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Newsletter

JUNE 2022

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Changes in transfer pricing

Since 2022, taxpayers have been dealing with a substantial number of changes in taxes, though these are unfortunately not advantageous in many cases. Nevertheless, among all these new amendments, there are some that can be regarded as positive developments. Such favourable tax changes have been introduced in the area of transfer pricing documentation.
For the record, transfer prices are used in transactions between or among related parties. Related parties should determine their prices under terms and conditions that would have been made between non-related parties (transactions carried out at arm's length).
To be considered at arm's length, a transaction must be supported by detailed documentation, also including market research into existing market prices, known as a benchmarking analysis.

Which changes are the most important?

First of all, the deadlines for preparing local transfer pricing documentation (a Local File) and filing information on transfer pricing (TPR) have been extended permanently – not only during the Covid-19 pandemic.
Additionally, it is no longer necessary either to submit an additional statement on preparing a local file or to inform the tax authority about adjusting the transfer prices in tax returns, meaning there is no need to file several documents. Currently, the statement forms an integral part of the TPR.
Importantly, under a new law passed in April 2022, new deadlines for filing a TPR and for preparing the transfer pricing documentation also apply to documentation prepared for 2021.

The new filing requirements, which become effective from 2022 and apply to documentation prepared for 2022, are :

- Local File must be prepared by the end of the 10th month from the end of the fiscal year (previously this was nine months);
- Information on transfer pricing must be submitted by the end of the 11th month from the end of the fiscal year;
- a Local File must be submitted at the request of the tax authority within 14 days (it used to be seven days).

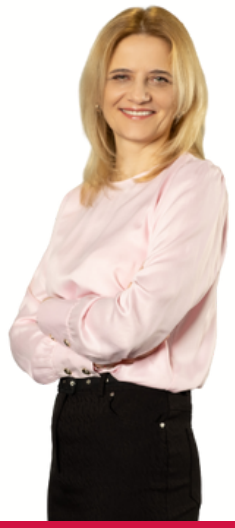
Taxpayers, who have their fiscal year the same as the calendar year, must prepare their transfer pricing documentation for 2021, with a TPR form, by 31 December 2022.

What are the other changes?

It is worth mentioning that a Local File must be prepared electronically. In addition, the catalogue of transactions exempt from the documentation obligation has been extended and now includes transactions:

- between Poland-based establishments of foreign non-resident related parties and between such establishment and its Polish related party;
- covered by a tax agreement and an investment agreement;
- regarding settlements in the so-called clean re-invoicing; and
- Safe harbour transactions for low value added services, loans, credits and bonds.

Additionally, certain transactions executed by micro- or small enterprises as well as transactions other than controlled transactions executed with residents of tax havens or such in which the beneficial owner is a resident of a tax haven may not be documented in full scope and may not include a benchmarking or compliance analysis.



Agata Wleklińska
tax advisor

What is a VAT group?

Starting from 1 July 2022, a new facility will be introduced to the Polish VAT system, i.e. VAT grouping. This mechanism will streamline VAT settlements and reduce administrative burdens between related parties from different industries. In many cases, VAT groups will improve financial liquidity.

What is a VAT group?

A VAT group is in fact a legal fiction for VAT purposes, in which the economic element is of major importance rather than the legal form. Eligible entities forming a VAT group remain legally separate but are treated as a single taxable entity for VAT purposes.

Who can form a VAT group?

VAT group treatment is an arrangement that allows corporate bodies to account for VAT as a single taxable entity. A VAT group may be created by Polish tax residents and non-residents that operate in Poland thorough a Polish branch. The composition of a VAT group may be freely changed by, for example, adding several entities from a single capital group. Members of a VAT group retain their separate legal and tax identity other than for VAT purposes.

The legal provisions do not provide for any industrial restrictions for creating a VAT group. Nevertheless, it seems that VAT grouping may be specifically favourable for financial, insurance or healthcare industries, as they are not entitled to deduct VAT.

Assumptions for VAT grouping:

a. Members of a VAT group cease to be an independent taxable entity separately identified for VAT purposes.
b. Bodies corporate forming a VAT group act as a single taxable entity in transactions with clients from outside the group and before tax authorities.
c. Supplies of goods and services among members of a VAT group are not subject to VAT, whereas taxable transactions made by any VAT group member to entities from outside the group are treated as made by the VAT group.
d. A VAT group has a single VAT identification number.

The joint and several liability of VAT group members for VAT liabilities seems to be a major drawback of this solution. The liability lasts for certain limitation periods after the loss of the status of a single taxable entity by the VAT group.

