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Automatic Exchange of Information on the Issued Tax Interpretations in the Context of a Taxpayer's Rights

Automatyczna wymiana informacji o wydanych interpretacjach podatkowych w kontekście ochrony praw podatnika

SUMMARY

The aim of this article is to analyse a form of administrative cooperation, which is the mandatory automatic exchange of information in the field of tax interpretations, concerned in Action 5 of the BEPS Project (Base Erosion and Profit Shifting) and introduced in Council Directive 2015/2376 (EU) of 8 December 2015, amending Directive 2011/16/EU with regard to mandatory automatic exchange of information in the field of taxation – as regards a taxpayer's rights and – in a broader context – those of an entity, to whom the individual interpretation concerns.

Keywords: automatic exchange of information; administrative cooperation; tax interpretations

INTRODUCTION

The BEPS Project, developed in 2013 at the Forum on Harmful Tax Practices, is the answer of OECD as well as countries united within the G20 to the problem of both tax avoidance and evasion, which affect the economic interests of numerous countries. In the aforementioned Project, 15 actions were adopted, which aim at counteracting the base erosion and profit shifting.

In Action 5, the necessity of an effective countering of harmful tax practices was emphasised, taking into account transparency and substance, i.a. by introducing a mandatory and spontaneous information exchange on tax law individual interpretations.

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Cross-border tax avoidance, aggressive tax planning as well as harmful tax competition have also been noticed at the EU level, as the Directive 2011/16/EU[1] on administrative cooperation in the field of taxation has been in force for the recent years. The Act mentioned above stipulates the following forms of tax information exchange between the EU member states: the exchange of information on request, spontaneous and automatic exchange of information. Since its adoption, the directive has been amended for a number of times with regard to automatic information exchange; its objective applicability scope has been extended, and duties related to accounting have been introduced[2].

The European Council, in its conclusions of 18 December 2014, expressed the need of continuing the efforts towards countering tax avoidance and aggressive tax planning, and expected the European Commission to submit a proposal on automatic information exchange within the scope of individual tax interpretations[3]. At one level, it has been underlined that individual tax interpretations facilitate a coherent and transparent law application as well as enable taxpayers to act in conditions of greater certainty, yet at another level the problem of tax avoidance connected with issuing individual interpretations in cross-border situations, in which factual circumstances were presented in order to grant profit for taxpayers, has been noticed. The Directive 2015/2376 of 8 December 2015[4] was supposed to solve the aforementioned problem by imposing the obligation on member states to transfer the individual interpretations of a cross-border character as well as pricing agreements on a regular basis.

AUTOMATIC EXCHANGE OF INFORMATION ON TAX INTERPRETATIONS

The exchange encompasses information on the issued interpretations, as well as amendments thereto, assertions of their expiry and reversal, which apply transactions, transaction complexes or other events[5], provided that:

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[1] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ L 64, 11.03.2011, p. 1).

[2] Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L 359, 16.12.2014, p. 1); Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L 146, 03.06.2016, p. 8); Council Directive (EU) 2016/2258 of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities (OJ L 342, 16.12.2016, p. 1).

[3] *Rada Europejska w 2014 r.*, www.consilium.europa.eu/pl/documents-publications/publications/2015/european-council-2014 [access: 13.10.2017].

[4] Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L 332, 18.12.2015, p. 1).

[5] Article 77 Item 2 thereof indicates that transactions or transaction complexes encompass in particular: existence of the foreign company, value calculation for the purpose of amortisation/

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- not all of the entities involved therein have their seat, management board or domicile in the territory of the Republic of Poland,
- a party to the transaction or transaction complexes runs a business activity in the territory of another country through a foreign entity, and the transaction, transaction complexes or other events constitute a part or an entirety of the foreign entity's business activity,
- any party to the transaction or transaction complexes has at the same time a seat, a management board or a domicile in the territory of more than one member states,
- transaction or transaction complexes or other events have cross-border consequences.

Automatic information exchange does not include interpretations concerning exclusively natural persons' matters, moreover, the Directive 2015/2376 foresees also the possibility of exclusion from the automatic information exchange of individual persons or groups of persons, whose annual net sales income on a group basis amounts to less than EUR 40 million, however, the Polish legislator failed to recognise this possibility. Tax interpretations, being the subject of the automatic information exchange, concern direct taxes, thus, they are excluded from the exchange scope, are based on regulations on goods and services tax, customs and excise duty tax, social security contributions, related to stamp duty as well as contractual receivables, in particular remuneration for public utility services.

