



IZBA
GOSPODARKI
ELEKTRONICZNEJ



E-COMMERCE

under scrutiny of fiscal authorities



How to run
e-commerce activity in Poland?

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Dear Sirs,

We are delighted to present you an updated publication regarding tax issues related to e-commerce which has been prepared by tax specialists of Advicero Tax. This report has also received patronage of Chamber of Digital Economy.

We believe that the scope of this publication would meet your expectations and needs. We have worked on it with the aim to ensure that this report creates a reliable source of information and above all is an interesting reading.

Polish e-commerce market keeps growing. According to Gemius survey, in 2017 Internet sales were used by 54% of Poles, which is 4% higher than in previous year. Taking into account an upward trend it is not surprising that more and more stationary shops decide to open the on-line platforms also for the clients from Poland.

Moreover an important factor which may lead to the growth of this market segment is fact that since March 2018 a gradual ban on trade on Sundays have entered into force, which in 2020 will ultimately cover all Sundays within a year.

At the same time it is natural that growth of e-commerce market value in Poland (currently estimated on PLN 36-40 billion) causes an increased interest of tax authorities, which in consequence will lead to extended number of controls among entrepreneurs operating in this sector.

To address these needs, in this report we pay your attention on complicated tax aspects which concern doing business in e-commerce sector. We are convinced that our publication will simplify your dealings with day-to-day business and will help to resolve at least a part of fiscal doubts.

We cordially invite you to familiarize with our publication and in case of any questions please do not hesitate to contact us at office@advicero.eu

We wish you an interesting and fruitful lecture!

Katarzyna Klimkiewicz-Deplano

PARTNER ZARZĄDZAJĄCY

1

INCREASED TAX CONTROLS OF ENTREPRENEURS – WHAT EVERY E-COMMERCE ENTREPRENEUR SHOULD KNOW?

One of the instruments of combating fiscal losses implemented by Ministry of Finance are extended tax controls and customs-fiscal controls of taxpayers. Generally the aim of control is to check, whether taxpayers properly fulfil their tax obligations.

Verification may consist of examination of timeliness of paying taxes or correctness of recognition of economic events in VAT registers.

Extensive reform binding from March 2017, as a result of which National Revenue Administration (hereinafter NRA) was established, made significant modifications in rules for carrying out tax controls of taxpayers' settlements. As a result of the reform certain authorities were liquidated and replaced by new ones equipped with new competences. Currently binding structure provides division into tax controls and customs-fiscal controls.

Tax control is conducted by the head of tax office. Its subject may cover all obligations resulting from tax provisions imposed on taxpayers, tax remitters, cashiers and their legal successors. Initiation of tax control shall be preceded by prior notification to taxpayer about intention to initiate control. Tax control shall end by issuing post-control protocol after which taxpayer is entitled to correct tax return.

More severe is customs-fiscal control, initiated as a rule by the head of customs and fiscal office. It aims at fighting against most serious offences affecting financial security of a state, in example VAT frauds.

What is important here, provisions do not impose on controllers an obligation to deliver notification about intention to initiate customs and fiscal control to the controlled entity. Therefore, taxpayer has no possibility to prepare (e.g. through different organization of work of an enterprise) for such control.

An active control actions of tax authorities are proved by statistics provided by NRA in this regard. Below please find a bunch of numerical data which shows the range of carried out control proceedings¹.

¹According to data provided by National Revenue Administration (as of the end of November 2017)

2760

Number of all control proceedings initiated in 2017

CIT

238 Number of all control proceedings initiated in 2017 related to CIT

Amount of detected discrepancies related:



PLN 876 million
+ PLN 204 million of interest

VAT

1296 Number of control proceedings initiated in 2017 related to VAT

Amount of detected discrepancies related:



PLN 9,31 billion
+ PLN 1,7 billion of interest

According to the statements of Ministry of Finance's representatives, also in 2018 active control actions regarding entrepreneurs will be continued. One of the key priorities of fiscal administration is tightening of VAT system. As it is highlighted by the representatives of Ministry of Finance apart from frauds in VAT and excise tax the subject of particular interest of customs-fiscal controllers will be CIT settlement in terms of tax avoidance with the use of aggressive tax optimization and transfer pricing.

