Polish GAAR and VAT anti-abuse rule now in effect

A general anti-avoidance rule (GAAR) and a VAT “abuse of law” rule (introduced by two new laws that amend the Polish Tax Ordinance Act and the Polish VAT Act, respectively) became effective on 15 July 2016. The new rules may have a significant impact on future activities of entities and individuals subject to Polish taxation, and the GAAR may apply to certain prior activities that result in tax benefits after 15 July 2016. The key measures of the new rules and their effect on the Polish tax ruling system are described below.

**GAAR**

The new GAAR is designed to prevent the creation and use of artificial legal arrangements, with little business justification, to avoid the payment of tax in Poland. Under the new rules, in the case of “tax avoidance” situations, the Polish tax authorities generally will have the power to disregard the form of a transaction/action and determine the tax consequences in a way that eliminates the effects of the tax benefits obtained (i.e. as if the “tax avoidance” was never in place).

Tax avoidance is considered to occur where a transaction/action is carried out primarily to obtain a tax benefit that, under the circumstances, is inconsistent with the subject and purpose of a provision in the tax legislation, and the transaction/action is carried out in an “artificial” manner.

The GAAR will apply only to transactions/actions from which the tax benefit (or the sum of tax benefits) obtained by a person after 15 July 2016 exceeds PLN 100,000 in a settlement period (the period in which a given tax is settled, e.g. an annual basis for corporate income tax purposes); the amount is calculated per transaction/action in the case of taxes that are not settled periodically. The GAAR will not apply, inter alia, to VAT (separate rules included in the VAT Act are discussed below) or in cases where the application of other provisions of tax legislation operates to counteract tax avoidance. Additionally, as explained below, a protective opinion indicating that the GAAR does not apply in a particular case may be available from the Minister of Finance (MOF).

**Transactions carried out primarily to obtain a tax benefit:** A transaction/action will be deemed to be carried out primarily to obtain a tax benefit if the other commercial or economic aims of the transaction/action, as indicated by the taxpayer, are deemed immaterial. A tax benefit will be deemed to be obtained in the following cases:

- The taxpayer is able to defer, reduce or eliminate its tax liability;
- The taxpayer creates or overstates a tax loss; or
- The taxpayer creates an overpayment of tax or a right to a refund, or increases the amount of an overpayment or refund.

The transaction/action to which the GAAR refers includes a set of related transactions/actions, carried out by the same or different entities.

**Transactions carried out in an artificial manner:** A transaction/action will be deemed to be carried out in an artificial manner if, under the same circumstances, it would not be carried out by a person that acts reasonably and is guided by lawful goals other than obtaining a tax benefit that is contrary to the subject and intention of the tax law. The new provisions provide a nonexhaustive list of factors that will be taken into account in assessing whether a transaction/action was carried out in an artificial way, including, for example, an unreasonable split of a transaction/action, or the involvement of intermediaries without commercial or economic justification.

“Protective opinion”: A taxpayer may request a protective opinion from the MOF that the GAAR does not apply to a particular transaction/action that is being planned, has been initiated or already has been concluded, provided the transaction/action is not the subject of pending tax proceedings, etc. by the authorities. The MOF will issue a protective opinion if the circumstances described in the taxpayer’s application indicate that the GAAR does not apply in the case; otherwise, the MOF will refuse to issue the opinion (in the latter case, the taxpayer may file a complaint with an administrative court (and also may appeal to the court if it disagrees with the MOF’s reasoning as to why the GAAR does not apply)).

The deadline for issuing the opinion is six months from the receipt of the taxpayer’s request, and the fee for submitting an application for the opinion is PLN 20,000.
VAT abuse of law rule

In the event of an abuse of law, activities subject to the VAT rules will lead to only those tax results that would have occurred in the absence of transactions/actions constituting an abuse of law.

An abuse of law is defined as carrying out an activity subject to VAT as part of a transaction/action that, despite meeting the formal requirements specified in the provisions of the VAT Act, basically was aimed at deriving tax benefits that are contrary to the intention of these provisions.

Impact of GAAR and VAT abuse of law rule on tax rulings

Some changes have been made to the tax ruling system in connection with the new anti-abuse rules. In general, tax rulings will not be issued for any existing or future transactions/actions where there is a “justifiable suspicion” that the GAAR may apply or there may be an abuse of law under the VAT Act.

Additionally, the Tax Ordinance provisions regarding the scope of protection resulting from a tax ruling will not apply if the facts of the case or future events that are the subject of a tax ruling also constitute a part of an activity that is the subject of a decision issued due to the application of the GAAR, or in relation to an abuse of law under the VAT Act. However, pursuant to the literal wording of the transition provisions, this rule is applicable only to tax rulings issued as from 15 July 2016.

Comments

It should be noted that the wording of the GAAR is rather vague and a number of definitions and statements are of a general nature – including, in particular, the definitions of “tax benefit” and “tax avoidance” – raising questions as to whether they are in conformity with certain constitutional principles in Poland.

Taking into consideration the items described above, the practical uncertainties related to the application of these provisions and the lack of experience of the tax authorities and tax courts with their interpretation, it is difficult to predict the extent to which the tax authorities will rely on the GAAR to question the tax treatment of certain transactions/actions. However, it is clear that, under the GAAR provisions, tax avoidance will be deemed to exist in cases where transactions are carried out without a sufficient business justification and in an artificial manner. It follows that, to assess whether transactions have the characteristics of tax avoidance, an evaluation of their business justification will be crucial.

Taxpayers should carefully review the existence and documentation of the business justification with respect to current and future, as well as past, transactions/actions resulting in tax benefits being obtained after the entry into force of the GAAR regulations (i.e. the GAAR may be invoked with respect to transactions/actions carried out before 15 July 2016 that result in tax benefits after this date; there is no similar provision for the VAT abuse of law rule).

Additionally, taking into consideration the impact of the GAAR/VAT abuse of law rule on tax rulings, taxpayers should review tax rulings obtained in the past, to confirm whether, and to what extent, the legal protection resulting from the rulings will be available with respect to executed or planned transactions. Finally, it is important to carefully monitor practice developments in the application of the new rules by the tax authorities and courts and, on this basis, to further assess how to differentiate between permitted tax planning and tax avoidance that may be considered an abuse of law.

— Ewa Grzejszczyk (Warsaw)  Łukasz Strzelec (Warsaw)
Partner  Senior Manager
Deloitte Poland  Deloitte Poland
egrzejszczyk@deloitteCE.com  lstrzelec@deloitteCE.com