

# Newsletter

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## TAX Alert: New deadlines for withholding tax

At the end of August 2022, the Regulation on the Extension of Certain Deadlines Related to Meeting the Obligations Resulting from Withholding Tax came into force.

This regulation extends the validity period of a statement made by members of the management board of remitters regarding the withholding tax (WHT) mechanism until the end of the tax year. As a result, remitters will be entitled to apply the preferential WHT rate or WHT exemption, respectively, on the basis of the originally filed WH-OSC statement until the end of their tax year,<sup>[1]</sup> rather than until the end of the second month following the month in which the statement was filed, as was the case under the regulations until recently.

According to the regulations in force on 1 January 2022, the deadline for filing the original statement was the end of the tax payment deadline for the month in which the PLN 2 million threshold was exceeded.

At the same time, the related and dependent deadline for filing a follow-up declaration was also extended. Here, the deadline was extended to the last day of the month following the end of the remitter's tax year (previously, the deadline was the seventh day of the month following the end of an additional two months).

According to the Ministry of Finance, the extension of the deadline is intended to mitigate the negative effects of the previous regulations, according to which the deadline for filing the original statement expires on the due date of payment of tax for the month in which the PLN 2 million threshold was exceeded.

This is because, since the beginning of 2019, a new withholding tax mechanism has been in force regarding payments exceeding PLN 2 million in a given year.



If the threshold is exceeded, the remitter is required to withhold tax on the excess over PLN 2 million, without being able to benefit from preferences arising from double-tax treaties and special provisions, i.e. the pay & refund mechanism now applies. The legislation allows for two exceptions to the obligation to apply the pay & refund mechanism:

- a WHT preference opinion (issued by the tax authorities); and
- a statement from the remitter that all conditions for applying an exemption are met (WH-OSC).

These changes are introduced by the Regulation on the Extension of Certain Deadlines Related to Meeting the Obligations Resulting from Withholding Tax of 29 August 2022 (Journal of Laws of 2022, item 1829).



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<sup>[1]</sup> For remitters who have their tax year equal to the calendar year, this will be 31 December 2022.

## Tax clarifications on VAT groups

**On 11 October 2022, the Ministry of Finance published the eagerly awaited tax explanations on VAT groups. These explanations (the “MF Clarifications”) relate to regulations on the creation and operation of a new type of taxpayer – a VAT group.**

The MF Clarifications refer to the regulations that come into force on 1 January 2023 and focus on the conditions for the formation of a VAT group, the settlement rules during the operation of a VAT group and the issues related to the termination of a VAT group.

It is worth mentioning that the VAT group regulations were originally intended to take effect from 1 July 2022, but this date was eventually postponed by six months.

The purpose of the MF Clarifications is to present a practical interpretation of the provisions of the VAT Act insofar as they allow joint VAT accounting by several entities within a group.

### How can VAT groups settle?

Members of a VAT group settle as if they were a single taxpayer – this means that a VAT group can submit a single JPK\_VAT covering all the purchase and sales transactions of the members, and pay tax for all entities forming the group.

Please note that the main purpose of the new regulations is the exclusion from VAT of transactions between group members. As indicated in the MF Clarifications, any taxpayer may become a member of a VAT group, and a VAT group may consist of:

- Polish tax residents, and
- Non-residents, if they operate in Poland through a Polish branch.

### Which entities cannot belong to a VAT group?

A foreign branch of a Polish entity cannot belong to a VAT group, but a Polish branch of a foreign entity may be a member. This leads to a situation in which transactions concluded between the Polish branch of a foreign business and its head office outside Poland will be taxed.

### Does the creation of a VAT group constitute a tax scheme?

We already know the answer to this question. Importantly, the MF Clarifications clarify this disputable issue. The Ministry of Finance has explained that neither the formation of a VAT group nor any activities aimed at its formation lead to the main or one of the main tax benefits that the entity or entities expect to obtain from the formation of a VAT group.


These activities do not meet the conditions of a general identification, a specific identification or another specific identification. They will, therefore, not constitute a tax scheme.

This leads to the conclusion that the activities described above will not constitute a tax scheme. As indicated in the MF Clarifications, an exception is the situation where a beneficiary of a given tax scheme is a VAT group member. In this event, the provisions on reporting tax schemes apply.

The MF Clarifications also include a handful of clarifications regarding fiscal cash registers. As the MF indicates, a VAT group may benefit, on general terms, from both subjective and objective exemptions from the obligation to use fiscal cash registers.



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## Who cannot be appointed as a member of the management board or a commercial representative of a company?

The amendment to the Code of Commercial Companies that came into force on 13 October 2022, changed the criteria when appointing members of the management board or commercial representatives, among other things.

When selecting a person to be a member of the management board or a commercial representative in a company, attributes such as skills, knowledge, education and experience, as well as credibility and integrity are usually taken into account. With regard to credibility and integrity, the Commercial Companies Code sets out the minimum requirements that every candidate must meet in order to be elected to serve in the company.

Pursuant to Article 18 of the Commercial Companies Code, a member of the management board or a commercial representative may not have been convicted, in a final and non-appealable judgment, of any of the criminal offences specifically indicated in that provision. Note that this prohibition ceases to be effective five years after the date when the judgment of conviction became final and non-appealable, or earlier, if the record of criminal conviction was already expunged from the official criminal register.