Moreover, customs-fiscal controls will also focus on gambling as well as merchandise trade with foreign entities (customs controls).

The issue that may be subject to change is a method of choosing entities to be controlled and range of industries in which in opinion of tax authorities there is the greatest risk of irregularities. According to communications, number of controls conducted in micro and small enterprises shall be decreased, while more intensive checks will apply to large entrepreneurs.


Undoubtedly it should be noted that effectiveness and speed of control activities conducted by National Revenue Administration has increased in recent years due to the usage of modern tools and IT systems which enable diagnosis and detection of discrepancies. Reference could be made to Standard Audit File for Tax already being in force or Information System of the Reconciliation Chamber (Polish abbrev. STIR) functioning as of 2018.

National Revenue Administration is aware of the fact that there are entities which intentionally avoid fulfilling their duties towards treasury by lack of payment of taxes and customs duty which in consequence impedes commitment of obligation towards community, causes decrease of services and public investments and make it difficult to equalize the chances of citizens. Therefore according to the vision of National Revenue Administration it shall undertake every effort to detect and sanction persons guilty of such cases and recover receivables of treasury.


In consideration of an increased activity of National Revenue Administration it is important to correctly conduct settlements by taxpayers also from e-commerce sector which in line with earlier announcements is one of the areas of potential risk of tax irregularities.

Taking care of reliable fulfilling of taxpayers' duties is particularly important in view of aims and courses of action of fiscal administration for years 2017-2020. One of main aims is tightening tax system which shall be performed by more effective enforcement of tax provisions and customs rules as well as fighting against offences and frauds. Taking the above into account it is important for taxpayers to take care about possessing full tax documentation and correctness of settlements. Below we present the areas of potential risk of tax frauds which may concern e-commerce industry.


E-COMMERCE AS AN AREA OF POTENTIAL RISK OF TAX FRAUDS




Risk of non-realizing or delayed fulfillment of obligations related to payment of tax amount or its advance payment.



Risk of non-realizing tax liabilities in full amount due to non-reported turnover/revenues resulting from VAT receipts/invoices by entities having registered business activity.



Risk of non-reporting revenues by lack of evidencing of sales, in total or partially, on cash registers



Risk of non-realizing tax liabilities in full amount due to lack of issuance of invoices or issuing invoices in amounts not corresponding to the actual amounts



Risk of running unregistered business activity.



What needs to be done to prepare for control?

As a rule only tax control has an announced character and taxpayer knows about it in advance. From the date of notification at least 7 days must elapse before clerks may start control activities. During that period taxpayer may supplement eventual gaps.

Customs-fiscal controls are not notified and may start immediately. In such case taxpayer is not able to perform any preventive actions. Therefore it is very important for taxpayer to be prepared properly before such control occurs.

Undoubtedly each of these control proceedings may cause stress and concern for taxpayer. To comfort you a little bit below we present the general information regarding issues that needs to be done to avoid worrying in case of eventual control of tax authorities:

- Be aware of your rights as controlled entity
- Have ordered tax and accounting documentation
- Take care of frequent audits in your company which enable to detect eventual discrepancies
- If you feel comfortable doing so – establish a proxy for contacts with tax authorities
- Respect deadlines

2





HOW TO START RUNNING E-COMMERCE ACTIVITY IN POLAND? – SUPPORT OF ADVICERO TAX

Tax advisory services provided by Advicero Tax cover all aspects of business activity regardless of size or level of economic development of your company.

Thanks to our assistance client is confident of performing his tax duties correctly and reliably. It also prevents all complications related to non-compliance with formalities.

Our services are guarantee of safety of your company. We will protect company against possible threats related to control of tax liabilities. We will also help in terms of their optimization - we will recommend the choice of the best form of activity or financing and funds saved in that way will remain at your disposal.

