

# As of 15 September restructurings overseen by KAS

## I. Company restructurings regulated in the Code of Commercial Partnerships and Companies

On 22 August 2023 the president signed the Act of 16 August 2023 amending the Code of Commercial Partnerships and Companies and certain other acts, as well as the Act of 26 May 2023 on the participation of employees in a company formed as a result of a cross-border restructuring, merger or split of companies. In consequence, amended provisions of the Code of Commercial Partnerships and Companies (the Code), which relate to reorganizing cross-border companies, have been in effect as of 15 September 2023. Irrespective of the above, changes have also been made in the area of domestic types of company transformations. These changes arise from the need to adapt Polish regulations to Union law (implementation is very late as it is).

## II. Positive opinion from the tax authorities needed to restructure effectively

As part of amending the Code, the legislators have also made changes to the provisions of the Tax Ordinance. As a result of those changes a new obligation has been introduced to obtain an opinion from the Head of the National Tax Administration (Head of KAS) on a cross-border company restructuring, merger or split (new Article 119zzl of the Tax Ordinance). This provision has been in effect since 15 September 2023. In the absence of such an opinion, or refusal to issue it, the registration court will generally refuse to certify a cross-border reorganization as compliant with Polish law and will decline to register it.

The changes in company restructurings that have been in effect since the middle of September make it necessary to obtain a confirmation from the authorities that the intended actions do not violate tax law, and in particular do not circumvent tax regulations or lead to undue tax advantages. The absence of such confirmation may result in the restructuring being blocked.



### III. Application filed with Head of KAS via registration court

The new regulations provide that an application to certify that a given cross-border operation complies with the law will be filed along with an application for the tax authorities' opinion to one organ, i.e. to the registration court, which will forward the application to the relevant tax authority. The Head of KAS will issue an opinion on the application filed by the company's management. An application to certify compliance will be sent to the Head of KAS by the registration court immediately after it is filed by the management of the interested company. An opinion should then be issued without unnecessary delay, no later than within a month of receipt by the Head of KAS. In particularly complex cases it will, however, be possible to extend this time by no more than 3 months.

### IV. Tax authorities to assess if planned restructuring is not tax avoidance

The purpose of the opinion issued by the Head of KAS is to present a position on the cross-border operation's compliance with tax regulations. The Head of KAS will also assess whether it is reasonable to assume that the cross-border company restructuring, merger or split could: constitute an activity or element of an activity specified in Article 119a § 1 (tax avoidance), or be the subject of a decision issued with the use of measures that limit contractual benefits, or constitute a violation of the law referred to in Article 5 of the Value Added Tax (violation of the law to obtain undue tax advantages). In addition, as part of the procedure of issuing or refusing to issue an opinion, the Head of KAS will confirm whether the company's financial obligations to the tax authorities have been fulfilled or secured. They will therefore check whether no tax collection proceedings are underway against the entity.

### V. A fee has to be paid for the opinion

An application for an opinion from the Head of KAS is subject to a fee of 50% of the minimum monthly wage as of the application date. Currently it is PLN 1505, whereas in the period from 1 January to 30 June 2024 it will be PLN 2121, and PLN 2150 after that. The fee is to be paid within 7 days of filing the application, to the account of the relevant tax authority. A fee paid at an amount higher than the amount due will be refunded no later than within 7 days of the end of the proceeding to issue an opinion.

### VI. Opinion not a guarantee that law not breached

If the Head of KAS finds that a given restructuring does not violate tax regulations or avoid taxation, then he/she will issue an opinion consistent with the company's application. Otherwise he/she will refuse to issue an opinion. The opinion or refusal will be sent to the registration court, which will use it to make a decision to certify (or not) compliance of the cross-border restructuring with Polish law. A decision to refuse to issue an opinion may be appealed before an administrative court. The company will also be able to apply for an opinion once again in a new proceeding, especially in the event of a significant change in circumstances. It must, however, be stressed that the issue of an opinion does not constitute a final ruling on the accuracy of the company's tax accounts in connection with the restructuring. In addition, an opinion issued by the Head of KAS is not a certificate within the meaning of the Tax Ordinance. Therefore, despite receiving a positive opinion, the company may still be audited, and irregularities may still be found in the area covered by the application.





## VII. Detailed reasons must be given

The application must contain, among others: a full description of the activity and links between the entities as defined in transfer pricing regulations, the objectives of the activity, the economic reasons for the activity, its tax consequences, including the anticipated tax advantages, the tax arrangement number, or an explanation why the arrangement was not reported in accordance with MDR regulations. This means that an application for an opinion from the Head of KAS requires a very detailed explanation of both the economic reasons for the transaction, and of any potential tax consequences of the planned actions.

## VIII. Preparation of application nearly impossible without expert assistance

Because of the requirements placed before applications for a restructuring opinion from the Head of KAS, special attention must be given to the need to indicate the objectives, as well as the economic reasons for the activity. It must be stressed that from the standpoint of the regulations on which the opinions of the Head of KAS are based, tax neutral are those restructurings that are performed for valid economic reasons. This means that a convincing written explanation must be presented already at the restructuring's planning stage. The regulations also indicate that the tax arrangement must be reported, and its number (NSP) obtained even before the application is filed with the registration court.

Preparing the necessary documentation, therefore, will not only be time-consuming, but will also require extensive economic and legal knowledge that exceeds that of a single organization.



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