further impact the activities of tax authorities. Eventually, however, the pandemic will be contained, which in turn may translate into intensified auditing proceedings.

Undoubtedly, subsequent amendments to the existing auditing provisions are to follow. In particular, there have been many voices for introducing the solution commonly

referred to as "evidence preclusion clause" into the tax proceedings. This means that at an early stage of a tax audit or proceedings, the taxpayer will be required to demonstrate all facts and evidence in their possession to support the existence of certain circumstances. If the taxpayer fails to comply with the evidence preclusion obligation, the tax authority will not be obliged to consider and take into account the evidence and facts presented by the taxpayer at a later stage, unless the taxpayer proves that they are not at fault for failure to submit the evidence in the time due. In other words, it may happen that the tax authorities would ignore the evidence favourable to the taxpayer and issue a decision without taking it into account, if such evidence is submitted past the deadline. The aim of the solution is to encourage taxpayers for even more effective cooperation with the tax authorities.

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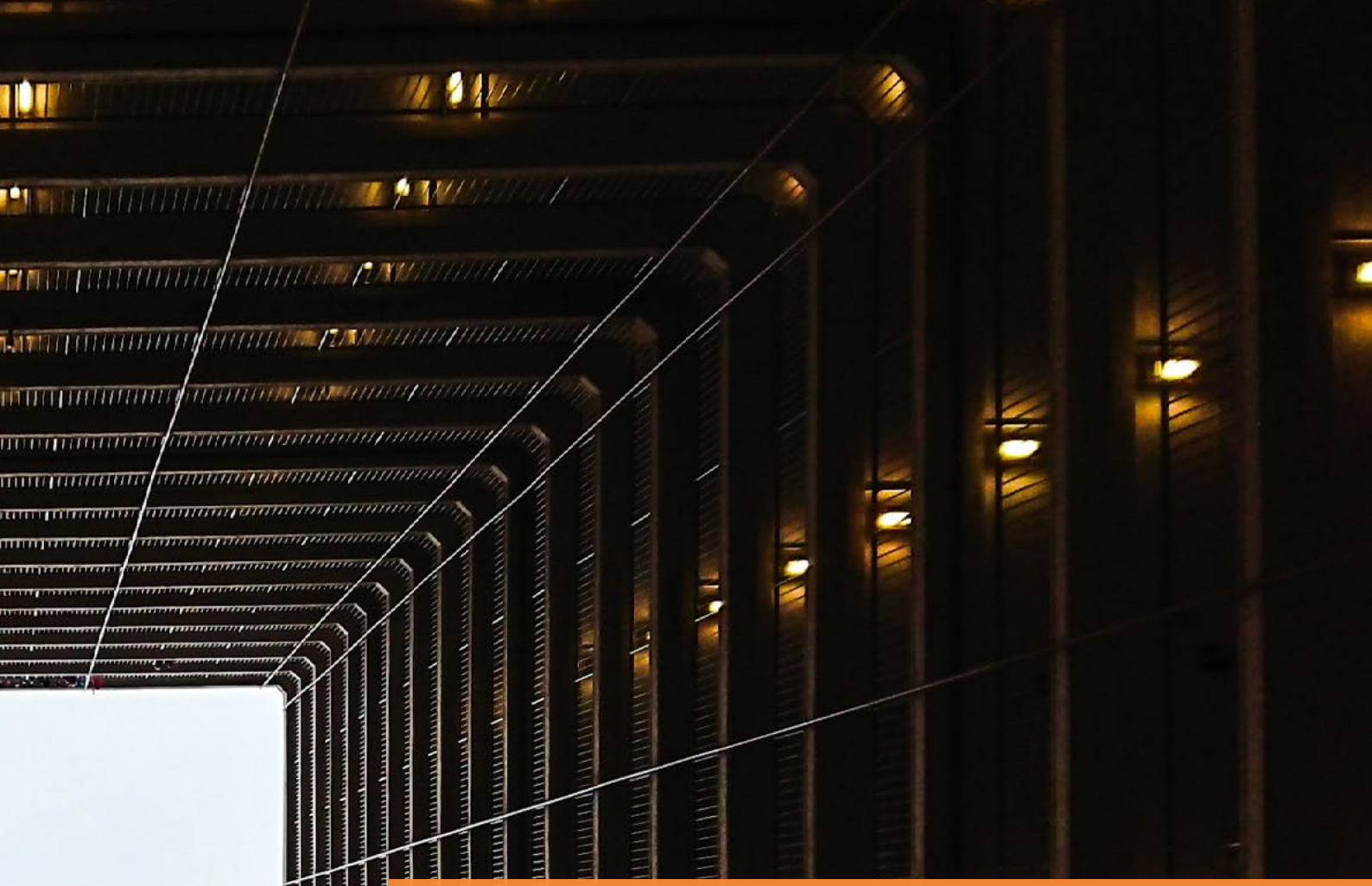