The scope of our assistance in terms of tax advisory covers each stage of functioning of a company, in particular:

-  Advisory for e-commerce industry: (i) optimal models of running business activity; (ii) company registration, (iii) VAT registration, (iv) hiring employees and their settlements, (v) advisory in scope of documentation requirements, (vi) keeping current tax settlements in Poland and abroad (including SAF-T file);
-  Advisory for retail industry and FMCG: (i) optimization of current operational activity, (ii) advisory in terms of lease agreements and settlements resulting from those contracts, (iii) settlement of losses of goods, calculations related to cost of sales; (iv) promotional campaigns; (v) optimization of contracts with employees;
-  Resolution of disputes with tax authorities: tax controls, proceedings in front of tax authorities in first and second instance, administrative court proceedings, applications for refund of overpaid tax;
-  Settlements with related entities, preparation of transfer pricing documentation, economic analyses.

3

MAIN ISSUES RELATED TO THE SETTLEMENT OF E-COMMERCE SALES IN POLAND

Below we present the list of selected issues essential from the point of view of a company acting in e-commerce industry together with our short. explanation.

Registration obligations of foreign entrepreneur in Poland

Foreign entrepreneur selling the goods to natural persons in Poland should have the awareness of registration obligations upon him. All entities performing actions that are subject to VAT in Poland are obliged to register before the date of the first taxable activity. Distance sales for private entities, including e-sales also requires registration of foreign entrepreneur for VAT purposes in Poland.

Not every entrepreneur is subject to VAT. Exemptions may be applied to taxpayers whose value of taxable activity did not exceed in previous tax year total amount of PLN 200.000, without including the value of tax.

However, above exemption do not relate to all activities. In case of supplies of goods made of precious metals, supply of buildings, providing legal services or jewellery services an obligation to impose VAT will occur regardless of the value of sales. Moreover, abovementioned exemption shall not relate to taxpayers who do not possess their registered seat on a territory of Poland.

In order to be registered correctly for VAT purposes in Poland foreign company shall collect and submit relevant documents required by tax office (i.e. articles of association, bank account agreement). In case of documents in foreign language there is an obligation to translate it into Polish.

After registration, the active VAT taxpayer is obliged to place its Tax Identification Number (Polish NIP) on issued invoices and offers.

Moreover, registered VAT taxpayer has an obligation to run VAT registers and submit monthly VAT returns or – after fulfilling certain conditions – quarterly returns.

Permanent establishment

General rule from the income tax point of view is taxation of a foreign entrepreneur in a country of its tax residence. In case of running business activity in Poland when permanent establishment occurs, income shall also be taxed in Poland.

Permanent establishment is an abstract term, which enables to assess whether activity of an enterprise outside of the country of its tax residence is so intense that justifies the taxation of an income acquired from business activity conducted there in a source state.

Detailed definition of permanent establishment is as a rule included in the internal tax law of given country as well as in double-taxation treaties.

In general, according to the OECD Model Convention (and the underlying definition included in it, which is base for the definitions indicated in specific Double Taxation Treaties), three conditions determine the creation of the permanent establishment:

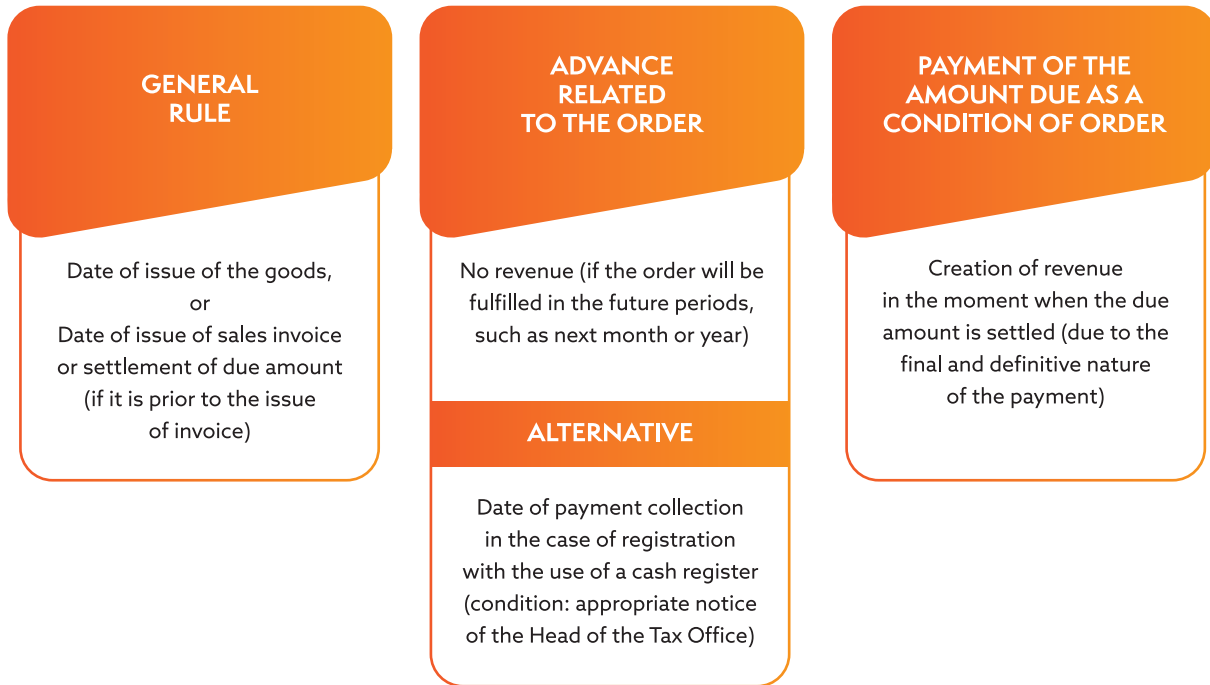
- existence of the facility (i.e. every place: office, part of the area, space on the territory of another state, which remains at the disposal of the enterprise regardless of the fact whether the entrepreneur has any legal title to dispose this place (ownership, lease);
- the permanent nature of the facility (keeping in mind the period of time when it exists and the intention to use it in a sustainable way);
- using the facility to conduct business activity entirely or at least partially.

It is worth emphasizing that the concept of a permanent establishment for income tax purposes (the so-called PE) is not equal to an establishment for VAT purposes (the so-called fixed establishment). In practice, this means that a foreign entity may be required to settle VAT in Poland in respect of sales on the territory of Poland, while such obligation will not arise for this entity with respect to income taxes. Therefore, in each individual case, a thorough analysis of the actual situation is recommended in order to properly define existing obligations related to the tax settlements.

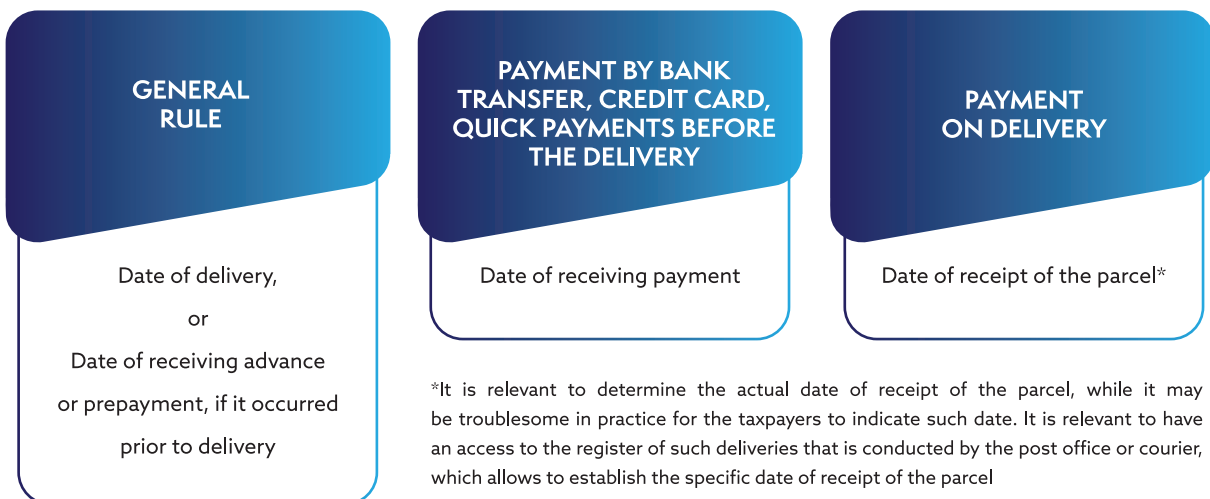
Moment of creation of the obligation in income taxes and VAT