What links the members of the group?

Pursuant to Article 11 of the EU VAT Directive, members of a VAT group must be closely bound to one another by:

- economic,
- financial and
- organisational links.

The Member States have a different approach to these requirements and interpret the importance of these links in a different manner.

What's next?

To address the question of whether it is the best solution for a given group of companies, it is necessary to examine the specific nature of their activities, links, transactions and other legal issues involving accounting for VAT as a single (group) taxable entity**.**

Maria Kotaniec
tax advisor

Posting an employee to Poland

In the context of dynamic cross-border economic cooperation, labour mobility is essential. Businesses should remember that posting an employee is subject to special legal regulations that, if not complied with, may trigger financial consequences.

The important issue is to know that labour mobility is an element of one of the fundamental freedoms protected by EU law – the freedom to provide services. The principle of the freedom to provide services entitles economic operators to provide their services in another EU Member State without having to become registered or established there. Due to the cross-border nature of this principle, the rules on posting workers have been unified across the EU. In Poland, the EU solutions have been implemented in the Act on the Posting of Workers for the Provision of Services of 10 June 2016 (the "Polish Posting Act").

In this article, we introduce the basic rules on posting workers to Poland – Polish employers posting workers to another EU Member State must act in line with regulations applicable in the host country.

A worker is posted to Poland if a foreign employer:

- refers a worker to perform a contract concluded with a Poland-based partner; or
- refers a worker to work in its Polish division or other member of its capital group operating in Poland.

Posting involves individuals employed by the business making the posting – in connection with the posting, posted workers do not enter into any new legal relationship, with the posted worker remaining employed by the original employer, who manages, settles and pays for the work.

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IPosting is a temporary assignment. In general, a posting assignment cannot exceed **12 months**, but if the employer makes a motivated notification to the National Labour Inspectorate (Państwowa Inspekcja Pracy), the posting period **may be extended to 18 months**. Employers intending to post employees must observe these time limits.

Importantly, the Polish Posting Act does not specify a minimum posting period, meaning that stays of just several days or even a one-day visit to Poland may qualify as posting for the provision of services.

At the same time, it must be remembered that posting is not the same as a business trip – in the event of a posting, a foreign employer must agree with the employee on any temporary change in the place of work to another place in Poland and then execute a relevant agreement in this respect.

Please note that the rules on posting also apply to employees seconded to work in Poland by non-EU employers.

Although a posted worker works on the basis of the employment contract with its original employer for the duration of the posting, they must benefit from the same basic working conditions and rights as workers in Poland (known as minimum working conditions). This means that, during the posting period, a posted worker will fall under the terms and conditions of employment resulting from the Polish Labour Code and labour and employment regulations. If the terms and conditions included in the original employment contract are less advantageous than the statutory terms and conditions of employment, the employer must adjust them accordingly. Specifically, the requirement to provide the minimum working conditions includes the obligation to pay posted workers the same for the same job as their local peers.

In addition, a posting employer must:

- appoint a person authorised to contact the Polish Labour Inspectorate in Poland;
- notify the National Labour Inspectorate (Państwowej Agencji Pracy) about the posting (specifically, the anticipated dates of the commencement and termination of posting and the nature of the services to be provided in Poland by the posted worker, with a statement of reasons for posting);
- keep specific files in Poland applicable to the posting (copies of the employment contracts, working time records and salary acknowledgement receipts).

The National Labour Inspectorate may review compliance related to the posting of workers. For this purpose, the employees' watchdog may demand explanations from the foreign employers, check whether the terms and conditions of posting are complied with (specifically with respect to the scope of business of the posting employer and the period of posting) and whether the posted workers are treated fairly.

In the case of any non-compliance or negligence on the part of the posting employer, the National Labour Inspectorate may impose a fine of up to PLN 30,000.

Additionally, posting employers must remember that:

- the legal employment and legal stay of a posted worker in Poland (specifically, receiving a work permit) is a totally different thing than the employer's duties associated with posting – the posted employer must seek relevant documents before the worker is posted;
- posting triggers consequences under the social insurance law (A1 form for a posted worker) and tax law (a tax residence certificate).

Posting workers is a complex and multifaceted process in the legal context. In order to make it right and avoid painful consequences, you have to comply with all applicable laws from a number of areas.

