Real Estate Tax Services News

Keeping you informed

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Taxation of real estate investments in Poland: New corporate income tax (CIT) law proposal

In brief

On 26 July 2021, the draft amendments to the Polish CIT Act (as well as other tax acts including the VAT Act and the Tax Ordinance) were published on the Government Legislation Centre's website. A number of these changes are likely to have a significant and direct impact on the taxation of real estate investments in Poland.

Proposed CIT law changes

Tax depreciation of real estate assets

Based on the draft amendments, tax depreciation write-offs recognised in relation to buildings cannot be higher than depreciation write-offs made for accounting purposes. In practice, this may mean that if a given entity does not depreciate the building for accounting purposes (but rather revaluates this property to its fair market value), tax depreciation of such a building should be excluded.

Moreover, it has been proposed that tax depreciation should be specifically excluded in relation to residential buildings and apartments (irrespective of their accounting treatment). It is not clear how these provisions can be applied to premises in non-residential buildings which – based on specific technical analysis – formally do not constitute apartments, but are used, for example, for short-term lease purposes.

Thin capitalisation rules

It is planned to specify that the thin capitalisation deductibility threshold should be understood as 30% EBITDA or PLN 3m (whichever is higher). So far, the above was not clear based on current rules but the prevailing interpretation (supported also by the judgements of the administrative courts) assumed that the above limit should rather be calculated as 30% EBITDA plus PLN 3m. As such, the amendment could lead to a significant change in this area and limit the deductibility threshold for taxpayers.

Withholding tax rules (“pay-and-refund” mechanism)

The draft amendments propose certain changes to the withholding tax (WHT) “pay-and-refund” mechanism for foreign payments exceeding PLN 2m per year. This mechanism was already introduced to the Polish CIT law in 2019, but its application has been suspended until 2022. The currently proposed changes assume that the mechanism would only apply to interest, dividend and royalty payments to related parties. As such, other payments (eg, payments for services or payments to non-related entities) should currently not be captured.

As another important change, it is proposed that the formal ruling on the applicability of a preferential WHT regime can be obtained not only in relation to the WHT exemption resulting from the EU Directive, but also in relation to the WHT exemptions or reduced rates resulting from the respective double tax treaties.

Also, the draft amendments specifically provide for higher “due diligence” standards for tax remitters in the case of payments to related parties.

“Hidden dividends” rule

The draft amendments include provisions intending to exclude from tax deductible costs so-called “hidden dividends”, ie, certain payments made for the benefit of shareholders (or entities related to shareholder/taxpayer) which could be seen as aimed at replacing dividends. The proposed regulation is not entirely clear, however, it should be assumed that if it enters into force, each payment to the shareholder/related entity should be analysed in the light of (i) its terms (ie, whether it is in line with market conditions), and (ii) its impact on the financial result of the taxpayer (ie, whether the taxpayer would have made a profit if it had not provided the benefit to the related entity). Such considerations may have an impact on the potential tax deductibility of the discussed payments.

Introduction of a “diverted profits tax”

Moreover, the draft amendments provide for new regulations introducing so-called “diverted profits tax”. This tax can be imposed at 19% on “diverted profits” understood as costs (such as intangible services, royalties or debt financing costs) incurred – directly or indirectly – for the benefit of related entities (provided that certain conditions are met). However, as a “safe harbour” mechanism, the “diverted profits tax” should not apply if the above costs are incurred for the benefit of a related entity subject to taxation on its worldwide income in the EU/EEA (assuming that this entity conducts a genuine and material business activity).

Other changes

On top of the above, other proposed changes include, eg,

- changes regarding the taxation of mergers and demergers (to be considered in case any group restructurings are planned);
- obligation to provide the Polish tax authorities with accounting books along with the annual CIT return;
- simplifying/clarifying changes in the area of transfer pricing (TP).

Our view

The proposed draft is still at an early stage of the legislative process. As such, further changes cannot be excluded and any further works (including the outcome of the on-going public consultations which will last until 30 August 2021) should be closely monitored.

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