Determining the moment of recognition of tax revenue and output VAT in the case of online sales, due to the fact that the regulations do not conform to the specifics of e-commerce, may create in practice numerous problems and therefore it is often under the scrutiny of the tax authorities.

ONLINE SALES - MOMENT OF CREATION OF TAX OBLIGATION IN INCOME TAXES



ONLINE SALES - MOMENT OF CREATION OF TAX OBLIGATION IN VAT



Standard Audit File for Tax (SAF-T, in Polish JPK)

One of the important tools of tax control when verifying online store settlements is undoubtedly the Standard Audit File for Tax (SAF-T). The SAF-T comprises seven structures, of which the SAF-T_VAT structure is crucial for most of entrepreneurs. This is the only file that is obligatorily sent to the tax office. The remaining structures are transferred only upon request. The obligation to provide tax authorities with selected financial data in the form of the JPK began gradually from July 2016 and from 1 January 2018 it applies to all VAT taxpayers. They are obliged to send monthly data to the Ministry of Finance.

Bearing in mind that changes implemented by the Ministry of Finance are going in the direction, to know as much as possible about taxpayers and on the basis of data provided by taxpayers in the IT system to process them to identify irregularities, it is extremely important to properly fulfill obligations in this area.

Additionally, SAF-T is tax information and the failure to comply with the obligation to send it to the Ministry of Finance in a timely manner is a prohibited act in accordance with the Fiscal Penal Code.

Documentation of online sales

The method of documenting transactions made by e-shops differs depending on whether the sale is made to the final consumers or entrepreneurs. The table below presents simplified rules for documenting of transactions.

DOCUMENTATION OF SALES

SALES TO THE CONSUMERS		SALES TO THE ENTREPRENEURS
GENERAL RULE	EXEMPTION	documenting by an invoice*
<p>Always: documenting at the cash register by issuing a receipt</p> <p>At the buyer's request: documenting by issuing an invoice (the obligation to issue such invoice exists for three months, counted from the end of the month in which the goods were delivered or payment was received in the entire amount or partially)</p>	<p>Payment via bank, post or credit unions (SKOK) on the bank account of the seller or an account in credit union, the taxpayer's annual turnover does not exceed the amount of PLN 20 000</p>	

* as the invoice can be considered any document containing the elements required for invoice indicated in the VAT regulations, no matter how it is named. Currently, the invoice can be issued in paper or electronic form. In order for an invoice to be considered as electronic, it must be issued or received in any electronic format.

Moment of registration of online sales

The regulations do not specify the moment when a given sale should be registered at the cash register, but in practice it is assumed that this should take place at the moment when tax obligation arises. In case the buyer makes a prepayment to the seller's account, the receipt should be printed on the date of payment and sent with the parcel. However, in case of payment on delivery, printing and sending a receipt in one package with the goods may turn out to be inappropriate, e.g. in case of sales at the turn of months - the tax obligation could then be reported in an incorrect period.

Also, the correct issue of invoice in case when actual date of delivery is not known may be problematic. However, the provisions of the VAT Act provide in such case the possibility of issuing a document without a sale date - this date should be indicated on the invoice provided it has been specified.

Documenting the return of previously seized goods

Another problematic issue for the taxpayer is how to document the return of the goods. In accordance with the provisions of the VAT Act, the condition for making a VAT adjustment by the taxpayer is to have confirmation of the sale (in case of sales to consumers, a document confirming such sale is a cash register receipt).