Changes in the corporate income tax (CIT) from 2021

When a new income tax regime, dubbed "Estonian CIT", was announced in September 2020, it looked as if, although overshadowed by COVID-19, the past year was to bring a raft of unprecedented business-facing tax amendments. The hope for a change seemed to find its confirmation in the provisions introduced by way of subsequent COVID-19 Acts, including postponing tax deadlines, deferring entry into force of some new public levies, as well as relaxing certain documentation obligations.

Announced by Polish PM, and supported by industry organizations, the Estonian CIT project seemed to perfectly fit in this new trend. An extensive information campaign, including the presentation of the main project assumptions, carried out in June 2020, along with far-reaching public consultations, only strengthened the belief that we were witnessing the emergence of a new legislative standard, with particular focus on preparing taxpayers to face changes that would have a significant impact on their activities and required planning beforehand, thus ensuring stability of the tax system.

Unfortunately, realty proved to be different and brought yet another disappointment. First of all, the project of the Estonian CIT solution turned out to be far from what was expected. A number of restrictions on the permissible form of activity (companies only) and ownership structure (only companies with shareholders being natural persons, plus the company itself cannot hold any shares in other companies), justified by the pilot nature of the solution, have significantly narrowed the scope of its application. Even the fact of increasing the revenue threshold from the original PLN 50m to PLN 100m (including VAT) did not change the outcome. Additionally, the complexity of the new regulation (draft explanatory notes thereto have over 120 pages) situated it far from the previously announced solution, which was supposed to simplify tax settlements and thus bring beneficial changes to taxpayers.

Secondly, before taxpayers even realized that the proposed simplification of tax settlements would in practice be accessible solely to a narrow group of entities meeting a long list of restrictions and requirements, they were yet again surprised by a new draft of amendments, this time aimed at sealing the Polish tax system. Unlike the Estonian CIT solution, the amendments had not been announced during numerous conferences held by representatives of the government. As a result, companies were forced to engage in urgent and strenuous analyses on how the new regulations would impact their existing and planned operations. This relates in particular to extending CIT obligations to limited and general partnerships, settling tax losses on reorganizing activities, introducing the obligation to prepare and publish a report on the executed tax strategy or imposing amendments related to real estate companies. Despite the requests for postponement of the new provisions made during the consultation phase, the vast majority of the new regulations entered into force on 1 January 2021.

> Finally, despite many announcements, 2020 did not bring any amendments related to the collection of WHT. Once again, it was decided to only postpone the entry into force of the solutions that were originally supposed to be introduced two years ago.

Importantly, some of them may impact the actions already performed by the taxpayers, e.g. restricted right of settling tax losses by entities taking part in reorganizing activities. Restrictive approach adopted by tax authorities is likely to translate into numerous disputes between taxpayers and authorities to be settled by administrative courts. In this context it must be noted that such a stance is in clear opposition to the principle of protection of the taxpayer's acquired rights exhibited in the jurisprudence of the Polish Constitutional Tribunal. The new regulations can also have a retroactive effect on the obligations related to preparation and publication of a report on the executed tax strategy. Pursuant to the new provisions, taxpayers will be required to prepare and publish a report on the implemented tax strategy by the end of the 12th month following the end of the tax year to which the report relates. According to the announcement published on the Ministry of Finance's website, this means that the initial report on the tax strategy executed in 2020 must be published by 31 December 2021. The requirement to provide a report for 2020 may give rise to justified doubt, especially given the fact that the related provisions entered into

force on 1 January 2021. Regardless of the controversy it may spark, it is worth considering preparation and execution of a tax strategy as part of CIT calculations for 2020, to meet the requirements of the legislator. Thus, it will become possible to determine the scope and level of detail of the required disclosures, in a manner consistent with the annual settlements. Considering that the report on the executed tax strategy will become publicly available (pursuant to the Act, it must be published on the taxpayer's website), the new obligation must be approached in a well-considered manner, to find a balance between fulfilling the requirement and ensuring that the information disclosed is positively received by the public.

