Poland

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General

1. What are recent tax developments in your country which are relevant for M&A deals?

CFC

As of 1 January 2015, CFC regulations were implemented in Poland. Under new rules income of foreign companies controlled by a Polish taxpayer may be subject to 19% CIT in Poland. A foreign company may be regarded as CFC if:

1. it has tax residency in a country qualified as a tax haven, or
2. has its tax residency in a with which Poland/EU did not conclude an agreement, including a double tax treaty that is the basis to the exchange of tax information, or
3. jointly satisfies the following conditions:

i. a Polish tax resident holds directly or indirectly for a period of at least 30 days at least 25% (in capital, profit or voting rights);

ii. at least 50% of the income of the company is derived from passive sources (i.a. dividends, capital gains, interest, royalties);

iii. at least one of the above mentioned passive income sources is (i) exempt or outside of the scope of taxation (excluding Parent-Subsidiary Directive exemption) or (ii) taxed with a rate lower than 14.25% in the country of residence.

There are certain exemptions when CFC rules are not applicable.

Thin capitalisation

As of 1 January 2015, new thin capitalisation rules were introduced. Further to the new rules the limitation on the tax deductibility applies to interest on loans that (i) exceed the value of equity of the company and (ii) were granted by companies holding directly or indirectly at least 25% shares in the taxpayer (or if the lender and the taxpayer are both directly or indirectly held in at least 25% by the same company).

The new provisions include also an alternative thin capitalisation calculation method which takes into account (i) tax value of assets, (ii) value of profits and (iii) nominal interest rate announced by the National Bank of Poland.

Under the grandfathering rules, the new provisions should generally apply to loans granted and paid as of 1 January 2015. Interest on loans granted prior to this date fall under the “old” thin capitalisation rules under which the indebtedness ratio was established at the 3:1 debt to share capital level and loans from indirect shareholders were not qualified for thin cap purposes.

Other

As of 1 January 2015 the dividends received by domestic company which were in any form deductible by the distributing company will not qualify for the Parent-Subsidiary based exemption.

Moreover, on 1 January 2015 new regulations on in-kind repayments of liabilities (such as loans, dividends or redemptions of shares) entered into force. Under the provisions in-kind repayments of liabilities should be treated for tax purposes as sale of asset.

As of 1 January 2016 dividends paid/received by the domestic companies may be exempt from tax under condition that there was a business substance for the activities which preceded the dividend (dividend like income) distribution.

2. What is the general approach of your jurisdiction regarding the implementation of OECD BEPS actions (action Plan 6 specifically) and, if applicable, the amendments to the EU Parent-Subsidiary Directive?

Generally, Poland implements OECD BEPS actions and the amendments to the EU Parent-Subsidiary Directive. In respect to OECD BEPS Action 6 the Polish Ministry of Finance is renegotiating some double taxation treaties (DTTs) in order to eliminate the possibility of so called treaty shopping. Among DTTs which have recently been amended are the treaties with Luxembourg or the United Arab Emirates.

3. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

a. Share deal

From the buyer's perspective share deals do not allow the buyer to achieve step-up on the value of assets of the target company. At the same time by acquiring shares in the target company, the buyer acquires an entity with all its potential tax liabilities, Net Operating Loss (NOL) for a year of acquisition and unsettled losses from previous years (no change of control rule). There is no legal possibility to cut off the liability of the target company from its tax liabilities arisen prior to acquisition.

Expenses incurred on acquisition of shares (e.g. price paid) constitute tax deductible costs on the date of disposal of the shares, while interest on the loan for purchase of shares are in general regarded as tax deductible costs on the date of incurring based on the current approach of tax authorities.

The acquisition of shares in a Polish company triggers obligation of payment of Tax on Civil Law Transaction (TACL). The tax at the rate of 1% is charged on the acquisition value of shares. Acquisition of shares in foreign company by Polish entity will also fall within TACL taxation if SPA is concluded in Poland.

