POLAND

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INTERNATIONAL DEVELOPMENTS

1. WHAT ARE RECENT TAX DEVELOPMENTS IN YOUR COUNTRY WHICH ARE RELEVANT FOR M&A DEALS AND PRIVATE EQUITY?

GAAR regulations

The most important changes with respect to M&A area between 2015-2017 concern in particular:

- Introduction of the new thin capitalisation regime – as of 1 January 2015 interest on loans paid to related parties (i.e. having at least 25% direct or indirect shareholding in the borrower or in the borrower and lender) are not tax deductible in the value of indebtedness exceeding the value of equity of the borrower
- Introduction of the anti-hybrid provisions with respect to dividends – as of 1 January 2015, dividends obtained by a Polish company from its EU based subsidiary does not benefit from the Parent-Subsidiary exemption if they were in principal in any form deducted from the income or tax by the company making the distribution
- Introduction of the anti-abuse regulations – as of 15 July 2016 a general anti-abuse rule (GAAR) was introduced into Polish tax law allowing in general to impose tax on operations that are aimed at achieving tax benefits in an artificial way. Additionally, specific anti abuse rules were introduced with respect to neutrality of mergers, spin-offs, exchange of shares transactions as well as dividend distributions between EU entities, when such operations are conducted without justified business reasons
- Taxation of the Close End Funds – as of January 2017, the scope of exemption from CIT for Closed End Investment Funds (so called FIZ) was limited. In particular income derived by FIZ from a Polish and foreign partnership is currently subject to 19% tax. Structures involving FIZ and Polish and foreign partnerships were widely used on the real estate market. The exemption of FIZ with respect to income derived from dividends, capital gains and interest (with certain exceptions) was maintained
- Introduction of the participation exemption regime for certain R&D companies – capital gains on the disposal of the minimum 10% of limited shares acquired in 2016 or 2017 and held for a minimum of two years in a company conducting R&D activities (further conditions apply) may be tax exempt.

2. WHAT IS THE GENERAL APPROACH OF YOUR JURISDICTION REGARDING THE IMPLEMENTATION OF OECD BEPS ACTIONS (ACTION PLANS 6 AND 15 SPECIFICALLY) AND, IF APPLICABLE, THE AMENDMENTS TO THE EU PARENT-SUBSIDIARY DIRECTIVE AND ANTI-TAX AVOIDANCE DIRECTIVES?

Generally, Poland supports OECD BEPS actions. In respect to OECD BEPS Action 6 the Polish Ministry of Finance is renegotiating some double taxation treaties (DTTs). In particular, Poland's efforts are targeted at eliminating from DTTs tax sparing credit clauses and introducing artificial arrangement clauses, real estate clauses as well as beneficial ownership clauses. Among the DTTs which are subject to negotiation / renegotiation or are planned to be renegotiated are the DTT with Brazil, Philippines, France, Kuwait, Morocco, Russia, Spain and Thailand. It is assumed that further adjustments of Polish DTTs with other countries could be made as part of the implementation of a multilateral instrument (Action 15) described below.

As regards OECD BEPS Action 15, Poland is an active member of the OECD Group Developing a Multilateral Instrument to Modify Bilateral Tax Treaties. The Polish Ministry of Finance has declared willingness to sign the convention - the signing ceremony is planned to take place mid-2017.

Poland has also transposed the amendments provided by the EU Parent-Subsidiary Directive into its domestic legislation. This refers in particular to the anti-hybrid rule with respect to dividends obtained by Polish company if it was deducted for tax purposes by its EU subsidiary as well as anti-abuse rule with respect to dividend distributions.