Finally, despite many announcements, 2020 did not bring any amendments related to the collection of WHT. Once again, it was decided to only postpone the entry into force of the solutions that were originally supposed to be introduced two years ago. Nevertheless, in 2021, the final form of the mechanism is likely to be presented, along with changes in the jurisdiction of tax authorities responsible for WHT-related issues. Given the above, it is worth planning in advance for the submission of a declaration allowing for the continued application of exemptions or obtaining a binding opinion on the application of the exemption, especially that the applicant may face even a twofold delay in the statutory deadline (i.e. 12 instead of 6 months).

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2021 challenges for employers

2020 brought unprecedented challenges to employers and employees. Many of them were tackled by the Act on Special Arrangements for the Prevention, Control and Management of COVID-19, Other Infectious Diseases and the Resulting Emergencies (hereinafter: the COVID Act), which provided for a raft of emergency aid measures targeted at businesses most affected by the epidemic outbreak. Some solutions are to remain in force in 2021, as long as the state of epidemic in the territory of Poland is not revoked. They include, inter alia, increased cap on PIT exemptions, including the value of payments made under the Company's Social Benefits Fund (from PLN 1k to PLN 2k), along with various reliefs and deductions available to businesses. Yet, a particular emphasis should be put on the solution that have already become an inseparable element of the Polish legal environment.

Civil law contracts

In January 2021, a new regulation, seeming of particular importance to ZUS contribution remitters who employ individuals under contracts of commission, is to enter into force. Under the regulation, contribution remitters (including natural persons) acting as contracting parties will be required to notify the Polish Social Security Administration (ZUS) of each contract of commission concluded, provided that it is entered into with a person who is not their employee or that it is not concluded for performance of work for the employer, by whom they are employed, within 7 days from the date of concluding such contract.

Although the new provision does not seem to pose a threat to remitters, especially given that contracts of commission are excluded from social security contributions, filling the ZUS RUD form, used for reporting purposes, may be an actual challenge. This is because, apart from data identifying the remitter and the work creator, the form must include the information on the subject matter of the contract and the number of contracts of commission concluded.

> The national legislation incorporating the Directive provisions has been in force from 30 July 2020 and applies both to new contracts and contracts already in place.

Simultaneously, for some time now, there has been a growing need to extend the scope of social insurance coverage to individuals employed under contracts of mandate. Specific measures in this regard are still to be unveiled, however, given the recent announcements, the possible amendments would be aimed at revoking a number of exemptions resulting from overlapping claims for insurance coverage.

The goal of the amendments discussed above is to counteract abusive use of civil law contracts as casual forms of employment, by instituting tools for tightening up the Polish social security control system.

Remote work

Remote work, as a new legal category, was introduced by way of the COVID Act and the Act amending the Act on the posting of workers in the framework of the provision of services and certain other acts.

Under the provisions thereof, during the state of epidemic emergency or the state of epidemic announced due to COVID-19 and within 3 months after their recall, in order to counteract the negative impact of the COVID-19 pandemic, the employer may instruct their employees to perform, for a specified period, work laid down in the employment contract outside the place of its regular performance (remote work).

The currently applicable tax provisions have no significant impact on remotely working individuals employed under Polish employment contracts. It must be noted, however, that some benefits granted to such employees may be exempt from tax, given that the joint conditions provided for by the judgment of the Polish Constitutional Tribunal No. 7/13 of 2014, the most controversial of which is that the benefit is incurred to the advantage of the employer, not the employee, are not met. Moreover, benefits may be subject to an objective tax exemption under the PIT Act (applicable to the use of own tools, materials and hardware).

Remote work considerations may also be of interest to cross-border workers. The PIT and social security-related implications for cross-border employees depend on many factors, including the length of their stay abroad and their tax resident status, determined pursuant to the Polish regulations and relevant double tax treaties.

Up to now, no changes in this regard have been made to the PIT Act. Nevertheless, it should be kept in mind that Poland and Germany concluded a mutual agreement on the principles of taxation of remote work performed by cross-border workers during the COVID-19 pandemic. Pursuant to the agreement, work performed at home (i.e. in the country of residence) by an employee for an employer from the other country may be considered as work performed in the country where the employee would have performed this work, had no measures been taken to counter the COVID-19 pandemic. In other words, in a situation where a Pole working in Germany is delegated by an employer to work from their home in Poland due to the COVID-19 pandemic, they are treated as if they were working in Germany all the time.

