Tax&Legal Highlights

Poland

Withholding tax (WHT)

Introduction of new rules of levying WHT for CIT remitters postponed until 31 December 2019

28 June saw the publication of the Regulation of the Minister of Finance amending the Regulation on the exclusion or restriction of the application of Article 26(2e) of the Corporate Income Tax Act. In accordance with the amended Regulation, the temporary exclusion of the application of Article 26(2e) of the CIT Act is extended until 31 December 2019 (within the scope not originally covered by indefinite exclusion).

Obligation to levy WHT
The amendment to the CIT Act (and the PIT Act) that came into effect on 1 January 2019 **obliges the remitter to levy WHT in the event that the payments subject to WHT in respect of one taxpayer exceed PLN 2m** (Article 26(2e) of the CIT Act). In such cases, if the remitter fails to levy the tax on the amount above the PLN 2m, or levies it at a reduced rate, apart from satisfying the prerequisites for a WHT exemption or a lower WHT rate under the CIT Act or a relevant convention for the avoidance of double taxation, they will have to:

- provide a statement, or
- obtain an opinion on the legitimacy of applying the WHT exemption (only in specific cases).

However, under a Regulation of the Minister of Finance the application of this provision has been temporarily excluded until 30 June 2019. An indefinite exclusion has also been applied to a limited scope of payments. **The most recent Regulation extended the temporary exclusion until 31 December 2019.**

Consequences for taxpayers

With the exclusion extended, **CIT remitters may continue to apply WHT exemptions and lower WHT rates throughout the second half of 2019 under the rules that have been applicable so far, i.e. without the need to provide the statements and obtain the opinions, even if the payments do exceed PLN 2m in total within the fiscal year.**

Other regulations concerning withholding tax (especially the duty to exercise due diligence and the new definition of a beneficial owner) remain unchanged and in force. We would also like to point out that **no similar regulation has been published with respect to PIT remitters**, which means that for payments in respect of natural persons (including partners of fiscally transparent entities) the new regulations are already in full force and effect.

Postponing the introduction of the new WHT regime for CIT remitters should allow them to **accurately verify their right to relief** (WHT exemption / lower WHT rate), taking into account the suggestions included in draft clarifications (i.e. the status of the taxpayer and the beneficial owner as well as genuine business activity), as well as to **potentially obtain individual tax rulings or opinions on the legitimacy of applying the WHT exemption: all before the first payments under the new regulations are made in 2020.**

Contact details

Mateusz Raińczuk
Manager in Tax Advisory Department
Tel.: +48 664 909 371
e-mail: mrainczuk@deloittece.com

Marcin Steuer
Manager in Tax Advisory Department
Tel.: +48 882 626 121
e-mail: msteuer@deloittece.com

What's new with ECP?

Starting with 1 July, the largest employers are obliged to introduce ECPs. Since June, financial institutions are also publishing their proposals. There are 19 of them as at the date of publishing this text. This means that for the largest organisations, the next few months will mean making strategic decisions and complying with

administrative obligations. In the heat of implementing this obligation, it is worth remembering about the important amendments to the Act on Employee Capital Plans (ECPs) introduced in June.

The ECP Act has been amended to address the questions and concerns raised mostly by the employers. Some of the modifications merely aim at organising or specifying some debatable issues in greater detail. Other, however, may materially affect ECPs and their functioning in organisations.

Maternal and parental leave vs. ECP
Extending the obligation to automatically sign up those on maternal and parental leaves for ECPs, by extending the definition of an employed person that is used for the purposes of the ECP Act, is certainly of practical value. ECP premiums are not paid for those persons during their leave, but the payment will have to be resumed immediately after they return, a fact which they might not be aware of due to their long absence. In accordance with the provisions of the ECP Act applicable so far, employees on maternity or parental leaves were to be signed up for ECPs only after they would return from the leave.

Calculating premiums
With the Act amended, calculating ECP premiums no longer involves the annual premium basis limit that applies in social security. If the limit, which is 30 times the average monthly pay (and thus is just above PLN 140,000 in 2019), is exceeded, the remitter no longer has to pay the old age and disability pension contributions to the Social Security Institution. As a result, the premiums for those who are subject to ECPs will be paid throughout the whole year, irrespective of their remuneration.