In case of documenting sales at the cash register, the return of goods results in the necessity to prepare a register of returns and complaints, which must include, among others, a document confirming the sale and acceptance of the return of goods or complaints of goods, signed by the seller and the buyer. It is worth noting that the said requirement of having a protocol to accept the return and confirmation of a given sale has been recognized by UOKIK (Polish Office of Competition and Consumer Protection) as an unlawful practice. Therefore, the tax authorities also confirm the possibility of replacing the abovementioned documents with other evidence.

Promotional actions

In order to increase the knowledge about products or services and the company itself, e-stores often organize promotional campaigns. Expenses related to such events are tax deductible for the company.

The reward received by the participant resulting from the promotional campaign as a rule will be taxable income. It is subject to a lump sum tax of 10%.

In most cases, the promoter of such campaign (i.e. the online store) will be required to withhold tax due on the reward. The payer is required to calculate and collect the tax and then to remit it to the tax office, as well as to complete and provide the tax declaration to the appropriate office. If the reward is in-kind, the tax should be collected before the prize is awarded. In practice, to avoid the above situation, lump-sum tax due

on prizes is most often financed by the organizer through the application of the so-called gross-up mechanism. There are also situations when the organizer of the marketing action is not obliged to collect the tax on the prizes – e.g. when the recipient is not a natural person - a consumer, but a legal entity or a natural person who is an entrepreneur.

Free of charge delivery of the goods belonging to the enterprise will be subject to VAT taxation. The only exception is the so-called gifts of small value and samples. In the marketing activities, the first of the above categories is of practical importance, i.e. gifts of small value, for which one person is entitled to at the unit purchase price up to PLN 10 or a total value not exceeding PLN 100 in the tax year, if the promoter carries out the registration, allowing to identify the recipients.

Vouchers

As part of marketing campaigns, entrepreneurs may issue to customers vouchers with a specified denomination, subject to exchange for offered goods.

In doctrine and jurisprudence, it is generally accepted that a voucher cannot be equaled with property law, likewise, the issuance of a voucher also does not constitute the performance of a service (it acts as a voucher or legitimacy mark entitling to receive a specific service).

Due to the fact that the issue of a good by the company that provides voucher is only made when the beneficiary realizes the voucher, early receipt of payment for the voucher should be considered as an advance payment for delivery of goods to be made in subsequent reporting periods. There are exceptions to this interpretation, e.g. in situations where a paid voucher issued is not exchanged for the good either before its expiration or before the end of the financial year of the issuing company. Similarly, due to the fact that the voucher is not considered as good within the meaning of the provisions of the VAT Act, the activity of issuing a voucher should not constitute a delivery of goods in the light of the provisions of the VAT Act.

Due to the fact that it is not always possible at the date of the issue of vouchers to determine what VAT rate will be applicable to goods that voucher is exchanged for, or if it is uncertain whether a voucher will ever be executed, paid delivery of vouchers cannot be treated as an advance payment within the meaning of the VAT regulations. Consequently, in case of paid delivery of vouchers, the VAT tax obligation should be recognized no earlier than upon the issue of good to the customer in exchange for a voucher.

It should also be verified each time, whether the issue of vouchers will not create the obligation for the entrepreneur to pay tax advance in relation to the recipients. If, however, the value of vouchers transferred by the company does not exceed PLN 200, and their recipients are not employees or other contractors of the entity issuing the vouchers, the taxpayer's obligations under the Income Tax Act will not arise.



Distance sales to the country

Cross-border sales made to Polish consumers who purchase goods offered by a foreign e-shop (so-called distance sale on the territory of the country) is a special type of sale transaction in which the taxpayer can benefit from the simplification in determining the place of taxation in goods and services tax.

Generally, in the case of distance sales from abroad, the place of taxation is the territory of the country to which the goods are delivered (e.g. Poland). The exception to the above rule is the situation when the value of sales made by a foreign e-shop (in net value, excluding value added tax) will not exceed the limit for the given country to which the delivery is made in a given and previous tax year - then place of VAT taxation of such transaction is abroad in the given country, not in Poland.

