

September 2021

Amendments to WHT provisions

Amendments to the CIT and PIT Acts, introducing changes to the provisions on withholding tax (WHT) collection method, were initially planned to enter into force on 1 January 2019.

The main assumption behind the amendments was to replace the relief at source, in the context of receivables paid to the same taxpayer by the same remitter, if the total value of thereof in a given year exceeds PLN 2 million, with WHT collection by the remitter, combined with the pay and refund mechanism.

The tax refund or the application of an exemption or a reduced rate by the remitter was to take place after proper verification of the right to preferential taxation with withholding tax on the paid receivables.

Current wording of the provisions

According to the current wording of the provisions (with entry into force postponed until 1 January 2022), remitters paying interest, dividends, license fees or remuneration for certain intangible services, the amount of which per a single taxpayer exceeds PLN 2 million in a tax year, will be required to collect WHT at the standard rate of 20 percent or 19 percent, depending on the type of payment made, and only once it is collected, foreign taxpayers or the remitters themselves (if they bore the economic burden of tax) may apply for a refund of the collected WHT.

The legislator also provided for two options that the remitter may use in order to apply the tax exemption or reduced rate of tax at the time of making the payment, namely:

- submitting a declaration (on the WH-OSC form) that they hold documents required under the provisions of tax law to apply the exemption, non-collection or reduced tax rate, pursuant to relevant specific provisions and double taxation treaties, as well as that they have exercised due diligence when verifying the conditions for the possibility of applying WHT exemption, non-collection or lower WHT rate, and to the best of their knowledge there are no circumstances precluding such a possibility;
- obtaining an opinion (WHT clearance opinion) on the possibility of applying by the tax remitter of an exemption from the collection of WHT, with preferential taxation schemes resulting from double taxation treaties remaining outside its scope.

Amendments envisaged under the Polish Deal

Amendments to tax acts brought about by the Polish Deal are to include important changes to WHT collection provisions, including, inter alia, narrowing the scope of application of the pay and refund mechanism only to passive payments, such as interest, royalties, and dividends (meaning exclusion of payments for the so-called intangible services),

made to related entities that are not Polish tax residents. Consequently, payments for intangible services, removed from the scope of the pay and refund mechanism, will not be included in the PLN 2 million cap, above which the mechanism must be applied.

Further amendments relate to the notion of receivables covered by WHT, invoked in the definition of the beneficial owner. At present, the issue of whether the entity to which the receivables are paid conducts an actual business activity should be assessed on a similar basis as in the case of the operations of CFCs. Under the amendments, however, the reference to CFCs is to be removed and replaced by the statement that the assessment in terms of conducting actual business activity should take into consideration the size and character of the activities conducted by the recipient in the scope of the receivable.

Importantly, under the amendments, the scope of the opinion confirming the taxpayer's entitlement to apply WHT exemption is to be extended to cover preferential treatment (exemption or reduced rates) provided for in double taxation treaties. Consequently, the name of the opinion will be changed to "the opinion on the possibility of application of preferential tax treatment".

Obligations of remitters

Please note that despite the planned amendments to the regulations, starting from 1 January 2022, remitters making payments subject to WHT will still be in the obligation

to submit a WH-OSC declaration in order to apply the exemption or reduced tax rate in relation to receivables covered by the pay and refund mechanism, in accordance with the initially modified provisions. Under the modified legal framework, the material declaration may be signed not only by the head of the entity (in the case of companies being the management board), but also by a designated individual belonging to a collective body managing the entity. However, signing the declaration by the proxy will remain impossible.

Alternatively, it will be possible to apply for an opinion confirming the taxpayer's entitlement to apply WHT exemption or reduced rate (WHT clearance opinion). Importantly, according to the amended provisions, such an opinion may also be obtained for preferential tax treatment resulting from double tax treaties.

The opinions, through which the taxpayer's entitlement to apply preferential WHT treatment is confirmed, are issued by the competent tax authority (at present, in the majority of cases being the Head of the Lublin Tax Office in Lublin). The related fee amounts to PLN 2k. On the basis of the opinion, the remitter will be entitled

to refrain from collecting the tax or to collect it at a reduced rate on the payments covered by the opinion, made within 36 months from the date of obtaining the opinion (unless the actual circumstances change beforehand). Given the fact that making a false WH-OSC declaration is subject to fiscal penal liability, and may also bring sanctions in the form of an additional tax liability in the amount of 10 percent of the receivables (and if the basis for determining the additional tax liability exceeds PLN 15 million – of 20 percent of the surplus over this amount), in relation to which the remitter has applied a lower tax rate or has not collected the tax, the opinion on the application of preferences may prove to be a very useful instrument ensuring withholding tax security.

Taxpayers that have already obtained an opinion on being entitled to apply a WHT exemption may consider extending it to other payments. Pursuant to the existing regulations, up to now the opinions only covered payments made to eligible related entities based in the European Union (and the European Economic Area or Switzerland). With amendments being made to the relevant provisions, however, they may

also be applied to entities from every country with which Poland has concluded a double taxation treaty providing for preferential WHT treatment. Because the deadline for issuing an opinion by the tax authority is 6 months from the date of submitting the application therefor, it is worth planning taking steps aimed at obtaining an opinion enabling safe application of withholding tax regulations beforehand.

We would also like to remind you that the obligation to exercise due diligence in verifying whether the recipient of the payment is its beneficial owner, will continue to apply, taking into account the changes in the definition of the beneficial owner resulting from the amendments to the provisions on withholding tax. Should the taxpayer decide not to apply for WHT clearance opinion, in connection with the obligation to exercise due diligence in order to confirm the status of the recipient of the receivable as its beneficial owner, it is worth obtaining an opinion from an independent adviser.

If you would like to learn more about the issues discussed, do not hesitate to contact us.

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