POLAND

POLAND

INTERNATIONAL DEVELOPMENTS

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

In 2018 Poland introduced a number of tax changes. The most important ones which may be relevant for M&A are as follows:

- Source of revenue: Division of operation profits and capital gains resulting in closing the possibility to mix income/losses from different sources. Capital gains catalogue includes in particular profits from: mergers and demergers, in-kind contributions, redemption of shares (and other decrease of their value), liquidation proceeds, retained profits, sale of shares, share for share exchange, sale of receivables previously acquired by the taxpayer and receivables resulted from the capital gains, certain property rights (e.g. licences), securities and derivatives connected with capital gains
- Thin capitalisation: Tax deductibility of financial costs (including interest) exceeding PLN 3m is limited up to 30% tax EBITDA. The regime refers to the debt financing from both related and non-related parties (including banks). Non-deductible debt financing costs have to be attributed to a particular source of revenue. Costs non-deductible in the given year may be recognized during 5 subsequent years. Additionally, if the taxpayer's debt financing costs exceed the value of financing which the taxpayer could obtain if the financing is granted by non-related parties (taxpayer's market creditworthiness), the tax authorities may determine taxpayer's income or loss differently than declared by the taxpayer
- Debt push-down: Excluding (entirely, irrespectively of thin capitalisation regime) from tax deductible costs interest paid on (group and external) financing granted for the acquisition of shares if, as a result of post-trade operations (e.g. merger), they are deducted against operating income of the acquired company (debt push-down mechanism). The new restrictions could cover interest on loans granted before the new law entered into force
- Intangible services: Tax deductibility of expenses for certain intangible services acquired from related parties exceeding PLN 3m is limited to 5% tax EBITDA. This refers to advisory, marketing, market research, management, data processing, insurance, guaranties and other of similar nature. The limitation covers also payments for certain intangible and legal assets (e.g. licenses, copyrights). Costs that were not deductible in the given year may be recognized during 5 subsequent years
- Profit participation exemption: Profit participation exemption is limited only to profit distributions (e.g. dividends). Liquidation of a Polish subsidiary or redemption of shares is no longer 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?

TGenerally, 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, real estate anti-abuse 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, the Netherlands 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.

In this regard, the key areas for Poland are:

- change of the method of avoiding double taxation from exemption with progression to tax credit
- introduce principle purpose test (possibility to question transaction with foreign party by the tax authorities if the transaction aims only to achieve the tax benefit); potentially within bilateral negotiations - iintroduction of limitation on benefits)
- introduction of real estate clause

Poland signed the convention on the ceremony which took place in June 2017.

Poland implemented a number of changes to the Polish tax scheme based on the Anti Tax Avoidance Directive (regarding e.g. introduction of tax baskets, thin capitalization, CFC regulations). It is also planned that exit tax will be introduced.

GENERAL

3. WHAT ARE THE MAIN DIFFERENCES BETWEEN AN ACQUISITION OF SHARES AND 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 cost (capital gain basket) 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 (not on accrual basis) on the current approach of the 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 realized on the transactions (capital gain basket) is subject to a standard 19% CIT rate. In both cases, income realized on disposal may be off-set with losses of the seller (from capital gain basket only), 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 Closed End Investment Fund.

B) Asset deal

From the buyer's perspective the general result of a 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 organized 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.

Transaction 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 utilized via deduction from output VAT or direct refund.

Certain transactions may fall outside the scope of VAT (enterprise or organized 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.

Sale / purchase of assets should generally fall into operating income basket. However, in particular in case of the sale of the enterprise or its organized part, the detailed analysis would be required in order to assess if certain assets may fall into capital gain basket.

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 AMORTIZATION OF GOODWILL AND SIMILAR INTANGIBLE ASSETS IN YOUR COUNTRY?

Goodwill is depreciable only if it has arisen as a result of an 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 commercialization and privatization. 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 ON THE DEDUCTIBILITY OF INTEREST EXPENSE? ARE THERE SPECIAL INTEREST LIMITATIONS IN THE CASES OF ACQUISITION OF SHARES AND ASSETS?

Interest on debt used for financing the purchase of assets or shares of a target company as a rule may be tax deductible.

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

However, the following restrictions regarding tax deductibility of interest may arise:

- Thin capitalisation restrictions: For the financing granted (and funds received) in 2015-2017: 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.

For the financing granted (and funds received) from 2018 the new rules are applicable (please refer to the point 1). However, "the old rules" will be in force only up to the end of 2018. From 2019 the taxpayers will be obliged to use new method even for old financing.

- Interest on debt push-down is tax non-deductible (please refer to the point 1).
- 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. We expect this approach will be continued despite new limits discussed above.

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

A typical strategy to push-down a debt is a post-acquisition merger: The Polish SPV draws the debt for the acquisition of the target, buys the target and subsequently merges with it. Another strategy could be an acquisition of assets of the target company financed by debt (e.g. a loan granted by an affiliated company or a third party bank) or transformation of the target into tax transparent partnership.

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, the tax authorities may challenge such structures based on the General Anti Avoidance Rules being in force in Poland since July 2016.

Tax deductibility of interest on acquisition financing in the case of a post-acquisition merger is denied.

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 A TARGET COMPANY AVAILABLE AFTER AN ACQUISITION IS MADE? ARE THERE ANY RESTRICTIONS ON THE USE OF SUCH LOSSES?

Generally, in the case of the acquisition of assets of the target company, the NOL and unutilised losses of the target company remain with the seller. In the case of the acquisition of shares of the target company, change of control does not have an impact on tax losses carried forward and 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 (based on tax baskets rule). 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% of each tax loss. There are no specific anti-abuse provisions limiting this possibility. However, tax losses reported before 2018 are subject to previous provisions with no allocation to tax baskets.