Posting of Workers Directive

The principles of posting of workers to another EU or EEA state by an employer under employment relationship are regulated by Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, amended by Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018.

The amending Directive 2018/957 brought a number of changes to Directive 96/71/EC. Yet, the core part of the provisions of Directive 96/71/EC was upheld, with amendments relating in particular to:

- extending the repertoire of minimum conditions of employment in force in the host country guaranteed to a posted worker,
- guaranteeing posted workers terms and conditions that apply to temporary agency workers in the Member State where the work is carried out,
- extending the scope of minimum conditions of employment in force in the host country guaranteed to a posted worker in case of long-term posting,
- introducing rules for replacing posted workers,
- extending the application of collective agreements and arbitration awards which have been declared universally applicable to all employment sectors.

The national legislation incorporating the Directive provisions has been in force from 30 July 2020 and applies both to new contracts and contracts already in place. It imposes not only the obligation to pay remuneration at market level instead of the minimum rates, but also provides for the rules for calculating the long-term posting period (12 months), which are also to apply to contracts already in place, with the posting period to be calculated from the moment of its commencement.

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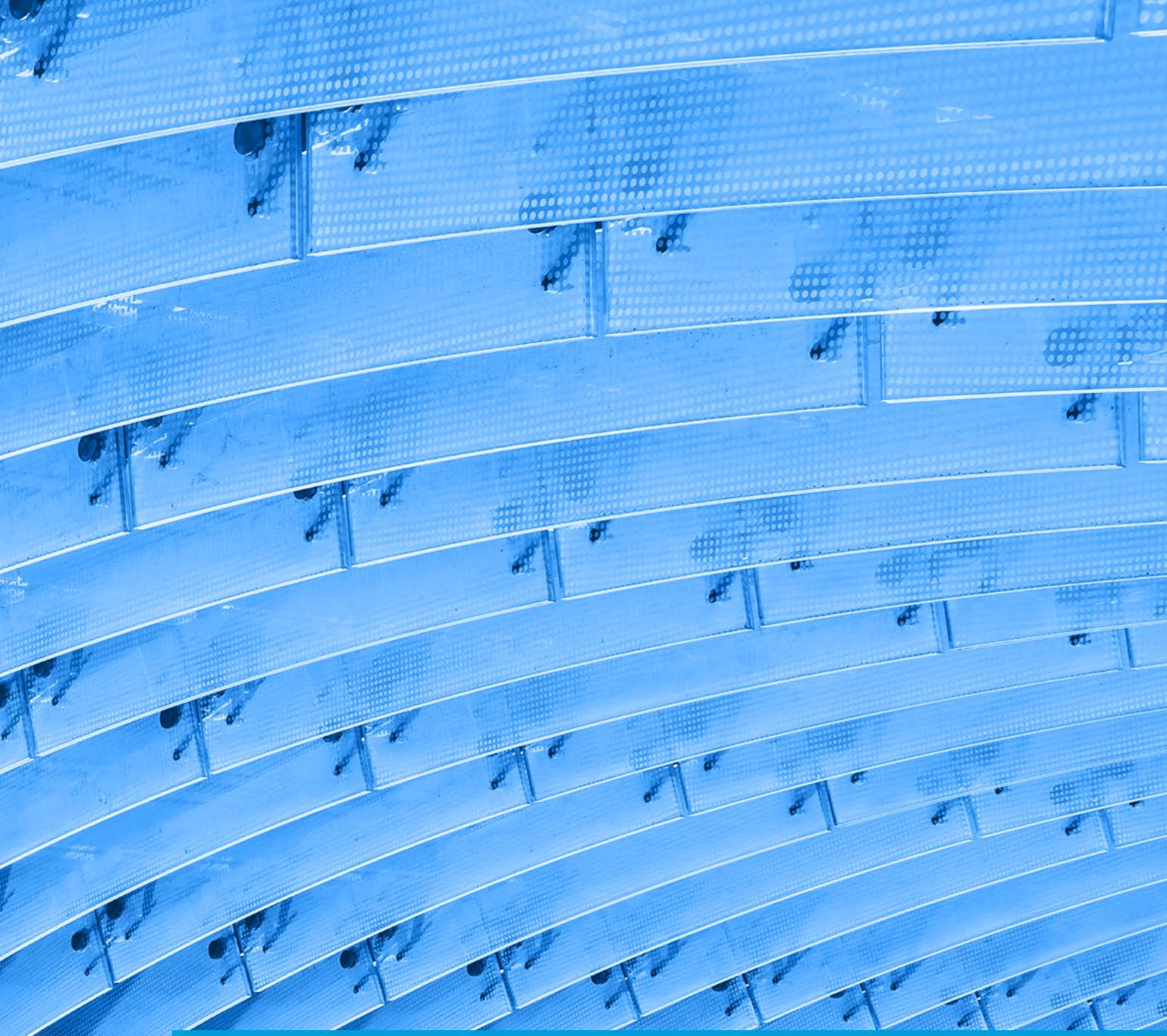