Each country has an obligation to set limits for distance sales. When the turnover of an entity exceeds the limit set by a given country, the delivery will obligatorily be subject to taxation in the country of destination of the goods. For Poland, the limit amounts to PLN 160,000 per year.

Trade prohibited on Sundays

As of 1 March 2018, the Act of 10 January 2018 on the restriction of trade in Poland on Sundays and public holidays and on certain other days entered into force. The provisions of the Act will apply only to entrepreneurs engaged in commercial operations and are particularly interesting from the point of view of entities involved in e-commerce.

The ban on trade will be introduced gradually. Starting from March 2018, the ban will not cover the first and last Sunday of every calendar month. In 2019, trade will be possible only on the last Sunday of each month. Ultimately, from 2020, all Sundays are to be subject to a total ban on trade.

Importantly, the Act provides for a number of exceptions - every Sunday customers will be able to shop, among others at petrol stations, in bakeries, at airports, in newspaper stores or in post offices. What is also important, the online stores and internet platforms can also function without any changes.

According to the Act, breaking the ban on Sunday trading will be punished with a fine of PLN 1 000 up to PLN 100 000. In case of persistent violation of the ban, the court will be able to decide even the penalty in form of the restriction of liberty.

Undoubtedly, the exemption from the above prohibition of online stores may be beneficial and may constitute a great opportunity for the development of this market segment in Poland.

Tax on retail sales in Poland

On 1 September 2016, the Act of 6 July 2016 on the tax on retail sales entered into force. The purpose of the above Act was to introduce into the Polish legal order a new tax, called a retail sales tax, where the subject of taxation is revenue from retail sales, i.e. sales made to the final consumers. Sale of specific products, including medicines, medical devices, electricity, natural gas and fuels, is excluded from the tax on retail sales.

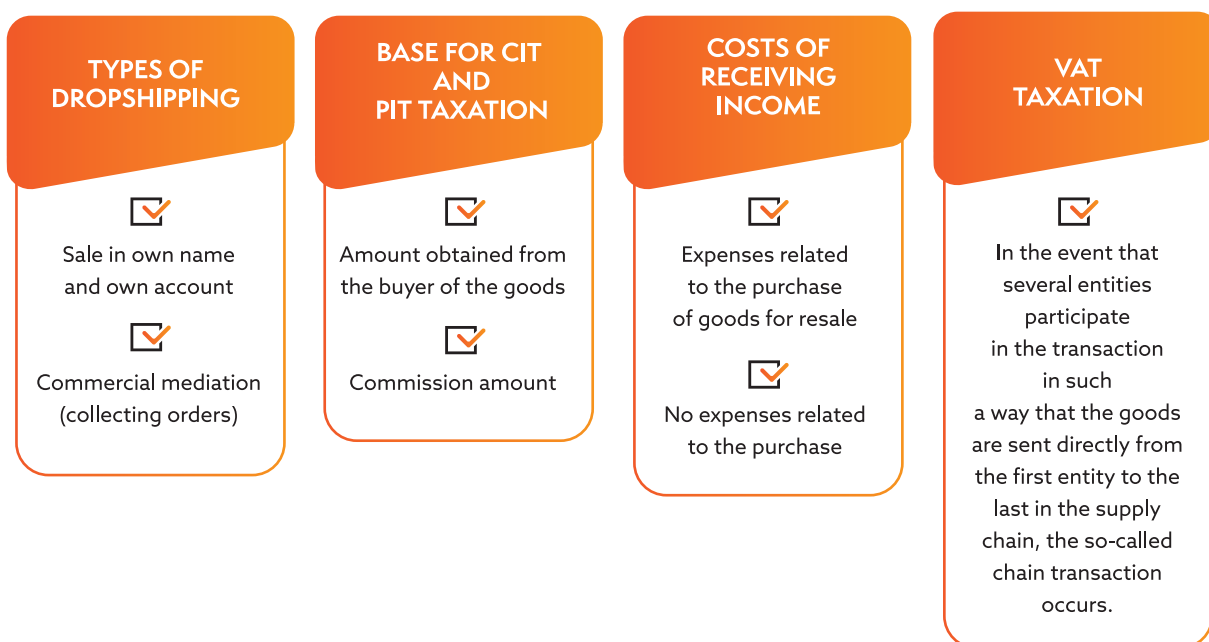
However, before this law entered into force its application was "suspended" in connection with the initiation by the European Commission of proceedings regarding the compliance with the European Community law of the tax in question. The proceeding ended with the final decision of 30 June 2017, in which the European Commission recognized the Polish retail tax as being in breach with EU state aid rules. The Polish government has appealed against the decision to the Court of Justice of the European Union. Pending the decision of the court, the Polish authorities decided to postpone the date of application of the Act on the tax on retail sales earned from January 1, 2019 by adding an appropriate provision to the Act.

