Real Estate Tax Services News

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Taxation of real estate investments in Poland: An update on the corporate income tax (CIT) law proposal

In brief

On 26 July 2021, 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. In the course of the ongoing legislative process, certain major amendments including, in particular, the introduction of a new type of "minimum CIT" have been added.

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 the 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 will apply to premises in non-residential buildings which – based on specific technical analysis – do not formally constitute apartments, but are used, for example, for short-term lease purposes.

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Thin capitalisation rules

It is planned to specify that the thin capitalisation deductibility threshold should be deemed to be 30% EBITDA or PLN 3m (whichever is higher). This was not previously clear based on current rules but the prevailing interpretation (which was supported by the judgements of the administrative courts) assumed that the limit should instead be calculated as 30% EBITDA plus PLN 3m. Consequently, 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 originally introduced to Polish CIT law in 2019, but its application has been deferred 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 caught.

In another important change, it is proposed that it will be possible to obtain a formal ruling on the applicability of a preferential WHT regime, 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 relevant double tax treaties.

In addition, the draft amendments specifically clarify that:

- for the purpose of assessing the business substance of the payment recipient, the nature of the business activity of such an entity should be taken into account;
- for the purpose of verifying whether the tax remitter has fulfilled his ”due care” obligation, the nature of his activity and his relations with the payment recipient should be taken into account (“hidden dividends” rule)

The draft amendments include provisions which seek 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 replacing dividends.

Based on the current draft, this can be the case if, for example, the amount/timing of the payment correlates with the profit generated by the taxpayer or, if the conditions of the payment are not arm's length (ie, a reasonably acting entity would not incur the cost or would incur it at a lower value if a similar payment were made to a non-related party). The latter condition should not apply if the amount of the potential "hidden dividend" is lower than the gross accounting profit of the taxpayer.

It is likely that the “hidden dividends” rules will enter into force as of 2023.

Introduction of a “diverted profits tax”

Further, the draft amendments provide for new regulations introducing a so-called “diverted profits tax”. This tax can be imposed at 19% on “diverted profits”, understood to be 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 relevant costs are incurred for the benefit of a related entity subject to taxation on its worldwide income in the EU/EEA (provided that this entity conducts a genuine and material business activity).

New type of a "minimum CIT"

A new type of ”minimum tax” is proposed to apply to all taxpayers declaring tax losses or negligible income (<1% of the revenue), subject to a reservation that tax depreciation write-offs should be disregarded for the purpose of determining the above loss/share of income in the revenue.

As a rule, the new "minimum CIT" should be calculated as 10% of a ”hypo basis” including i.a. (i) 4% of the revenues plus (ii) the excess of the intra-group financing costs over 30% tax-EBITDA plus (iii) the excess of the intra-group service costs over 5% tax-EBITDA plus PLN 3m. Certain deductions or exempt categories of income may reduce the above “hypo base”.

Certain exemptions from the “minimum tax” regime will be available, eg, for new companies (within the first three years of activity) or for companies suffering a sudden decrease of revenue (at least 30%). Furthermore, it is assumed that the ”minimum tax” paid by a taxpayer can potentially be set-off against "regular" CIT payable in the same year or within three subsequent tax years.

It is not clear how the new type of ”minimum tax” should interact with the already existing "minimum CIT" for real estate companies (payable monthly based on the value of the property). As of today, there is no specific exclusion in this area which means that – at least theoretically – real estate owners may simultaneously be subject to two types of "minimum tax" (if all conditions are met).

Other changes

Additionally, further proposed changes include, for example,

- changes regarding the taxation of mergers, demergers and share-for-share exchanges (to be considered where any group restructurings are planned);
- elimination of the current EBITDA-based rules limiting the deductibility of intra-group services above the threshold of 5% tax EBITDA plus PLN 3m (however, note that certain parts of these rules will be incorporated into the calculation mechanism for the new type of "minimum tax");
- obligation to provide the Polish tax authorities with accounting records along with the annual CIT return; and
- simplifying/clarifying changes around transfer pricing (TP).

Our view

The proposed draft has already been approved by the lower chamber of Parliament and is still subject to legislative process in the higher chamber of Parliament. Therefore, further changes cannot yet be ruled out and the ongoing legislative process should closely be monitored.

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