As far as Anti-Tax Avoidance Directives are concerned, Poland also has already introduced to its tax system some of the measures intended by the ATA Directive (i.e. GAAR and CFC rules). As the Directive has not yet come into force, it shall not have an impact on the M&A transactions itself (the ATA Directive shall be implemented by Member states until the end of 2019 as the Directive coming into effect in 2020 at latest). There are no signals yet of how the ATA Directive will influence already implemented rules (as CFC, GAAR, thin capitalisation). Currently binding GAAR and CFC rules can be regarded as even more restrictive than provided in ATA Directive, while it seems that in many situations currently binding thin cap restrictions are less restrictive that those foreseen by the ATA Directive.

GENERAL

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 when paid 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 a Polish entity will also fall within TACL taxation if the 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 a 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). It should be also noted that with respect to certain R&D companies, capital gain on the disposal of its shares may be exempt under certain conditions. In practice, if share deals are contemplated for the transfer of a Polish target, the transaction is usually effected from the level of the seller located in a typical holding jurisdiction (where participation exemption regime exists) or through Polish FIZ.

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 an 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 the 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).

From the seller's perspective a sale of assets is generally subject to 19% CIT on the difference between the price obtained and the net asset value.

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 a step-up in the value of assets of the target company. Certain possibilities in this regard exist after the transaction (such as transferring of the assets from a SPV to another entity through liquidation), any such process however should be strongly grounded with a business justification.

5. WHAT ARE THE PARTICULAR RULES OF AMORTISATION OF GOODWILL IN YOUR COUNTRY?

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. WHAT ARE THE LIMITATIONS TO THE DEDUCTIBILITY OF INTEREST ON BORROWINGS IN THE CASES OF ACQUISITION OF SHARES AND ASSETS?

Deductibility of interest on debt used for financing the purchase of assets or shares of a target company is subject to general rules.

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

Some general restrictions on the deductibility of interest on loans can be however applicable and concern:

- Thin capitalisation restrictions: thin capitalisation regime for given debt can be determined under one of two methods: standard i.e. when interest on indebtedness exceeding 1:1 debt to own equity ratio are not tax deductible if granted by a related entity or an alternative which takes into account (i) the tax value of assets, (ii) the value of profits and (iii) the nominal interest rate announced by the National Bank of Poland. In particular, under the alternative method the amount of tax deductible interest resulting from loans granted by related and non-related parties (e.g. bank) is limited to:
  - the tax value of assets (excluding intangibles) multiplied by the reference rate of the National Bank of Poland (currently 1.50) increased by 1.25 percentage points and
  - 50% of the profits resulting from the operating activity in the given tax year.

  In order to choose this alternative method, a written notification should be submitted before the tax authorities. Afterwards, it has to be apply by given taxpayer for a minimum period of three years.
- The 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.

- CIT law provides that interest on own capital invested by the taxpayer in a source of his revenue does not constitute a tax deductible cost. This limitation covers loans granted to partnerships by their direct partners, proportionally to their participation.
- 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.
- Last but not least there is a growing tendency among tax authorities to examine the capacity of an entity to draw a corporate debt and to discuss if it should be regarded as debt or rather as equity.

7. WHAT ARE USUAL STRATEGIES TO PUSH-DOWN THE DEBT ON ACQUISITIONS?

A typical strategy to push-down the debt is a post-acquisition merger: The Polish SPV draws debt for the acquisition of the target, buys the target and subsequently merges with it. Another strategy could be the 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 the 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 a post-acquisition merger is usually confirmed in individual tax ruling.

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

8. ARE THERE ANY TAX INCENTIVES FOR EQUITY FINANCING?

Currently there are no provisions in Polish tax law that would allow for tax incentives for equity financing.

9. ARE LOSSES OF THE TARGET COMPANY(IES) AVAILABLE AFTER AN ACQUISITION IS MADE?

Generally, in the case of the acquisition of assets of the target company, the NOL and un-utilised losses of the target company remain with the seller. In the case of the 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 capital company).

10. ARE THERE ANY ITEMS THAT SHOULD BE INCLUDED IN THE SCOPE OF A TAX DUE DILIGENCE THAT ARE VERY SPECIFIC TO YOUR COUNTRY?