From the seller's perspective both sale of shares and sale of assets are taxable events. Any income realised on the transactions is subject to standard 19% CIT rate. In both cases, income realised on disposal may be off-set with operating losses of the seller (if there are any available) as Polish CIT does not provide for special regime for taxation of capital gains and gains from alienation of property.

In practice, if share deals are contemplated for the transfer of Polish target, the transaction is usually effected from the level of the seller located in the typical holding jurisdiction (where participation exemption regime exists). Combination of the use of DTT and provisions implementing EU Parent-Subsidiary Directive (90/435/EEC) and Merger Directive (90/434/EEC) is used to minimise tax burden on sale.

b. Asset deal

From the buyer's perspective the general result of concluding an asset deal is that the purchase price paid will constitute tax depreciation base as well as tax cost basis (decreased by the depreciation write-offs made by the buyer) for the future sale of assets.

The acquirer of assets may be held responsible for tax liabilities of the seller in case the assets constitute enterprise or its organised part. The liability may be effectively limited or excluded if the buyer obtains from the tax authorities a specific certificate disclosing tax liabilities and pending penalties due by the seller. In such a case, the buyer may not be held responsible for tax arrears and other dues not revealed by the certificate.

Transactions regarding sale of business assets are generally subject to VAT (currently 23% standard rate). As long as the buyer runs VAT-able activity, VAT charged upon acquisition should be effectively neutral. Input VAT incurred upon acquisition may be utilised via deduction from output VAT or direct refund.

Certain transactions may fall outside the scope of VAT (enterprises or organised part of thereof; OPE), or be exempt from VAT (e.g. certain types of real estate). Sale transactions falling outside the scope of VAT and transactions regarding real estate and shares which are VAT exempt are subject to TACL. The rates of TACL vary from 1% to 2% of the market value of assets (meaning usually purchase price).

Buy-side

4. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

Generally share deals do not result in step-up in the value of assets of the target company.

The current existing step-up opportunities include structuring with tax capital groups and closed-end investment funds (FIZ) which are tax exempt in Poland irrespectively of the source of income.

With respect to assets there exists also a possibility of implementing a scenario which includes such steps as exchange of shares and use of a partnership.

Additionally, there are other possibilities to conduct step-up process, which require additional effort and the need to obtain a tax ruling to secure the envisaged procedure.

5. What are the particular rules of depreciation of goodwill in your country?

According to the Polish CIT law, goodwill is depreciable only if it has arisen as a result of acquisition of an enterprise or an OPE through purchase, leasing enterprise under financial lease agreement (under additional conditions) or contribution in kind of an enterprise under the specific provisions on commercialisation and privatisation. Goodwill revealed upon acquisition of shares in the company or contribution in kind of company's enterprise is not depreciable.

If goodwill is depreciable, it may be written-off for tax purposes over a period of 60 months (5 years) i.e. at 20% annual rate. The taxpayer may prolong depreciation period and reduce yearly rate. In any case depreciation period and rates should be determined before commencement of depreciation write-offs.

6. Are there any limitations to the deductibility of interest on borrowings?

In principle there is no direct limitation on deductibility of interest on debt if it is used for financing the purchase of assets or shares of a target company. Despite the fact that some technical doubts may arise with respect to deductibility of interest on loans financing acquisition of shares in a company, we are not aware of cases where tax administration would try to challenge interest deduction on loans financing such acquisitions. Please note however that based on the current judgements of administrative courts, including the Supreme Administrative Court, interest on a loan taken for the payment of dividend or remuneration for redemption of shares is not deductible.

Nevertheless the CIT law provides a few general restrictions on the deductibility of interest on loans. It must be noted that under the Polish domestic law interest is deductible on cash (i.e. upon payment, off-set, capitalisation) and not accrual basis. Interest on debt financing acquisition of fixed assets accrued until the date of delivery for use are capitalised to the initial value of assets for tax depreciation purposes.