Reduced basic premium applicable for a longer time
Those who earn the least (up to 120% of the minimum wage), may apply a reduced basic premium at a minimum of 0.5% of their remuneration (the standard rate being from 2%). To apply the reduced premium, employees should provide their employers with relevant declarations. This solution has already been in place under the regulations applicable so far; however, before the amendment of the ECP Act, the declaration remained in effect only until the end of the calendar year in which it was made, and employees would have to make new declarations the following year. With the Act amended, the employees' declarations will be applicable for an indefinite time (insofar as their remuneration does not exceed the threshold that allows them to apply the reduced premium).

EPPs vs. ECPs
The relation between Employee Pension Plans (EPPs) and ECPs has also been specified in greater detail. The amended ECP Act clearly specifies that if a given organisation already has an EPP in place, which would make it exempt from having to set up an ECP, it can nonetheless voluntarily introduce the capital plan at the same time. Those who have opted for the exemption, however, should remember that in order to maintain it, EPP participants should constitute at least 25% of all employees throughout the whole time a given EPP is in place. Otherwise, they will be legally obliged to set up an ECP. Participation will be verified twice a year.

Given the above-mentioned changes, it is worth verifying whether the inclusion of those on maternal and parental leaves will not affect such

matters as the date from which a given organisation is obliged to implement an ECP, or the level of employee participation in the voluntary EPP, the prerequisite for the exemption. The arrangements that have been made so far may be subject to change. New solutions may also have to be taken into account with respect to budgeting the wages for the years to come. In turn, those organisations that have decided to implement EPPs will have an additional reporting obligation to attend to.

Contact details

Anna Skuza
Attorney at Law, Senior Managing Associate
Tel.: +48 22 348 33 87
e-mail: askuza@deloittece.com

IP Box (Innovation Box) - a preferential 5% income tax rate. Clarifications of the Ministry of Finance

On 16 July 2019 the Ministry of Finance published Clarifications concerning the use of IP Box (Innovation Box). Below are the most important details which will help you use IP Box in practice.

What is IP Box (Innovation Box)?

The term "IP Box" (or "Patent Box", "Innovation Box") refers to a tax relief introduced on 1 January 2019, whereby a preferential tax rate at 5% may be applied to income derived from the so-called "eligible intellectual property rights".

The catalogue of rights that are subject to the relief is included in both the PIT Act and the CIT Act[1], and covers patents, utility models and copyrights to computer programs. These rights should be created, improved or developed as part of the taxpayer's R&D activities.

In turn, the amount of income to which the preferential rate may be applied is based on the income derived from eligible rights multiplied by the so-called *nexus index.*

[1] Pursuant to Articles 30ca and 30cb of the Personal Income Tax Act of 26 July 1991 (Polish Journal of Laws of 2018, item 1509) and Articles 24d and 24e of the Corporate Income Tax Act of 15 February 1992 (Polish Journal of Laws of 2019, item 865)

Who may use IP Box?

As specified by the the Ministry of Finance in their Clarifications, IP Box is intended for all CIT and PIT taxpayers.

The Ministry confirmed that IP Box may be used by taxpayers who reside in Poland but receive income from their business activities abroad, insofar as under the convention for the avoidance of double taxation between the relevant two states, such income is subject to taxation in Poland.

In a similar fashion, IP Box may be used by foreign taxpayers who receive income from Poland via a permanent establishment located in Poland.

IP Box may also be used by partners in commercial partnerships in proportion to their share in profits.

Eligible IP
The Act lists rights that may be deemed eligible intellectual property rights (IP). Income derived from those rights may be covered by the preferential 5% tax rate. Importantly, the taxpayer should **create, improve or develop such rights as part of** their **R&D activities.**

- **What classifies as R&D activities?**

In their Clarifications, the Ministry of Finance provided a series of criteria for assessing whether a given activity can be deemed R&D.