The exchange of individual interpretations is performed on the basis of standard forms and encompasses information concerning: data identifying the entity, date of issuing the interpretation, tax interpretation kind, value of transaction or transaction complexes specified in the interpretation, setting out other member states to which the given tax interpretation may be applicable, specifying entities having their seat or management board in other member states (with those countries listed), whose tax obligations may be impacted by transactions, their complexes or events comprised by the tax interpretation – provided that those entities can be identified, the interpretation summary – including the description of factual circumstances or a future event or the description of a planned or an already introduced action.

depreciation of the assets element acquired from an affiliated foreign entity, investment realisation, delivery of goods, service rendition, financing, utilisation of tangible fixed assets or intangible assets.

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EXCHANGE OF INFORMATION AND PROTECTION OF THE TAXER

The Directive 2015/2376, followed by the Act on Tax Information Exchange[6], does not include any particular regulations related to the protection of a taxpayer or – in a more broadly understanding – of entities whose data is being exchanged between the countries, which results from the character of this exchange. While the primary requirement of the information exchange on request, which would be aimed at the protection of the above mentioned entities, constitutes the notification about undertaking this form of cooperation, it is excluded in the case of the automatic information exchange, as the information – being the subject of such an exchange – as well as the temporary periods of time, are known well in advance. What is more, with regard to the information on tax interpretations, the data strictly related to the entities is not the subject of the exchange, as it is the case in the automatic information exchange on income; instead, it is more general data about factual circumstances, actions performed by the taxpayer, as well as value of transactions, which is to be presented in a form of a summary.

Therefore, a question arises as to what form of protection can be applicable to the entities, whose data comprises tax interpretations, as they are indirectly engaged in a given form of the administrative cooperation. Seeing that the scope of the exchanged information varies and is performed *ad casum*, it should be verified whether exclusively indispensable data related to taxpayers is the subject of the exchange, and whether it does not encompass any information irrelevant in the context of such an administrative cooperation, specifically, the eradication of tax base erosion and profit shifting by affiliated entities.

It is noteworthy that it is not the very individual interpretations that are the subject of the exchange but their summary that contains, as already mentioned above, the description of the factual circumstances or of a future event or the description of a planned or an already introduced action. Undoubtedly, it is a solution that considerably facilitates the information exchange, as the same interpretations, depending on the complexity level of the factual circumstances, may be very lengthy, and their shortened version may be easily attached to the form. Additionally, it should be noted that a considerable simplification of the interpretation may result in the foreign tax organ receiving incomplete data, and – as a result – an inaccurate evaluation of the factual circumstances in that particular case. The Directive 2015/2376 foresees the possibility for a member state to apply for additional information – including the full text of the individual interpretation – to the country that has issued it on terms stipulated for information exchange on request, whereby this possibility was not provided for in the Act. However, the very proceedings aimed at receiving the full

[6] The Act of 9 March 2017 on Tax Information Exchange with Other Countries (Journal of Laws, Item 648 as amended).

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interpretation raise concern, since the application for granting tax information is to contain: data identifying the entity to whom the information may concern, specification of the requested information and the purpose of its application, statement informing about exhausting any possibilities to obtain the information pursuant to the national law regulations applicable for a country submitting the request, as well as confidentiality undertaking as regards the received information, pursuant to the national law of the country submitting the request. In the context of transferring the individual interpretation, it seems needless to submit a formal request, especially with regard to the fact that it requires issuing a declaration about exhausting any national means aimed at obtaining the information. Since a member state has submitted a given individual interpretation and acknowledged that its objective or subjective scope concerns another country, it is groundless to require a justification of applying for a full text (of this interpretation) of this country. Moreover, seeing that it is an automatic exchange, this country is unable to meet the conditions of utilising the national means in order to obtain the necessary information. Thus, it would be justified to enable the transfer of the full text of the interpretation even as an attachment thereto, which would guarantee that only complete information is the subject of the exchange.

