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Tax Alert

KPMG in Poland

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Tax changes in the Polish Deal affecting the real estate market

On 1 October 2021, the updated bill of amendments to the Polish tax law called "Polski Ład" ("Polish Deal") was passed by the Sejm. The bill was submitted to the Senate. Some of the amendments brought by the bill may have negative impact on the real estate market.

Please find below summary of the proposed changes, which may particularly affect the real estate industry.

Limitation of tax depreciation in real estate companies

The proposed changes include limitation of the deduction of tax depreciation write offs of real estate assets in real estate companies. Under the proposed rules, the tax deductibility of tax depreciation write offs in real estate companies would be limited up to the value of accounting depreciation.

The main purpose of this amendment is to reduce the differences between the tax and accounting result reported by the real estate companies in a given year. However, neither the amendments nor the explanatory memorandum provide further information on interpretation of this rule for real estate companies recognizing the real estates as investment for accounting purposes in the fair market value where no accounting depreciation is being claimed.

If this new rule is to take force, this may mean that effectively no tax depreciation could be claimed, what would negatively impact the returns on assets.

Disallowed tax depreciation of residential real estates

According to the proposed amendment, residential real estates should not be subject to tax depreciation. The taxpayer would be entitled to recognize costs incurred for acquisition of this asset upon disposal.

This amendment would have significant impact on the profitability of Private Rental Sector projects.

According to the change in regulations adopted during legislative works in the Sejm, in 2022 the taxpayers will apply the present rules of taxation to the private rental by natural persons and tax depreciation of residential real estates. The new regulations in this regard will apply as of 1 January 2023.

Minimum tax

The draft provides for a new minimum income tax of 10 percent of the tax base. It will apply to CIT taxpayers, including tax capital groups and foreign entities with a permanent establishment in Poland, which:

- suffer losses from income other than capital gains; or
- show a low profitability ratio within operating income resulting from the ratio of revenues to tax deductible costs (i.e. the share of revenues in revenues constituting no more than 1 percent of the tax base).

However, to determine whether an entity is subject to a minimum tax, the tax loss or tax income should be adjusted by the value of expenses or depreciation write-offs for fixed assets.

The tax base will consist of an amount corresponding to 4 percent of incomes other than capital gains, excess debt financing from related entities exceeding the statutory deductibility limit (PLN 3 million or 30 percent EBITDA), costs of intangible services acquired directly or indirectly from related entities or entities based in a country that uses harmful tax competition and the value of deferred income tax resulting from the disclosure of non-amortised intangible assets in tax settlements to the extent that it results in an increase in gross profit or a decrease in gross loss.

The proposed regulations provide that taxpayers will be able to deduct the minimum income tax from CIT calculated in accordance with general principles in the following tax years.

There are also proposed exemptions from the application of the minimum income tax to taxpayers:

- starting a business, in the year of commencement of operations and in the next two tax years immediately after the year of commencement of operations;
- that are financial companies;
- if in a given tax year their income was lower by at least 30 percent compared to the previous tax year;

- whose stockholders, shareholders or partners are natural persons and at the same time the taxpayer does not have shares/other property rights in another entity (i.e. a company, investment fund participation titles or rights to receive a benefit as a founder/founder of a trust or other entity of a fiduciary nature).

During the legislative works in the Sejm the bill was amended by adding the exemption for the companies belonging to a group of at least two companies, in which one company has a direct 75 percent share in a capital of the other companies belonging to the group, the tax year of the companies covers the same period, and the share of the total income of the companies in their total revenues calculated for the tax year is more than 1 percent – however, while determining the conditions of the exemption, only companies which are the Polish tax residents can be taken into account.

Hidden dividend

Under proposed changes the costs incurred by a taxpayer in connection with a service provided by a related entity (within the meaning of transfer pricing regulations) to the taxpayer or to a partner (shareholder) should not be considered as tax deductible costs, if such cost constitutes a hidden dividend.

Costs constitute a hidden dividend if:

1) the amount of these costs or the date of their incurring in any way depend on the profit made by the taxpayer or the amount of this profit; or
2) a rationally operating taxpayer would not incur such costs or could incur lower costs if a comparable service was performed by an entity unrelated to the taxpayer; or
3) these costs include remuneration for the right to use the assets that were owned or jointly owned by the partner (shareholder) or an entity related to the partner (shareholder) prior to the creation of the taxpayer.

The cases described in points 2) and 3) do not apply when the sum of the costs incurred by the taxpayer in the tax year is lower than the amount of gross profit within the meaning of accounting regulations obtained in the financial year in which these costs were included in the financial result taxpayer.

The main purpose of this amendment is to prevent recognizing as tax deductible costs payments that may be classified as hidden dividends.

During the works in the Sejm the date of entry into force of the provisions on hidden dividend was postponed until 1 January 2023.

