

Polish GAAR to Enter into Force on July 15, 2016

Dr Janusz Fiszer

**Associate Professor at the Warsaw University School of Management
and Partner at the GESSEL Law Office**

Warsaw

On May 13, 2016 Sejm, the lower chamber of the Polish Parliament, passed amendments to the 1997 Tax Code, introducing the General Anti-Avoidance Clause (GAAR). The relevant provisions shall enter into force on July 15, 2016. The most important provision of the GAAR, being newly-added Article 119a of the Tax Code stipulates that, a transaction performed mainly for the purpose of obtaining a tax benefit, in given circumstances contradicting the object and purpose of the tax law, shall not result in tax benefit, if the manner of actions [of the taxpayer] was artificial (tax avoidance)". It states further that "in situation defined above, the tax consequences of actions [of the taxpayer] shall be determined based upon such factual status, which could have taken place, if the appropriate action had been performed", clarifying that "the action shall be deemed appropriate if it could have been performed [by the taxpayer] in given circumstances, had [the taxpayer] acted reasonably, guided by the law-compliant goals other than obtaining a tax benefit, contradicting the object and purpose of the tax law". The GAAR provides further that if the circumstances indicate that obtaining a tax benefit was the only purpose of given action [of the taxpayer], the tax consequences of such action shall be determined based upon such factual status, which could have taken place, if the given action had not been performed.

The initial draft outlining of the planned GAAR have already been already announced in 2013, but the new provisions amending the 1997 Tax Code have been passed on May 13, 2016. It is worth to mention that the first version of GAAR has been adopted already 14 years ago, but in 2005 the Polish Constitutional Tribunal repealed the GAAR provisions, as being too vague and unprecise

Application of the GAAR would in practice mean that tax authorities could determine tax liability on grounds of actual business substance and typical legal structure disregarding legal structures that were used by the taxpayer solely or mainly to achieve tax benefits.

In case the double tax treaties concluded by Poland contain clauses aimed against tax avoidance, referring to tax benefits being the main or one of the main purposes of performing certain transaction or establishing a structure or referring to obtaining of an income in connection with an artificial structure, the above GAAR provision shall apply accordingly. The action manner shall be deemed artificial if based upon existing circumstances one should assume that it would not have been applied by a person acting reasonably and guided by the law-compliant goals other than obtaining a tax



benefit, contradicting the object and purpose of the tax law.

There are certain exceptions from the GAAR, including, among others, transactions resulting in a tax benefit not exceeding PLN 100,000 (approx. EUR 23,000) or cases in which a special ruling has been obtained by the taxpayer from the newly-created body called "Council for Counteracting of Tax Avoidance". Application for such a special ruling "securing" the position of the taxpayer vis-à-vis the tax authorities is subject to a relatively high administrative fee of PLN 20,000 (approx. EUR 4,600).

The new GAAR rules shall apply to tax benefits obtained after the date of entry into force of the amendments to the Tax Code, i.e. to tax benefits obtained after July 15, 2016. As a result of such principle, in

fact, the GAAR rules may apply to transactions performed or tax-optimization structures established before that date, if the actual tax benefits were to be obtained after July 15, 2016.

Another important change applies to the rules regarding the standard tax rulings issued by the Minister of Finance. The new Article 14n of the Tax Code stipulates that the tax ruling shall not be issued with respect to such elements of the factual status or future situation, which raise justified assumption that they might be subject to decision based upon Article 119a (i.e. GAAR) or constitute an abuse of law, referred to in Article 5.5 of the 2004 VAT Law.

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