Transferring complete information concerning both the entities involved in transactions and their object is related to the threat of violating trade or industrial secrets or professional secrecy or the secret of a production process, thus, the description of the factual circumstances is prepared in a way that does not lead to their breach. The above-mentioned solution safeguards the entities running a business activity against disclosure of any sensible data concerning their enterprises, including economic espionage[7]. Nevertheless, there is no normative definition of the aforementioned kinds of secrets, whereby the Polish legislator regulated the term "trade secret" in Article 11 Item 4 of the Act of 16 April 1994 on Combating Unfair Competition, which states that these are: "technical, technological, organisational information or other information having an economic value, with regard to which the entrepreneur has undertaken the necessary actions as to guarantee their confidentiality, undisclosed to the public", whereby it is emphasised that the above enumeration is not exhaustive[8]. In the comment to the Article 26 of the OECD Model Tax Convention[9] on the information exchange, it is noted that a trade or industrial secret comprises facts or circumstances of an important economic character, which may be applied in practice, and which inadmissible application may

[7] B.J.M. Terra, P. Wattel, *European Tax Law*, Alphen aan den Rijn 2008, p. 675.

[8] M. du Vall, E. Nowińska, *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz*, Warszawa 2013, p. 138.

[9] The OECD Model Tax Convention on Income and on Capital with an official comment – version of 22 July 2010.

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lead to serious damage (whereby – in principle – tax determination, assessment and withholding is not considered as such).

Professional secrecy encompasses confidential information related to working in a given profession[10], whereby it is first and foremost connected with professions of public trust, regulated in Acts constituting particular professional self-governances[11]. Moreover, professional secrecy is considered a kind of a financial secret which – alongside bank and fiscal confidentiality secrets – is a non-disclosure obligation with regard to information on public trading, the disclosure of which could breach the interests of the participants of such a trading[12]. In this case, the non-disclosure obligation does not result from the very fact of working in a given profession, e.g. as a stockbroker, but from the particular kind of a business activity run by the enterprise[13].

The second restriction is a public-policy clause (*ordre public*), which has a wide scope, as it encompasses not only regulations resulting from normative acts but also general rules of law and social order that are necessary for preserving the organisation and functioning of the society[14]. In view of the fact that neither the Directive 2015/2376 nor the Act on Tax Information Exchange provides a normative definition of a public order, one can refer to the comment of the OECD Model Tax Convention, which specifies that this restriction may be availed of only in extreme cases, which may be illustrated by an exemplary situation in which a tax investigation is started in a country applying (for information exchange) due to political, racial

[10] M. Rusinek, *Tajemnica zawodowa i jej ochrona w polskim procesie karnym*, Kraków 2007, p. 17.

[11] R. Dowgier, *Komentarz do art. 305 h) o.p.*, [in:] R. Dowgier, L. Etel, C. Kosikowski, P. Pietrasz, S. Presnarowicz, *Ordynacja podatkowa. Komentarz*, Warszawa 2011. The following Acts can be enumerated as examples: of 19 April 1991 on Pharmaceutical Chambers (Journal of Laws 2014, Item 1429 as amended); of 2 December 2009 on Medical Chambers (Journal of Laws 2015, Item 651 as amended); of 1 July 2011 on Self-Governance of Nurses and Midwives (Journal of Laws, No. 174, Item 1038 as amended); of 8 June 2001 on the of Psychologists' Profession and Professional Self-Governance of Psychologists (Journal of Laws, No. 73, Item 763 as amended); of 15 December 2000 on Professional Self-Governance of Architects and Construction Engineers (Journal of Laws 2014, Item 1946, consolidated version); of 26 May 1982 – Law on the Advocates' Profession (Journal of Laws 2015, Item 615); of 14 February 1991 – Law on the Notaries' Profession (Journal of Laws 2002, No. 42, Item 369 as amended); of 6 July 1982 on Legal Advisors' Profession (Journal of Laws 2015, Item 507); of 5 June 1996 on Tax Advisory (Journal of Laws 2011, No. 41, Item 213 as amended).

[12] J. Gliniecka, H. Dzwonkowski, J. Kondratowska, *Komentarz do art. 305 h) o.p.*, [in:] *Ordynacja podatkowa. Komentarz*, red. H. Dzwonkowski, Warszawa 2014, p. 1231.

[13] M. Rusinek, *op. cit.*, p. 46; the Act of 29 July 2005 on Trading in Financial Instruments (Journal of Laws 2014, Item 94 as amended); the Act of 26 October 2000 on Commodity Exchange (Journal of Laws 2014, Item 197 as amended); the Act of 27 May 2004 on Investment Funds (Journal of Laws 2014, Item 157 as amended).