New obligations of real estate companies

2021 is to bring a raft of significant amendments to Polish tax regulations. The key changes, crucial from the real estate market's perspective, include introduction of the new 'real estate company' definition along with a number of new obligations to be assumed by such entities.

Definition of real estate company introduced by new regulations

The definition of real estate company refers to the entity's asset structure, meaning that it can also be met by entities which do not have legal personality, nor are income tax payers, including foreign companies.

Under the amended provisions, a real estate company means an entity obliged to prepare a balance sheet in line with provisions of accounting law, in which:

- for entities commencing their business activity - as at the first day of the tax year, at least 50% of the market value of assets (directly or indirectly) consisted of real estate located in Poland or rights thereto, with the value exceeding PLN 10m; or
- for other entities -
  - as at the last day of the year preceding the tax (financial) year, at least 50% of the book value of assets (directly or indirectly) consisted of real estate located in Poland or rights thereto, with the book value exceeding PLN 10m or an equivalent amount determined according to the relevant exchange rate; and
  - in the year preceding the tax (financial) year, taxable revenues (revenues included in the net financial income) from:
    - letting, subletting, lease (and other similar contracts); and/or
    - from the transfer of ownership to real estate or rights thereto, and from shares in other real estate companies,

  constituted at least 60% of total taxable revenues (revenues included in the net financial income).

Polish law and provisions of double tax treaties (DTT)

It must be emphasized that introduction of the concept of a real estate company into tax law and application of these provisions should be considered in the context of Poland-signed DTTs. The real estate clause, introduced to a significant number of double tax treaties signed by Poland, relates to entities with the assets consisting mainly (in the majority of cases in at least 50%), directly or indirectly, of real estate located in the territory of one of the treaty's signatories; in turn, pursuant to the same clause, the country in which the said real estate is located has the right to impose tax on alienation of shares in such an entity.

Thus, correct identification of duties imposed on real estate companies can only be made based on a thorough analysis of Polish regulations and the applicable DTT provisions which are not fully uniform.

Collecting tax advance payments by real estate companies - practical concerns

One of the key changes brought by the amended provisions is that the tax remittance obligations were shifted to real estate companies. In the case of alienation of more than 5% of shares (or rights of similar kind) in a real estate company by a foreign entity, the real estate company will be obliged to settle the income tax advance payment on the realized income from the transaction on behalf of the seller.

Importantly, new regulations provide for a situation where a real estate company has no knowledge on the amount of income earned by the seller through transaction. In such a case, it will be required to pay an income tax advance at the tax rate of 19% on the market value of the alienated shares (or rights of similar kind), irrespectively of the actual value of transaction and with no right to deduct

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It must be emphasized that introduction of the concept of a real estate company into tax law and application of these provisions should be considered in the context of Poland-signed DTTs.

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the related expenses. It should be also emphasized that under the amended provisions, there is no possibility for a real estate company to be released from the liability as a tax remitter for non-collected tax.

Moreover, the seller (i.e. taxpayer) is required to transfer the amount of the income tax advance to the real estate company (i.e. remitter) before the deadline for making the payment falls. This, in turn, gives rise to a practical concern as to ensuring such performance of the transaction to secure interests of all parties thereto.

Other obligations of real estate companies

Other obligations imposed on real estate companies include:

- providing the Head of the National Revenue Administration with information on its partners/shareholders (whereas partners/shareholders in real estate companies will be required to report on shares/contributions held in these companies);
- appointing a tax representative, provided that such real estate companies have no seat or place of management in the territory of Poland or an EEA Member State;
- establishing a report on the executed tax strategy (for entities being part of tax capital groups or exceeding the cap of PLN 50m in revenue).

Summary

The amendments are to influence the Polish real estate market. This means that it must be prepared to develop new solutions aimed at securing turnover and mitigating the risk of incurring additional liability for tax settlements resulting from new obligations.