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 buyer 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 may 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. Starting 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 (TACL)

14. ARE THERE ANY PARTICULAR TAX ISSUES TO CONSIDER IN THE ACQUISITION OF A DOMESTIC COMPANY BY A FOREIGN COMPANY?

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 from European Union or European Economic Area (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 MANNER THROUGH MERGERS OR A TAX GROUPING?

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 applies 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. ARE THERE ANY PARTICULAR ISSUES TO CONSIDER IN THE CASE OF A TARGET COMPANY THAT HAS SIGNIFICANT REAL ESTATE ASSETS?

A number of 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). Also the Polish CIT Law provides for a real estate clause.

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, the average share capital of each company should be at least PLN 500k, at least 75% shareholding required between the company and subsidiaries (two-tier structure).

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.

18. DOES YOUR COUNTRY HAVE ANY SPECIAL TAX STATUS SUCH AS A PATENT BOX FOR COMPANIES THAT HOLD INTANGIBLE ASSETS?

In Poland there is no special tax status such as a patent box for companies holding intangible assets. However, the Polish government is working on it.

19. DOES YOUR COUNTRY IMPOSE ADVERSE TAX CONSEQUENCES IF OWNERSHIP OF INTANGIBLES IS TRANSFERRED OUT OF THE COUNTRY?

Currently there is no any special adverse tax regime in case of a transfer of intangibles outside of Poland although generally subsequent cost of use of intangibles will be limited – based on the new CIT regulations, tax deductibility of payments / amortization write-offs for intangibles previously owned is limited to the value of income generated from its sale. Additionally, transfer pricing / GAAR rules will apply.

SELL-SIDE

20. HOW ARE CAPITAL GAINS TAXED IN YOUR COUNTRY? WHAT, IF ANY, GAINS ARISING IN AN M&A CONTEXT ARE ELIGIBLE FOR SPECIAL TREATMENT?

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. BBased on this provisions, if so-called commercialized intellectual property (e.g. royalties, patent, know-how) is contributed in-kind by the so-called commercialized entity, the taxable revenue will arise after five years from this moment.

Any profits realised on such transactions are generally subject to 19% CIT (based on tax baskets rule). 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).Such structures should be business justified and have proper substance, otherwise anti abuse regulations may apply.

21. IS THERE ANY FISCAL ADVANTAGE IF THE PROCEEDS FROM THE SALE OF SHARES OR ASSETS 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.

22. 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. Additionally, in June 2017 the Ministry of Finance published a document describing when a foreign holding structure may be treated as an aggressive optimization and where it listed a circumstances proving that the foreign holding (SPV) does not have a place of management in its jurisdiction which are among others: (i) directors of SPV are at the same time management board members of the Polish company, (ii) directors of SPV reside and perform their duties in Poland and their visits in the country of SPV is limited only to sign documents or take resolutions, (iii) there are no specific tasks assigned to these directors, (iv) directors of SPV do not have a special competence and knowledge to perform their duties, (v) there is no documentation proving performance of their duties, (vi) there is no office of the SPV, e-mails, telephone numbers, (vii) the SPV does not have employees (besides administration). It may be expected that the tax authorities when analysing the residency of the holding companies will take into account also the above conditions.

23. 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 emission value of shares (which is a price for the taken up shares not lower than their market value) 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

24. WHAT ARE THE TAX CONSIDERATIONS IN YOUR JURISDICTION FOR MANAGEMENT INCENTIVES IN CONNECTION WITH SELLING OR BUYING A COMPANY?

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 %.

However, within new provisions (which are in force as of 1 January 2018) income of employee who actually acquire shares of their employee or its dominant entity (within the meaning provided in the Polish Accounting Act), as a result of execution of the incentive program, is subject to taxation not earlier than upon sale of these shares (even if the shares are acquired free of charge or for price lower than FMV of the shares). Sale of shares will be subject to 19% flat rate taxation.

Deferal conditions are as follows:

- the employee incentive plan needs to be implemented by joint-stock company or its dominant entity (within the meaning provided in the Polish Accounting Act) based on the resolution of general meeting of shareholders
- the entitled individual acquires shares of the employer or its dominant entity
- individuals (employees or co-workers who receive income from civil law contract) who acquire shares either directly or through execution of rights resulting from securities
- the emitent's registered office should be localised on the territory of the country with which Poland has concluded a double tax treaty. This provision should be changed since under its literal meaning the tax deferral would not be applicable towards shares in Polish companies

In case when deferral conditions are not met, income derived from realisation of specific securities and financial derivates should be recognised as income derived under basic contract (i.e. income from employment contract or income from other sources). In both cases income would be subject to progressive taxation (18% or 32% rate PIT). Income from employment contract will be also subject to social security and health insurance contributions.

The Polish tax law does not regulate directly the moment of the taxation In this regard, thus the following be considered:

1) If the shares are acquired free of charge or for price lower than FMV of the shares tax obligation will arise at the moment of grant of the said benefit. Value of granted instrument will be subject to progressive taxation and social security and health insurance contributions (as employment income), or

2) Upon sale of shares - the taxable base will be the excess (recognised as capital gain) as difference between price resulting from sale and value of granted financial instruments and subject to flat tax rate 19%.

Additionally, 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.

FOR MORE INFORMATION CONTACT:

Monika Lewandowska
Tel: +48 22 324 5934
E-mail: monika.lewandowska@taxand.pl

Andrzej Puncewicz
Tel: +48 22 324 5949
E-mail: andrzej.puncewicz@taxand.pl