Michał Mieszkowski
attorney at law

New obligation to hold a "cryptocurrency licence"

Cryptocurrencies have been arousing huge interest among enthusiasts of new technologies and finance and among laypeople for a few years now. There are at least several reasons why the cryptocurrency business is blossoming[NF1] .
In the Polish legal system, cryptocurrencies are referred to as virtual currencies – as defined in the Act on Anti-money Laundering and Countering the Financing of Terrorism (AML/CFT), of 2018 (the "AML Act").

Pursuant to the AML Act, a virtual currency is a digital representation of value that is not:

- a legal tender issued by the National Bank of Poland, a foreign central bank or other public authority;
- an international clearing unit established by an international organisation and accepted by individual countries belonging to or cooperating with such an organisation;
- electronic money within the meaning of the Act on Payment Services of 19 August 2011;
- a financial instrument within the meaning of the Act on Trading in Financial Instruments of 29 July 2005;
- a bill of exchange, promissory note or cheque.

A virtual currency is convertible in business dealings for legal tender and accepted as a medium of exchange; it may be electronically stored or transferred or may be the object of electronic trade.

Are cryptocurrencies recognised as a legal tender?

No, cryptocurrencies are not recognised as a legal tender, but are means of exchange, and can be converted into fiat money.

What is driving the cryptocurrency phenomenon?

Primarily, cryptocurrencies have become an alternative to fiduciary money forming the basis of the monetary system almost all over the world. Fiat money is issued and controlled by national central banks, meaning that its value largely depends on the policy of central authorities. Fiat money exists in electronic and physical form (as banknotes and coins). Unlike national currencies, cryptocurrencies, are, by definition, not reliant on any central bank and only have an electronic form operating on blockchain technology. Most countries do not allow payments by cryptocurrencies in their legal systems.

The other issue that contributes to the growing popularity of cryptocurrencies is their anonymity, which simply means that there is no personal data of the users disclosed in the available information on the transaction (unlike, for example, in the case of a traditional bank transfer). A user's cryptocurrency "wallet", in which cryptocurrencies are stored, is represented as a unique series of random numbers and letters.

This issue was recently addressed by the European Commission, which, at the end of March 2022, voted on a proposal that would put an end to the anonymity of cryptocurrency transactions by introducing a requirement to collect information on the owners of cryptocurrency wallets. Under the new updates to the EU AML rules, providers of cryptocurrency services, such as cryptocurrency exchanges and bureaux de change, would be required to conduct due diligence on their customers.

The details of this requirement are not known yet, but there are also plans to introduce an obligation to notify any transfers worth EUR 1,000 or more to the authorities. The proposed measures are the next steps taken to undermine the independence and freedom of cryptocurrencies.

On 31 October 2021, a very important amendment to Poland's AML Act entered into force.
In accordance with the amendment, any activity involving:

- an exchange of virtual currencies for fiat money;
- exchange services between virtual currencies;
- intermediation (brokerage) for the exchange of virtual currencies; and
- the provision and maintenance of accounts for virtual currencies (wallets), being a collection of identification data allowing eligible entities to use virtual currencies, including to make exchange transactions;

is considered a regulated business within the meaning of the Entrepreneurs Law of 6 March 2018 and may be conducted after registration in the Register of Companies Engaged in Cryptocurrency Activities, which is maintained by the Minister of Finance. A failure to register is punishable by a fine of up to PLN 100,000. This means it is necessary to seek a cryptocurrency licence. The legislator has also introduced a requirement to have a set of special qualifications for anyone wishing to engage in virtual currency services.

Until recently, crypto has had a reputation for being independent from central banks, government policies or legislation. Over the years, and being aware of inherent risks associated with cryptocurrency use, the need has arisen to gradually regulate this business. Therefore, it seems evident that the freedom of crypto will be restricted by governments in many countries.

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→ Law and taxes in Poland

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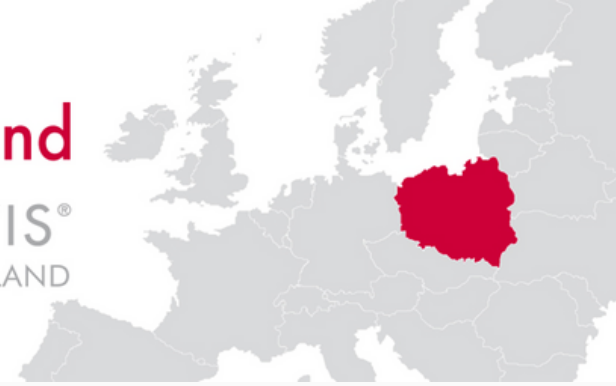

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