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International framework for income taxation: challenges brought by 2021

The ever-accelerating pace of change surrounding Polish tax regulations may be overwhelming for many businesses. Although the majority of amendments affect the local landscape, one should keep in mind that some of them may potentially impact cross-border settlements. In this context, particular attention should be paid to the provisions on hybrid mismatch arrangements, applicable as of 1 January 2021, as well as the long-awaited changes to the WHT collection mechanism. One should also keep track of the international deliberations on taxing the digital economy and global businesses.

Hybrid entities

PCIT Act provisions on hybrid mismatches are the result of the implementation of an EU Directive commonly referred to as ATAD 2. Their aim is to prevent situations, where entities or transactions are qualified differently under two separate jurisdictions and as such enjoy preferential taxation.

This may occur, for example, when a given cost is deducted in two separate jurisdictions (double deduction) or deducted in one jurisdiction without corresponding income being reported in the other jurisdiction (deduction without inclusion). Thus, under the new rules, for transactions meeting the criteria set out therein, the taxpayer will be denied the right to recognize their expenses as tax deductible costs in Poland.

This means that taxpayers should thoroughly analyse their cross-border transactions against possible hybrid mismatches - a task which may prove particularly difficult given the specificity of foreign tax regulations.

Under the new regulations, it may also become necessary to recognize taxable revenue, even where the provisions exclude its recognition (e.g. in the case of accrued interest or mergers of companies). Additionally, the amended CIT Act brings a raft of provisions on dual tax residency or situations where the taxpayer's foreign permanent establishment was not considered.

Withholding tax: long-awaited changes are still to come

Despite many announcements in this regard, a draft act on the WHT collection mechanism still has not been presented by the Ministry of Finance. In turn, the entry into force of a part of related provisions (i.e. those introducing the 'pay and refund' mechanisms to transactions exceeding PLN 2m) has once again been postponed. Yet, according to the Ministry's announcements, the works on the solution are underway and should terminate in 2021. Similarly, in 2021, explanatory notes to WHT provisions are to gain their final shape.

This means that this year's works of the Ministry of Finance should be carefully analysed. According to the Ministry's declarations made so far, possible amendments would include, in particular, limiting the pay and refund mechanism to payments to related entities and passive payments (interest, royalties, dividends), extending the scope of the binding opinion for applying WHT exemption resulting from double taxation treaties and excluding dividends paid to Polish residents from the pay and refund mechanism.

Unfortunately, problems related to WHT settlements still persist and the questions on the types of payments

> Under the new regulations, it may also become necessary to recognize taxable revenue, even where the provisions exclude its recognition (e.g. in the case of accrued interest or mergers of companies).

which should be subject to WHT in Poland (the list is inconclusive), the scope of due diligence verification of payment recipients, application of the beneficial owner clause and the requirements in terms of business substance to be met to apply preferential WHT rates remain unanswered, yet are still of concern to entities making payments abroad.

Taxation of the digital economy

The COVID-19 pandemic has significantly accelerated the development of the digital economy. In fact, the emerging business models have been long detached from the company's physical presence in the given market, meaning that the currently applicable taxation rules become irrelevant. This is why the necessity to reprogram the international taxation system has long been at heart of the worldwide discussion. Still, reaching an international agreement in this area seems very difficult.

In 2018, the European Commission presented a draft directive on the taxation of digital services, however, faced with unanimity within the European forum, the project was suspended. Some countries (such as France, Spain, Italy, Austria, Czech Republic and the UK) attempt to introduce unilateral solutions in this regard. Poland has not yet decided to implement a tax on digital services, with the exception of a 1.5% fee payable to the Polish Film Institute on revenues generated in the territory of the Republic of Poland by entities providing on-demand audio-visual media services. The fee became applicable on 1 July 2020.

In fact, 2021 is to bring new developments in this regard, which is why works of the OECD should be closely followed. The programme of OECD's work is divided into two pillars.

Pillar One addresses various proposals for new nexus rules. It includes the allocation of taxing rights between jurisdictions covering users or markets in which products or services are sold by digital companies. In turn, Pillar Two calls for the imposition of the global minimum tax on groups with consolidated revenue exceeding EUR 750 million. The OECD's works on the program are expected to end by mid-2021. However, if an international agreement is not reached, the European Commission plans to come up with its own proposal. Thus, it seems that, regardless of the final shape the international negotiations will take, new regulations in terms of digital market taxation are surely to come.