The legislator did not include in the Act on retail tax regulations relating directly to online sales. However, according to the justification to the draft of this Act on tax on retail sales, online sales are not subject to tax. Due to the fact that this form of the Act was established during legislative works (initially this tax was supposed to include also e-commerce), we do not expect that after any possible modifications it would also include this sales channel.

Settlement of dropshipping

Dropshipping is a way of selling online, according to which the transferring of the goods is performed by the third entity ("supplier"). In this model, the on-line store picks up orders and passes them to the supplier, while the supplier sends the goods to the customer who placed the order. Such solution allows to reduce the costs of storage, shipping as well as staffing.

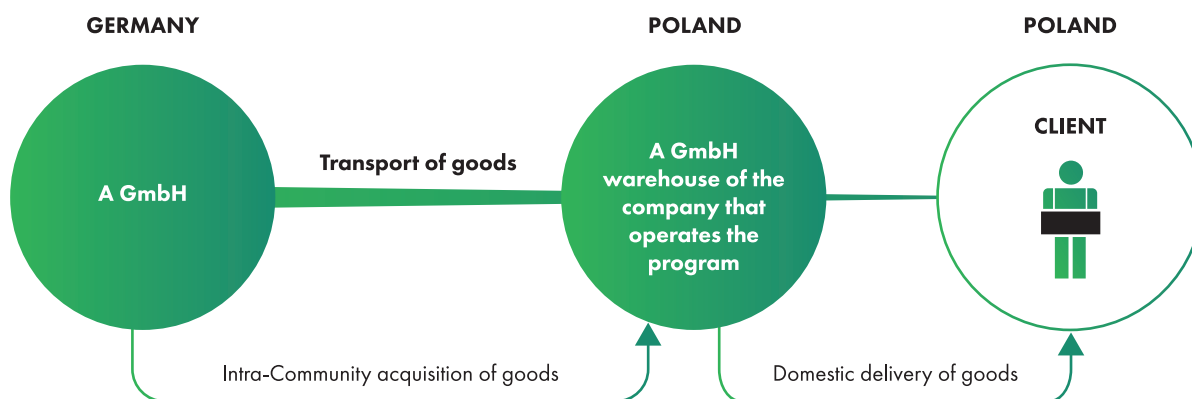
DROPSHIPPING



Fullfilment agreement

There are also programs on the market that allow companies to cooperate with an entity dedicated to the distribution of on-line orders. As part of such a program, the entrepreneur's goods are transported to one of the warehouses of the company servicing the program, which are located in different countries. Goods in warehouses can be freely moved to other warehouses in Poland or abroad, until their final sale to the consumer. The company operating the program is entitled to make an independent decision in this regard. Nevertheless, the right to property remains with the entity entrusting its goods.

Under the program, there is no taxable supply of goods between the owner of the goods and the company operating the program. Depending on where the warehouse is located, where the goods are sent and who is the recipient, the transaction may be a domestic delivery of goods, intra-Community delivery of goods or distance sales. Depending on the structure of the transaction, it may create various obligations for the supplier on the basis of VAT. Regardless of its shape, the only entity authorized to issue invoices and settle VAT is only the owner of the goods (and not the company that operates the program). Below, we present an example of the course of the transaction:



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