Thin capitalisation rules

According to the proposed change with regard to thin capitalization rules, it is intended to make it clear that any net financing cost resulting from the thin capitalization rules would be deductible to the higher of: 30 percent tax EBITDA or a 3M PLN.

Withholding tax

The draft narrows the scope of the WHT refund mechanism to payments mainly made as interest, dividends and royalties only to a related entity (according to the meaning of transfer pricing rules). The draft act also provides for the exclusion of dividends paid to Polish residents from the WHT mechanism.

According to the draft, the "pay and refund" mechanism would also apply to receivables which, without justified economic reasons, were not classified as receivables covered by this method of settlement. It can be assumed that this regulation would apply to payments that have been artificially structured.

The proposed regulations assume that the requirement to present the documents required in the WHT refund procedure in terms of the status of the beneficial owner and conducting real business activity applies when separate provisions of law or DTT agreements require the examination of the fulfillment of the conditions referred to in these provisions.

In addition, the draft act also extends the scope of the opinion on the application of the exemption to DTT agreements. It assumes that the tax authority, upon an application submitted by a taxpayer or remitter, issues an opinion on the application by the remitter of WHT exemption or the application of the tax rate resulting from the relevant DTT agreement, provided that the application shows compliance with the conditions set out in the relevant provisions of the CIT Act (resulting from the provisions implementing EU Directives) or the conditions for the application of the DTT agreement.

Effective place of management

The planned amendment implements to the Polish CIT law the concept of effective place of management.

According to the proposed amendment, the taxpayer has a management board in the territory of the Republic of Poland, inter alia, when the current affairs of this taxpayer are conducted in an organized and continuous manner on the territory of the Republic of Poland, based in particular on:

- an agreement, decision, court decision or other document regulating the establishment or functioning of this taxpayer; or
- granted powers of attorney; or
- connections within the meaning of the provisions on transfer pricing.

The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavour to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.
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"Conducting the current affairs of the taxpayer" should be understood primarily as the actual making of the most important management and economic decisions necessary for the functioning of the taxpayer. To determine where these management decisions are actually made, it is also important where they were actually prepared by professional personnel and where data were collected and processed or analyses made to make these decisions, i.e. in practice the place of the actual decision-making process.

The main goal of proposed changes is to prevent the practice of incorporation of foreign entities by the Polish residents, which are effectively managed from Poland, but income is taxed in the country of the entity's seat. In case the company would be regarded as a Polish tax resident under effective place of management, it should be subject to taxation in Poland on its worldwide income.

Polish holding company

The proposed amendment introduces to the Polish law new rules on taxation of holding companies seated in Poland.

In case certain conditions are met, Polish holding company would be tax exempt on:

- dividends received from its subsidiary up to 95 percent of its amount (i.e. only 5 percent of received dividend will be taxed in Poland);
- capital gain realised on disposal of shares in the subsidiary to non-related entity.

However, this rule would not be applicable to the exemption of the capital gains on the sale of shares in the real estate companies.

The proposed amendment will be an alternative for the current exemption for dividends under EU Parent-Subsidiary Directive. It means that in case the taxpayer applied tax exemption based on EU Parent Subsidiary Directive for dividend distribution, disposal of shares in a subsidiary would be then taxed under general rules.

The proposed changes are intended to enhance foreign and Polish investors to incorporate holding entities in Poland.

The consolidation relief

The consolidation relief is purposed to encourage Polish taxpayers to expand their business activity through domestic and foreign acquisitions. Based on the proposed amendments, taxpayers would be entitled to deduct so-called “qualified expenses” associated with the acquisition of shares from the tax base in the year of acquisition up to the amount of PLN 250K. The following costs should be considered as “qualified expenses”: costs associated with legal services, valuation (due diligence), interest, transaction taxes, notary and court fees (purchase price for shares is excluded from “qualified expenses”).

Consolidation relief would be available only in case:

- the acquired company is seated in Poland or another country which signed a double tax treaty with Poland that has a basis for exchange of tax information;
- the core activities of the acquired company correspond with the scope of business activity of the Polish taxpayers or could be considered as supporting for the Polish business and such activity was carried out for both companies for at least 24 months prior to the acquisition;
- the companies were not related parties in the period of 2 years prior to the acquisition;
- the transaction involves acquisition of absolute majority of votes.

Restructuring

According to the proposed changes, the restructuring regulations are to be significantly changed. Especially:

- only the first exchange of shares could be neutral if the conditions for tax neutrality are met. It should be noted that these changes may have a significant impact, in particular, for foreign investors whose asset value results, directly or indirectly, from the value of real estates located in Poland;
- the neutrality of mergers and demergers is to depend on whether the shares in the acquired or divided entity were acquired as a result of an exchange of shares or another merger or demerger.

The amendments brought by the draft bill are planned to enter into force on 1 January 2022.

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

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