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The impact of the COVID-19 pandemic on settlements between related parties

The COVID-19 pandemic had an unprecedented impact on our everyday life: it imposed movement restrictions, brought social distancing measures, put unparalleled strain on the healthcare system and gravely wounded the global economy.

The majority of businesses had to adapt to the new reality, e.g. by introducing remote work, developing e-commerce practices, incurring the costs of implementation of new safety and hygiene measures, accepting limitations on certain industries' operations and acting in line with other extraordinary regulations.

On the other hand, many distressed companies can now apply for State aid and government support at an unprecedented scale. The main goal behind the support measures is to protect workplaces and improve business liquidity. In fact, there are many indications that not only 2020, but probably 2021, will be marked by the fight against the coronavirus pandemic and efforts to revive the impacted economy.

Thus, unprecedented in its global reach, the COVID-19 pandemic has created exceptional challenges for the economy around the world. Given the circumstances at hand, acting in line with the core rule of transfer pricing, i.e. the arm's length principle, becomes a challenge, both for taxpayers and tax authorities. In most cases, the correctness of settlements and the application of the principle will be assessed by the tax authorities with a certain delay, while taxpayers belonging to international capital groups have to make their settlements for 2020, considering the impact of the pandemic, as soon as possible. Undoubtedly, both parties are faced with uncertainty as to the application of the rules, which in the long term may significantly increase the risk of double taxation and, consequently, the risk of disputes.

In many countries, however, the aid came in a form of locally applicable guidelines. Nevertheless, due to the international character of transfer pricing practices, the OECD Guidelines on the application of the arm's length principle during the COVID-19 pandemic have been eagerly awaited.

The Polish Ministry of Finance announced that the issue of explanatory notes to transfer pricing applications would be tackled by the Transfer Pricing Forum, but made a reservation that any work on the notes must follow OECD giving its opinion in this regard, for the sake of consistency.[1]

The Guidance on the Transfer Pricing Implications of the COVID-19 Pandemic (hereinafter: COVID-19 Guidance), published by OECD on 18 December 2020, was elaborated with lightning speed, for a document requiring coordinated actions and approval of the OECD's 137 member countries.

The COVID-19 Guidance gives useful hints amid COVID-19 turmoil but should be analysed and interpreted in conjunction with the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. It must be noted that the COVID-19 Guidance does not contain separate and independent recommendations.

The focus of the Guidance is on four areas, which, according to the OECD, have the most significant practical implications, i.e.:

1. Comparability analysis
2. Losses and allocation of COVID-19 specific costs
3. Government assistance programmes
4. Advance pricing arrangements (APA)

It must be kept in mind, however, that the COVID-19 Guidance does not

[1] The Transfer Pricing Forum is an opinion-making and advisory team for the Minister of Finance, established under the instruction of the Minister of Finance of 27 April 2018 on the establishment of the Transfer Pricing Forum

> Correct application of the COVID-19 Guidance requires taxpayer's active involvement and appropriate preparation of analyses, documents and calculations.

provide arbitrary and decisive answers on how to determine, document and verify transfer prices, but only indicates which areas should be taken into account when assessing specific transactions and the situation of a given entity.

In the area of comparability analyses, the COVID-19 Guidance focuses on the difficulties with obtaining comparable data. In principle, the analysis should rely on the observation of behaviour of unrelated parties operating under comparable circumstances. In the absence of up-to-date data on transactions between unrelated entities, OECD points to: (i) the use of data from other time periods, (ii) the possibility of inclusion of loss making comparables, (iii) the reference to budgeted financial information, (iv) the use of pre-pandemic data and indicators to assess the pandemic's impact, including its influence on market results, but also (v) to the use of more than one transfer pricing method or (vi) statistical and econometric method and (vii) the possibility of making adjustment at a later stage, when the relevant data becomes available.

When analysing the possibility of allocating losses and specific costs tied to the pandemic, the COVID-19 Guidance gives priority to the analysis of a specific taxpayer, along with its functional profile, and the scope of the risk incurred before and during a pandemic, while allowing modifications to pre-existing agreements with related parties, provided that they are made line with the arm's length principle. In fact, the COVID-19 Guidance makes the possibility of allocating exceptional costs arising from COVID-19, or even losses derived from it, dependent on the entities' capacity to assume risk, referring to the force majeure provisions and, once again, to the observation of behaviour of unrelated parties.