Furthermore Polish CIT law introduces rules according to which deductibility of interest on loans between associated entities is subject to thin capitalisation restrictions. Please note that provisions on thin capitalisation were amended as of 1 January 2015 (please refer to point 1 above).

The Polish CIT law provisions include also an alternative method of thin capitalisation calculation which takes into account (i) tax value of assets, (ii) value of profits and (iii) nominal interest rate announced by the National Bank of Poland.

In addition, transfer pricing adjustments may be also applied if the financing terms agreed by taxpayers performing transactions with related entities differ from market conditions limiting the amount of tax deductible costs.

Tax treatment of the takeover of debt and payment of related interest is not regulated by the provisions of Polish CIT law. Therefore, tax consequences of such operations should be carefully analysed case by case. However, interest on loans taken over without consideration is very unlikely to be deductible.

CIT law provides that interest on own capital invested by the taxpayer in a source of his revenue does not constitute tax deductible cost. This limitation covers the loan granted to the partnership by its direct partner, for this partner proportionally to his participation.

7. What are usual strategies to push-down the debt on acquisitions?

A typical strategy to push-down the debt is post-acquisition merger. Another strategy could be acquisition of assets of a target company financed by debt (e.g. a loan granted by an affiliated company or a third party bank) or liquidation of a target company.

It should be stressed that Poland has not introduced any specific anti-abuse provisions regarding merger of the entity acquiring shares with the target (apart from the general merger anti-abuse clause). However, deductibility of interest in the case of post-acquisition merger is usually confirmed in individual tax ruling.

Somewhat less frequently used strategies are the establishment of Tax Capital Group or consolidation with tax transparent partnerships.

8. Are losses of the target company(ies) available after an acquisition is made?

Generally in case of acquisition of assets of the target company the NOL and un-utilised losses of the target company remain with the seller. In case of acquisition of shares of the target company, NOL of such company arisen prior to acquisition, may be off-set against its taxable income for the given fiscal year of acquisition or carried forward. The losses incurred and not utilised in a given tax year may be carried forward and used for tax purposes during 5 consecutive years. The maximum amount that can be utilised in each of these years is 50%. There are no specific anti-abuse provisions limiting this possibility.

Certain restrictions on utilisation of losses exist in respect to specific forms of transfer of assets. In particular losses of entities disappearing within the framework of a merger, spin-off, liquidation or division are lost for tax purposes. Also losses of transformed entities are forfeited (unless transformation involves transformation of one type of capital company into another type of the capital company).

9. Is there any indirect tax on transfer of shares (stamp duty, transfer tax, etc.)?

According to the Tax on Civil Law Transactions (TACL) Law, the acquisition of shares is subject to 1% TACL paid by the buyer (regardless if a Polish or foreign entity). In certain cases i.e. when acquisition is performed via foreign or Polish investment enterprises or stock-listed company is subject to acquisition transaction will be TACL exempt.

The tax base is the market value of shares transferred. Transactions on shares in foreign entities as a rule are not taxed with TACL in Poland (unless the acquirer is a Polish entity and the transaction is performed in Poland i.e. the contract is concluded in Poland).

10. Are there any restrictions on the deductibility of acquisition costs?

The acquisition costs are in general tax deductible. However, expenditures which are necessary so that the acquisition of shares become possible and effective such as TACL paid on the purchase price or notary fees becomes tax deductible costs when the shares are sold. Other acquisition costs of shares such as legal or financial advisor fees are deductible when they are incurred.

11. Can VAT (if applicable) be recovered on acquisition costs?

In general, VAT on acquisition costs is not recovered unless the acquisition of shares is made in order to effectively participate in managing the target.

Further to the judgment of the CJEU in the case C-29/08 AB SKF, the right to deduct VAT would be granted if the expenditures constitute part of the price of the transactions covered by the economic activity of the taxpayer and are not included in the price of the shares sold.