The Ministry stressed that **it suffices for R&D activities to constitute enterprise-scale creative work**, which means that, if all other requirements are satisfied, IP Box may be used by those who develop new or improved products, processes or services as part of their R&D activities**, even if similar solutions to theirs have already been developed by some other entity.**

Furthermore, R&D activities should be carried out systematically. However, as the Ministry pointed out, the proof of the systematic nature of the activities does not depend on their continuity (which includes the specified duration of such activities) or the taxpayer's plans to carry out similar activities in the future.

We are glad that this is the Ministry's approach. It shows a rational understanding of R&D and corresponds to the scope of R&D activities that many enterprises actually carry out.

- **How can IP be "improved" or "developed"?**

The Clarifications stress that what is important, is how IP is actually "improved" or "developed". Taxpayers, however, are not expected to take steps aiming at developing the IP they already have to such an extent that it would become subject to further protection rights.

The Clarifications provide a few practical examples which help to understand this issue. One of the examples involves a situation where a **taxpayer holds an Integrated Circuit Topography (ICT) right in respect of an injection moulding technology.** As part of their R&D activities, the taxpayer **creates a prototype of a production line that will make use of the IC. The prototype is understood as a development of IP (of an ICT right, to be precise), as it leads to the intellectual property in question becoming more useful**. Thus, if they satisfy the other requirements, the taxpayer in this example may use IP Box.

Can IT companies use IP Box? To be confirmed through individual tax rulings.
As regards computer programs, the Ministry confirmed that they should be understood in the broad sense of the term. For example, work concerning interfaces may also require R&D activities to be carried out, and the result of those activities will satisfy the requirements for it to be deemed eligible IP.

However, the Clarifications state that given the dynamic development of technologies, copyright to computer programs cannot be precisely defined. As a result, **taxpayers willing to use IP Box with respect to income derived from their copyrights to computer programs, and to obtain relevant tax and legal protection in this respect should file a request for an individual tax ruling with the Director of the National Revenue Administration.**

Calculating the *nexus* factor
In accordance with the law, the *nexus* factor should be calculated based on costs incurred for R&D activities, which includes costs related to acquisitions of R&D results and eligible IP. Importantly, the Clarifications stress that the calculations should take into account **the costs actually incurred**, **irrespective of the manner they are recognised under tax-deductible expenses.** Furthermore, the index should be **calculated on a cumulative basis, throughout the years**.

IP Box vs. transfer pricing
The Ministry has pointed out that provisions on transfer pricing will apply to determining:

- the *nexus* factor, in respect of calculating the costs related to acquisitions of R&D results and IP from affiliated entities;
- the income derived from the eligible IP accounted for in the price of a given product or service, if applicable, and;
- other income derived from the eligible IP (through sales or licensing) in transactions with affiliated entities, if applicable.

Settlement of losses
IP Box allows for settling losses incurred in respect of a given eligible IP throughout five consecutive years. Crucially, however, a loss incurred in respect of a given IP cannot lower the income derived from other IPs or income from other sources taxable on general terms. **Therefore, using IP Box requires a well though-out strategy, also in terms of the planned income for the years to come.**

IP Box vs. R&D relief: can be used interchangeably but with respect to different income baskets
Taxpayers may avail themselves of IP Box and the R&D relief within the same fiscal year, but with respect to different income baskets. The R&D relief may be applied only to that part of income which is taxable on general terms, the Ministry pointed out. In turn, income subject to the preferential IP Box 5% tax rate is treated as a separate income basket, and, therefore, eligible costs identified for R&D relief purposes cannot be subtracted therefrom.

IP Box vs. SEZs / Decisions to provide support
The Ministry has also confirmed that **IP Box may be used by those taxpayers who avail themselves of the income tax exemption** under permits to conduct business activity **within Special Economic Zones (SEZs)** or under **decisions to provide support issued as part of the so-called "Polish Investment Zone"**. In such cases, IP Box will allow those taxpayers to enjoy their tax exemptions for longer, as the amount of

income tax subject to exemption becomes lower and the exemption limit available is, effectively, used up slower.