Certain Polish specific tax rules are provided with respect to (i) companies operating in the Special Economic Zones or (ii) companies benefiting from certain R&D reliefs. Besides, there are certain business specific risks that should be carefully checked, for example, the risk of VAT fraud in businesses such as the sale of electronics or raw materials, or settlements of the acquisition of real estate by a real estate company for tax purposes (whether it is subject to VAT or TACL). Also, due to recent significant changes in the tax authorities' approach in Poland in the last two years, one should also carefully analyse any reorganisations performed by the target (in particular in kind contributions, mergers, spin-offs, exchange of shares, in particular those where a tax loss was declared). Additionally, in a due diligence one should also put extra effort to analyse the transactions with related parties as tax authorities currently very diligently examine the conditions upon which they are performed and if the new Transfer Pricing requirements with respect to documentation are met.

11. IS THERE ANY INDIRECT TAX ON TRANSFER OF SHARES (STAMP DUTY, TRANSFER TAX, ETC.)?

The acquisition of shares of a Polish target is subject to 1% TACL payable by the buyer (regardless if the target is a Polish or a foreign entity). In certain cases i.e. when the acquisition is performed via foreign or Polish investment enterprises, or a stock-listed company is subject to acquisition, the 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).

12. ARE THERE ANY RESTRICTIONS ON THE CORPORATE TAX DEDUCTIBILITY OF ACQUISITION COSTS?

Costs related to the acquisition of shares are in general tax deductible. However, expenditures which are necessary to incur to conduct the transaction such as TACL paid on the purchase price or notary fees become 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.

Acquisition costs related to the purchase of assets are as a rule capitalised into their initial value and deducted through depreciation.

13. CAN VAT (IF APPLICABLE) BE RECOVERED ON ACQUISITION COSTS?

In general, the acquisition of shares under Polish VAT Law is not subject to VAT, thus as a rule, VAT on acquisition costs is not recovered unless the acquisition of shares is made in order to effectively participate in managing the target.

However, 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.

Transactions involving assets are generally subject to Polish VAT. VAT related to the purchase of assets and other linked expenditures is deductible provided that these expenses have been incurred in connection with a planned or carried out business activity being subject to VAT. If a deal is structured as a sale of an organised part of the enterprise (a going concern), such supply is out of scope of Polish VAT. Recently a negative trend of the tax authorities has been noticed with regard to reclassifying transactions involving the sale of commercial real estate, from a supply of goods subject to VAT to a supply of an organised part of the enterprise (a going concern) which is not subject to VAT. In 2016, the tax authorities carried out a number of audits and made such reclassification of transactions. As a consequence, the tax authorities stopped VAT refunds. The actions of the tax authorities caused also the necessity to tax the sale of real estate with 2% tax on civil law transactions.

14. ARE THERE ANY PARTICULAR TAX ISSUES TO CONSIDER IN THE ACQUISITION BY FOREIGN COMPANIES?

Foreign companies may not benefit from the 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 applicable to Polish investment funds).

When a foreign company acquires shares in a Polish entity, 1% TACL of the FMV of shares is due (save for certain exemptions) – see more in question 11.

15. 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 contributions of a going concern, mergers, divisions, spin-offs and exchanges 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% of the shares of the company disappearing through the merger, or does not hold any shares in the latter). Spin-offs and divisions are neutral provided that both the assets carved out and staying in the divided company constitute organised parts of an enterprise.

Due to specific anti-abuse regulations, tax neutrality of mergers, spin-offs or exchange of shares only apply provided that business justifications for these operations are assured.

Moreover, please note that Polish transfer pricing regulations allow the tax authorities to examine the arm`s length conditions of remunerations in relation to restructuring between related entities (including an exit charge or a lack of it thereof).

16. IS THERE ANY PARTICULAR ISSUE TO CONSIDER IN CASE OF TARGET 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 companies 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.