VAT related to expenditures linked with mergers, acquisitions, divisions or the changes of the legal form of a business is deductible provided that these expenses have been incurred in connection with a planned or carried out business activity being subject to VAT.

12. Are there any particular issues to consider in the acquisition by foreign companies? *(for example non-resident taxation rules/substance rules and tax efficient exit routes)*

Foreign companies may not benefit from tax consolidation regime provided under the Polish CIT law. However, certain objections may be raised against such regulations under the EU law principles.

On the other hand, the general tax exemption for investment funds is accessible also for foreign investment funds (provided that they satisfy the statutory conditions for Polish investment funds).

When a foreign company acquires shares in Polish entity, 1% TACL of the FMV of shares is due (safe for certain exemptions) – see more in question 9.

13. Can the group reorganise after the acquisition in a tax neutral environment through mergers or a tax group?

Under the Polish CIT law: in kind contribution of a going concern, merger, divisions, spin-offs, exchange of shares may be performed free of tax based on the domestic provisions implementing Merger Directive (90/434/EEC). The possibility for tax neutral reorganisation comprises also cross-border mergers of capital companies (including companies limited by shares).

The domestic provisions provide for specific conditions for neutrality of mergers (the operation is CIT neutral provided that the surviving company holds at least 10% shares of the company disappearing through the merger or does not hold any shares in the latter). Spin-off and division is neutral provided that both the assets carved out and remained from the divided company constitute organised parts of an enterprise. Please note that there are restrictions on utilisation of losses of companies disappearing on mergers and divisions (spin-offs) – as described in section 8.

When planning the merger, special attention should be paid to business justification for the restructuring. This operation, along with division, was in 2015 the only one with respect to which the domestic legislation introduced an explicit anti-avoidance clause.

Moreover, please note that Polish transfer pricing regulations have been amended. Under the new provisions the tax authorities are entitled to examine the arm`s length conditions of remuneration in relation to restructuring between related entities (including exit charge or its lack).

Also, Polish Minister of Finance is working intensively on the general anti abuse law.
For further details see section 17.

14. Is there any particular issue to consider in case of companies of which main assets are real estate?

Generally Polish domestic law does not contain specific regulations for real estate entities. It should be kept in mind however that certain Polish Double Tax Treaties (DTT) provide for a rule leading to taxation of income realised on alienation of shares in real estate company in Poland (so called 'real-estate clause' – e.g. DTT with Luxembourg).

Under these provisions real estate companies should be generally referred to as entities the value of which (or the value of their shares being alienated) is directly or indirectly derived mainly (some treaties provide for 50% ratio) from immovable property.

Sell-side

15. How are capital gains taxed in your country? Is there any participation exemption regime available?

Polish CIT does not provide for participation exemption regime in respect to sale of shares. Any profits realised on such a transaction are generally subject to 19% CIT. However in practice, tax effective share deals are achieved through exchange of shares transaction prior to the sale. Also the structure which is very frequently used is sale of shares in Polish company via foreign holding company located in a jurisdiction providing for participation exemption regime and with which Poland has a DTT under which capital gains will be fully taxable at the level of seller (i.e. no real estate clause).

16. Is there any fiscal advantage if the proceeds from the sale are reinvested?

Polish CIT does not contain special incentives for the reinvested income. Nevertheless use of closed-end investment funds (FIZ) should allow the postponement of effective taxation of profit until it is paid, which gives the possibility to conduct neutral reinvestment.

17. Are there any local substance requirements for holding/finance companies?

Under the general rule, the company will be regarded as a tax resident in Poland if it has its seat or place of management in Poland. There are no specific rules or interpretation how the place of management should be understood. To some extent, CFC provisions regarding genuine business activity requirements, can served as a point of reference. It should be also noted that the Ministry of Finance is working intensively on the general anti abuse law, which applicability may set down some new directions in this respect. The date of entry into force of the clause is not yet known. However, it is probable that the clause becomes a binding law in 2016.

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