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Impact of the planned tax changes on real estate sector

The real estate sector has become the target of new tax mechanisms introduced by the legislator. This includes amendments to double tax treaties (in the form of real estate clauses) and new tax settlement requirements.

According to unofficial information from the Ministry of Finance, advanced negotiations on amending protocol to the double tax treaty between Poland and the Netherlands aiming at its prompt conclusion are already underway. The protocol will introduce, inter alia, a real estate clause, which will impose on Dutch shareholders the obligation to pay in Poland income tax on profits from the sales of shares in real estate companies owning assets in Poland. Currently, the exact content of the clause and the date of its entry into force remain unknown.

Furthermore, on 23 October 2020, the draft bill amending the Personal Income Tax Act, the Corporate Income Tax Act and the Act on Flat-Rate Income Tax on Certain Revenues Generated by Natural Persons and certain other Acts (hereinafter: the Draft Bill), supplemented with revisions made by the Parliamentary Public Finance Committee, was published on the website of the Lower House of the Polish Parliament.

Below we present the most important proposals of amendments related to real estate companies.

Definition of real estate company

The legislator intends to amend the definition of the so called *real estate company*.

Under the amendments proposed, an entity will be considered a *real estate company* if:

- in respect of newly established entities, as at the first day of a tax year, the percentage share of real estate in Poland in its total asset value amounted to at least 50 percent and the value of its real estate was higher than PLN 10 million
- in respect of entities continuing their business activity, as at the last day of the year preceding the tax year, the percentage share of real estate in Poland in its total asset value amounted to at least 50 percent while its real estate value was higher than PLN 10 million and moreover, its taxable revenues from rental, sublease, lease or contracts of similar nature represented at least 60 percent of the total taxable revenues.

Sale of shares in a real estate company and transfer of tax remitting obligations to a real estate company

One of the primary goals of the new regulation is to transfer the obligation to settle the tax on capital gains from the sale of shares in a real estate company to that real estate company if the seller is not a Polish tax resident.

In such a case, the real estate company, as the tax remitter, will be required to calculate the 19 percent tax and collect it from the seller (and to pay it to the account of the tax office by the 20th day of the month following the month in which the transaction took place).

In order to fulfil the above obligations, the real estate company should therefore know details of the transaction (including revenues and costs on the seller's side). In the absence of such information, the real estate company will be obliged to settle the tax based on the market value of the shares.

It is important that, in the event of problems with collecting funds to cover the tax on the transaction carried-out from the seller, the real estate company will be required to pay it with its own funds.

This regulation rises considerable doubts and may have a negative impact on the real estate transaction market.

Obligation to appoint a tax representative under a penalty of up to PLN 1 million

Under the Draft Bill, real estate companies having no registered office or place of management in Poland will be required to appoint a so-called *tax representative*. However, this obligation will not be imposed on EU and EEA real estate companies.

The role of the tax representative will be to perform remitting obligations in the name and on behalf of the real estate company. The tax representative will be jointly and severally liable with the real estate company for its tax obligations arising from the sale of shares in this real estate company.

Failure to appoint a tax representative of a real estate company may result in an administrative fine of up to PLN 1 million.

New disclosure obligations

The Draft Bill imposes new disclosure obligations on real estate companies and on taxpayers holding, directly or indirectly, at least 5 percent of the voting rights or at least 5 percent of the total number of participation units or rights of a similar nature in a real estate company.

Under the Draft Bill, real estate companies will have to disclose information on entities holding, directly or indirectly, shares, participation units or rights of a similar nature in the that real estate company, along with the number of such participation rights held by each of them, while partners of real estate companies will be obliged to disclose information on the number of shares, participation units or similar rights held, directly or indirectly, in this real estate company.

The above-specified information, as at the last day of the tax year of the real estate company, will be submitted electronically to the Head of the National Revenue Administration within 3 months from the end of the tax year.

This provision rises numerous practical doubts particularly with respect to entities that are listed on stock exchange or entities within investment funds' structures.

It should be underlined that failure to disclose this information may result in penal fiscal liability of individuals with the disclosure duty.

Key transfer pricing changes

The Draft Bill also contains a number of important transfer pricing amendments.

These include, in particular, in extending the range of transactions to be verified for compliance with the arm's length principle, especially where the beneficial owner is seated in a so called *tax haven* (i.e. a country

or territory applying harmful tax competition).

The obligation of preparing a Local File will also be imposed on taxpayers and companies which are not legal entities conducting non-controlled transactions with entities having their place or residence, seat or place of management in a tax haven, provided that the transaction value in the given tax year exceeds PLN 500k.

This provision will apply accordingly to taxpayers and companies which are not legal entities carrying out controlled and/or non-controlled transactions if the transaction's beneficial owner has their place or residence, seat or place of management in a country or territory applying harmful tax competition.

For transactions conducted with "tax havens", the Local File will also have to contain an economic justification for undertaking the transaction, including especially a description of the expected economic and tax benefits.

Report on the implementation of tax strategy

The Draft Bill imposes a requirement to prepare and publish a report on the implementation of tax strategy in the given tax year on certain taxpayers.

The reporting obligation will apply to:

- taxpayers whose revenue exceeded EUR 50 million in a given tax year
- tax capital groups.

The report must be prepared taking into account the nature, type and size of the taxpayer's business activity and include:

- description of the processes and procedures ensuring performance of taxpayers' obligations arising from tax regulations and proper obligation implementation, as well as an overview of forms of the

taxpayer's voluntary cooperation with the National Revenue Administration (e.g. under a cooperation agreement entered into with the Head of the National Revenue Administration)

- information on the performance of tax obligations in Poland along with information on the number of reports on tax arrangements submitted to the Head of the National Revenue Administration, grouped by the type of tax they apply to
- information on transactions with related parties if their value exceed 5 percent of the balance sheet assets
- notification on the submitted motions for issuing individual and general tax rulings, binding rate information and binding excise information
- information on settlements made in countries that applying harmful tax competition.

Importantly, the list presented above is not an exhaustive catalogue. Pursuant to the explanatory memorandum to the Draft Bill, taxpayers should supplement their reports with all additional data, which, to the best of their knowledge, should be disclosed for the purpose of reporting correctly. Submission of the report may require the taxpayers to analyse separate acts and regulations and to explain the manner in which decisions in respect of tax matters are undertaken, indicating the persons and organizational units involved.

The report should be presented within 12 months from the end of the tax year.

Failure to comply with the obligation to present the tax authority with the address of the website on which the information on the tax strategy employed by the taxpayer will be published may result in a fine of up to PLN 250k.

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Moreover, failure to publish a report on the implementation of the tax strategy may result in fiscal penalties.

It should be noted that a report on the implementation of the tax strategy should be published within the statutory deadline, which means that work on the identification of tax risk management processes and procedures and incorporating them into tax strategy should already be underway.

If you would like to learn more about the issues discussed, please do not hesitate to contact us at: mampytanie@kpmg.pl

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