Chapter III of the COVID-19 Guidance is dedicated to the impact of public and government aid on transfer pricing, the impact of aid on the comparability criteria and risk allocation between the parties to the transaction.

The OECD also comments on the impact of COVID-19 on the concluded and negotiated Advanced Pricing Arrangements (APA), pointing to the importance of critical assumptions and the possible approach in a situation of their breach.

The COVID-19 Guidance emphasizes the importance of the distribution of functions, assets and risks. The focus shifts to risk analysis, especially in terms of the risk-assuming party and the scope of risk, including: (i) marketplace risk (due to the decline in demand for certain products and services, (ii) operational risk (disruption of supply chains and inhibited production; and (iii) financial risk (as borrowing costs for some industries have spiked and customers have delayed or defaulted on payments). Each chapter underlines the necessity of taking action by related parties, which in practice means shifting the onus of proof onto the taxpayer. In fact, the key assumptions should be documented by the taxpayer. These include: information about third party (unrelated party) behaviour, the functional profile and scope of the risk incurred, the degree of impact of the pandemic on the economic activity of a given entity or industry, and non-compliance or failure to meet a critical assumption of the APA.

Correct application of the COVID-19 Guidance requires taxpayer's active involvement and appropriate preparation of analyses, documents and calculations.

The OECD's COVID-19 Guidance provides useful hints and it will certainly prove helpful in the process of finalizing settlements between related parties in 2020, but perhaps also in 2021. It should also provide support to the authorities assessing the settlements at a later stage and find its application in the course of ongoing negotiations to conclude or amend APAs.

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KPMG's publications

The KPMG analyses and reports are an output of our expertise and experience. The publications take up issues important to enterprises operating in Poland and globally.

Entrepreneurs' prospects and sentiments

The report "Entrepreneurs' prospects and sentiments" was prepared by KPMG in Poland as a result of a survey conducted at the turn of Q2 and Q3f 2020 through CAWI (Computer-assisted web interviewing), among 79 companies operating in Poland. Among the respondents there were companies of various sizes and operating in various industries. The aim of the survey was to assess companies' prospects and plans for further development. According to the survey conducted by KPMG in Poland, as a result of the complicated situation, nearly 1/4 of the surveyed companies consider restructuring their business activities.

Investment climate in Poland in the opinion of American companies

The report "Investment climate in Poland in the opinion of American companies" was prepared based on a survey of companies with American capital operating in Poland. The first edition of the survey took place from January to February 2020, before the outbreak of the COVID-19 pandemic. The second edition of the survey took place in October 2020, during the global pandemic. In both editions the companies were asked to express their opinions on the investment climate in Poland in a three-year perspective. Moreover, in the second round of the survey, the entrepreneurs were additionally asked to indicate the impact of the COVID-19 pandemic on their business development plans in Poland.

An employee abroad. How do companies post their employees?

The report "An employee abroad. How do companies post their employees" was prepared by KPMG in Poland based on a survey conducted at the turn of August and September 2020 through CAWI among 33 Poland-operating companies that post their employees abroad. The aim of the publication is to present the practices related to the posting of employees abroad.

New reality: the consumer in the COVID-19 era. How have Polish consumer shopping habits changed in the coronavirus pandemic?

The report "New reality: the consumer in the COVID-19 era. How have Polish consumer shopping habits changed in the coronavirus pandemic?" was prepared by KPMG in Poland based on a survey carried out through CAWI (Computer-assisted web interviewing), among respondents selected from Norstat's web panel. The survey used a representative sample of Internet users, due to their age, sex and the size of place of residence. Survey respondents included only adults. The sample size was 1,001 respondents. The aim of the survey was to analyse changes in consumer behaviour caused by the COVID-19 pandemic.

Automotive industry Q3/2020 Edition

The report "Automotive industry. Q3/2020 Edition", prepared by KPMG in Poland in cooperation with Polish Automotive Industry Association as part of a series of quarterly reports, aims at presenting current trends in the Polish automotive industry, including automotive retail, manufacturing and financial services. Analysis was based on the most recent registrations, statistical and market data.

Check our publications related to **business resilience in the new reality** and see how KPMG experts can support your company in these challenging times. **Questions?** Contact us at: **mampytanie@kpmg.pl** to receive expert support in the given domain.

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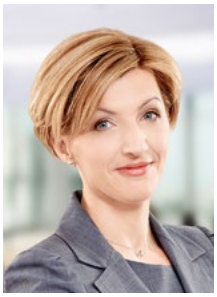

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