The previous provisions referred to crimes and offences, such as crime for the unlawful disclosure of information, offences against the credibility of documents, property crimes, white-collar crimes (economic crime and crime property interests in civil law transactions) and offences against trading in money and securities. Now, in addition to the reference to the provisions of the Criminal Code and the addition of extra provisions from the Criminal Code, this catalogue has been extended to include certain provisions from the Commercial Companies Code, specifically: Articles 587-5872, Article 590 and Article 591 of the Commercial Companies Code.

The new provisions introduced into the Commercial Companies Code set out sanctions for:


- non-compliance with disclosure obligations, such as: failing to provide within the specified time, submitting false information, documents, reports or explanations, or concealing information that has a material impact on the content of such information, documents, reports or explanations. The provision provides for a fine of between PLN 20,000 and PLN 50,000 or the restriction of liberty. If the perpetrator acted unintentionally, the fine will be between PLN 6,000 and PLN 20,000.
- causing the management board to fail to provide the advisor to the supervisory board with access to documents, withholding the requested information, providing false information, or concealing information that has a material impact on the content of such information or documents. The provision provides for a fine of between PLN 20,000 and PLN 50,000 or the restriction of liberty. If the perpetrator acted unintentionally, the fine will be between PLN 6,000 and PLN 20,000.

The new provisions are intended to make anyone appointed to perform a function in a company, such as members of the management board and commercial representatives, attach even greater importance to the duties they perform, given that the sanction for infringements, in addition to financial consequences and the restriction of liberty, also includes a temporary prohibition on holding such offices.



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## Contracts executed by the company with a member of the management board

**During the lifetime of a limited liability company, a person holding the position of a member of the management board may wish to enter into a contract with the company.**

This type of conflict of interest arises most frequently when concluding an employment contract with a management board member. The provisions of the Commercial Companies Code expressly prohibit board members from acting on both sides of a contract.

In such a case, the company is represented by the supervisory board or a commercial representative appointed under a resolution of the meeting of shareholders.

The regulations do not explicitly indicate how the supervisory board should be represented when signing a contract with a member of the management board. They state that the supervisory board should act collectively, unless the company's articles of association or the regulations of the supervisory board provide otherwise.

The creation of a supervisory board in a limited liability company is not mandatory (unless it is a large company with a share capital exceeding PLN 500,000 and more than 25 shareholders). If there is no such board, the meeting of shareholders is required to adopt an appropriate resolution appointing a commercial representative in this respect. Such a resolution should be adopted by a written vote and cannot be adopted by circulation or without holding a meeting.



The situation becomes more complicated in the event that a shareholder is also the sole member of the management board. In this case, a legal transaction between the shareholder and the company he or she represents must be in the form of a notarial deed, and the notary must notify the competent registry court of the legal transaction via an ICT system.

A similar restriction also applies to joint-stock companies, which are also required to act through a supervisory board or a commercial representative appointed in a resolution of the general meeting.



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## Non-solicitation clauses

In industries with limited access to employees with the required skills, it is extremely important to properly regulate relations with contractors with regard to the takeover of key employees. This is because, in today's market reality, employee poaching is becoming an increasingly common practice.

In relations with employees or contractors, it is possible to conclude a separate non-competition agreement including restrictions on taking on additional employment during the cooperation and afterwards. The admissibility of such restrictions does not raise any major doubts. At the same time, the introduction of a non-solicitation clause providing for contractual penalties in the event that the employee is poached during or after the term of the contract is a common practice. This raises questions about the admissibility of such clauses and the enforceability of sanctions in the event of a breach.

There is no uniform stance on this issue.

On the one hand, it is argued that such clauses are contrary to the rule of law and the principles of social co-existence. This thesis suggests that their inclusion in model contracts is therefore prohibited, and that if a contract containing such clauses is concluded, they are invalid. As an argument in support of this, it is pointed out that non-solicitation clauses are contrary to the principle of the freedom of contract, as such a prohibition in a contract between contractors affects the situation of employees, "by limiting their right to right to freely choose employment," which consequently violates the principle of the freedom of work, which is also a constitutional principle.

It is further pointed out that such provisions also infringe on the employer's freedom of choice of employees, resulting in a violation of the principle of the freedom of labour on the employer's side of the employment relationship, as well as the principle of the freedom to conduct business, which has its source in the Polish Constitution.

On the other hand, non-solicitation clauses are considered to be a lawful restriction in employment and do not violate any statutory and constitutional norms, in particular where the purpose of such clauses is to protect company secrets. This is because there are no legal obstacles for contractors

in certain situations to regulate the protection of confidential information contractually, entering into mutual obligations in this respect and imposing sanctions for a breach of such obligations with, for example, the obligation to pay a contractual penalty. It is true that an obligation not to employ employees of the other party for a certain period of time undoubtedly restricts the freedom of the party on which the obligation was imposed.

However, this cannot be seen as an infringement of the rules of economic freedom, since the party itself, exercising its autonomy of will, undertakes not to take certain actions, while the obligation, in practice, has very little effect on the possibility of freely conducting its business activity.

It follows that the use of non-solicitation clauses in contracts governed by Polish law raises questions. It seems important to properly describe the purpose to be served by limiting the employment of the contractor's employees. If this purpose is to protect business secrets/confidential information, there is a good chance that sanctions will be enforced in the event of a breach. In other cases, there is a risk that such clauses will be found to be ineffective.



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# → Law and taxes in Poland



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