[14] A. Mednis, *Prawo do prywatności a interes publiczny*, Kraków 2006, p. 210. See more: K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w konstytucji RP*, Kraków 1999.

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or religious reasons or when the information is a state secret. Due to its general character, the public-policy clause ought to be applied only in exceptional cases[15]. It may be extremely hard to avail oneself thereof within the scope of the exchange of the issued interpretations.

Importantly, it is the tax organs of the country issuing the interpretation that prepare the summary of the individual interpretation, and are responsible for: firstly, assessing as to which information is encompassed by the trade secret, and secondly, drawing up such a description of factual circumstances that will safeguard it against its disclosure, which seems to be exceptionally difficult in practice.

Furthermore, the transfer of information occurs for the benefit of both member states and the European Commission, whereby it has a reporting character in the latter case. The information scope is restricted to the indispensable data, as it is to monitor and assess the efficiency of the information transfer and may not be used for any other purposes. Therefore, the exclusion from the obligation of transfer are: data identifying the entity, specification of entities having their seat or management board in other member states – alongside the list of the countries, which tax obligations may be impacted by transactions, transaction complexes or other events encompassed by the tax interpretation, as well as the interpretation summary.

The information being the subject of the exchange is transferred irrespective of its status, which means that there are transferred interpretations that are both in force (towards which no action has been brought before an administrative court), acknowledging the standpoint presented by the taxpayer, and those which result in litigation between the taxpayer and tax organs. It seems that the objectives such as transparency and clarity of the tax system may be thwarted by the obligation to transfer any interpretations. It does not seem justified to send non-valid interpretations. It is a solution that may distort the process of data gathering by the tax organs.

Undoubtedly, a considerable threat for taxpayers may be posed by a backward information exchange, as the Directive 2015/2376, followed by the Act on Tax Information Exchange, imposes the obligation to submit tax interpretations issued since 1 January 2012. The aforementioned regulation may be connected with the possibility of starting tax and control proceedings for this period, seeing that the tax liability expiration term, pursuant to Article 70 § 1 of the Tax Ordinance[16], amounts to 5 years, counting from the end of the calendar year, in which the tax liability term expired. This solution is not in line with the principle of legal certainty, whereby it is difficult to seek protection in national legislation institutions, since the Directive 2015/2376 informs directly about applying any possible means in order to eradicate obstacles that could hinder an efficient and possibly broadest information exchange.

[15] X. Oberson, *International Exchange of Information in Tax Matters: Towards Global Transparency*, Northampton 2015, p. 35.

[16] The Act of 29 August 1997 – Tax Ordinance Act (Journal of Laws 2015, Item 613 as amended).

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CONCLUSIONS

The automatic exchange of information, the term set forth in the Directive 2015/2376, in reality refers to the exchange of information regarding tax interpretations, as the subject of the exchange are their summaries along with the description of the factual circumstances in this matter. Before introducing this form of information exchange, countries could transfer the information between one another, if they were justified to suspect that tax losses may occur in another member state, whereby the described spontaneous information exchange was performed *ad hoc*, it was never of a permanent but only temporary character. The European Commission will be able to assess the efficiency of the adopted solutions, as the data related to the interpretations will be submitted to the Commission – in a limited scope, and the countries transferring the interpretations after receiving feedback from the countries that have already received it. Whether the basic rights of taxpayers and entities, impacted the transferred data, are respected, will depend upon the practice of tax organs, as they are responsible for drawing up the interpretation summaries and the assessment, as to which information may be transferred, and which should be considered confidential.

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STRESZCZENIE

Niniejszy artykuł ma na celu analizę teoretycznoprawną nowej formy współpracy administracyjnej, jaką jest automatyczna wymiana informacji o wydanych interpretacjach podatkowych, stanowiąca element działania 5 projektu BEPS, a także uregulowana w dyrektywie Rady (UE) 2015/2376 z dnia 8 grudnia 2015 r. zmieniającej dyrektywę 2011/16/UE w zakresie obowiązkowej automatycznej wymiany informacji w dziedzinie opodatkowania – w aspekcie ochrony praw podatnika i szerzej: podmiotu, którego dotyczy interpretacja indywidualna. Zostały przedstawione zagrożenia dla ich interesów oraz możliwe środki ochrony przed nadmiernym wykorzystywaniem przez organy podatkowe tej formy współpracy administracyjnej.

Słowa kluczowe: automatyczna wymiana informacji; współpraca administracyjna; interpretacje podatkowe