17. IS FISCAL UNITY/TAX GROUPING ALLOWED IN YOUR JURISDICTION AND IF SO, WHAT BENEFITS DOES IT GRANT?

Polish CIT Law allows a group consisting of at least two capital companies linked by capital relationships to be viewed as a single taxpayer for income tax purposes i.e. to create a TCG. The CIT provisions include a number of requirements that have to be fulfilled to establish a TCG, e.g. it should consist solely of the Polish capital companies (only limited liability – sp. s o.o. and / or joint-stock companies – S.A.), it is required that there are at least two companies in a TCG.

In general, the main reason behind the establishment of the TCG is a consolidation of tax results of its members. The benefits of TCG is that taxable income of TCG is calculated as an excess of the aggregated income of all members in the TCG over their aggregated losses. Following this, there are other advantages of the TCG such as the lack of application of transfer pricing rules to a transaction between TCG companies.

Additionally, consolidation of the tax result can be also achieved in a structure involving a holding company having shares in partnership(s) running business activity.

SELL-SIDE

18. HOW ARE CAPITAL GAINS TAXED IN YOUR COUNTRY?

Polish CIT does not provide for a participation exemption regime in respect to sales of shares (except special provisions for companies investing in R&D companies). Any profits realised on such transactions are generally subject to 19% CIT. However in practice, tax effective share deals have been achieved through exchange of shares transactions prior to the sale. It should be however noted that under current anti-abuse rules, share for share exchange transactions are deemed to be conducted to achieve tax benefits (and thus are not tax neutral) if there is no business reason for its performance.

Also the structure which is very frequently used is a sale of shares in a Polish company via a foreign holding company located in a jurisdiction providing for a 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).

19. IS THERE ANY FISCAL ADVANTAGE IF THE PROCEEDS FROM THE SALE OF SHARES ARE REINVESTED?

Polish CIT Law does not contain special incentives for the reinvestment of 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 reinvestments.

20. ARE THERE ANY LOCAL SUBSTANCE REQUIREMENTS FOR HOLDING 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 on how the place of management should be understood, however there is a growing tendency among the tax authorities to examine the substance of international structures of which Polish entities are a part of. To some extent, CFC provisions regarding genuine business activity requirements can serve as a point of reference.

21. ARE THERE ANY SPECIAL TAX CONSIDERATIONS REGARDING MERGERS/SPIN-OFFS?

Under certain circumstances, mergers may be performed free of tax, provided that the restructuring has business justification and is not only tax driven (see question 15). Tax neutrality of spin-offs can be assured if both the carved out part of the company and the part of business that remains in the demerged company constitute an organised part of an enterprise (OPE).

In case the transaction does not involve OPEs, a demerger may be subject to taxation in Poland on the surplus of the nominal value of shares acquired by shareholders in the new entity over the value or amount of expenses incurred in order to take over or acquire shares in the divided company, calculated proportionally to the ratio of the nominal value of that shareholder’s shares in the divided company to the nominal value of shares before division.

Mergers and spin-offs are generally VAT-neutral.

MANAGEMENT INCENTIVES

22. WHAT ARE THE TAX CONSIDERATIONS IN YOUR JURISDICTION FOR MANAGEMENT INCENTIVES?

There are no specific tax considerations in Poland for management incentives. As a rule, management activities are subject to personal income tax, at an applicable progressive tax rate of 18 % to 32 %. For individuals who conduct management and advisory services there are also certain mechanisms allowing for the application of 19% flat rate taxation of advisory activities.

Additionally, as part of the incentives initiatives, employees and management staff can be granted rights to participate in stock and option plans as part of which they can then receive in the future conditional rights to acquire shares in companies or other rights to companies' profits. In the hands of the beneficiary, income from such rights is likely to be subject to 19% personal income tax, opposite to the 18%-32% progressive rate for i.e. employment remuneration. However, as there are no clear provisions in Polish tax law in this regard, participation in those incentives schemes causes uncertainty as to the rules (especially tax point) of taxation for the beneficiaries.

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