Contact details

Adam Wacławczyk
Partner in Tax Advisory Department
Tel.: +48 695 668 437
e-mail: awaclawczyk@deloittece.com

Jagoda Aleksandrowicz
Manager in Tax Advisory Department
Tel.: +48 662 103 002
e-mail: jaleksandrowicz@deloittece.com

Zero PIT for taxpayers below 26. New taxpayer obligations

As of 1 August 2019 taxpayers aged below 26, generating income under employment and outwork contracts, employed by cooperatives or working on contracts of mandate, shall enjoy new PIT exemption. The exemption limit for income generated after 1 January 2020 shall be PLN 85,528, while in the period from 1 August to 31 December 2019 it shall be proportionally reduced to PLN 35,636.67 (i.e. to 5/12 of the exempted amount).
The exemption does not apply to income subject to a lump sum tax.

What will taxpayers have to do to enjoy the exemption? Below we present new taxpayer's obligations.

New obligations

Income income tax withholdings

During the period from 1 August to 31 December 2019, when calculating monthly income tax withholdings, withholding agents shall not apply the exemption available under the new regulations (i.e. income tax withholdings shall continue to be paid), unless employees or contractors provide written statements that income generated during that period shall be exempted in whole. In such cases, withholding agents shall refrain from deducting income tax withholdings beginning from the month following the one in which such statement is obtained at the latest.

Please note that under the amended act, withholding agents are obliged to monitor the month in which taxpayers are no longer entitled to the exemption having exceeded the limit or having turned 27.

As of 1 January 2020 withholding agents shall not deduct income tax withholdings from salaries paid to those aged under 26 until the exemption limit is exceeded (i.e. until their income reaches the threshold of PLN 85,528). The case when a taxpayer files a written motion to the withholding agent to pay income tax withholdings is an exception; in such cases, withholding agents are obliged not to apply the exemption beginning from the month following the one when the motion was received at the latest. The motions must be filed separately for each fiscal year. Therefore, if a withholding agent does not receive an appropriate motion, it should discontinue the deduction of income tax withholdings from employee's salary.

When taxpayer's income received from the withholding agent exceeds the exemption limit, the agent is obliged to deduct income tax withholdings from the amount above the limit, in line with the applicable tax scale.

Please note the additional obligation imposed on the withholding agent, i.e. the obligation to monitor the time when the collection of tax withholdings on employee's income should commence. This necessitates modification of payroll systems, where the calculation of tax withholdings should depend on both the income amount and the age of an employee / contractor (the exact birthday date; the actual age as at the payment date is important).

Tax-deductible expenses

General terms of calculating tax-deductible expenses shall continue to apply to young employees/contractors. The total accumulated tax-deductible expenses shall be deducted from the taxable income generated from a single source (up to its amount).

The application of 50-percent tax-deductible expenses due to copyright transfer will be an exemption. In such cases, the calculation of the annual cost limit (at present amounting to PLN 85,528) must include the income exempted from taxation under new regulations. Thus, individuals using the 50-percent tax deductible expenses may derive lower benefits from the law amendment.

Social and health insurance premiums

PIT-exempted income is included in the calculation of social and health insurance premiums, of course if no other exemptions occur (e.g. regarding students working on contracts of mandate or the simultaneous existence of several insurance titles). Consequently, withholding agents are obliged to deduct social and health insurance premiums from salaries paid to young employees. Please note that the premiums deducted from PIT-exempted income cannot be deducted from taxable income or from tax. If a health insurance premium based on PIT-exempted income is higher than the tax withholding calculated on the same income without the exemption, it should be reduced accordingly.

This forces withholding agents to carry out hypothetical calculations to ensure correct settlement in this respect.

Withholding agents preparing PIT-11 forms

The amended regulations do not release withholding agents from the obligation to prepare PIT-11 form and file it with the competent tax office, even if employee's income is fully tax-exempted. The form should report the entire salary paid to a given taxpayer during the fiscal year, including amounts exempted based on the new regulations, as well as social and health insurance premiums deducted from the salary, along with tax withholdings paid. A precise manner of reporting PIT-exempted income depends on the format of PIT-11 form (not published yet).

Income not exempted from PIT

Under the amendment act, not all income generated by people aged under 26 is PIT-exempted. The exemption does not apply to sole proprietorship, contracts of specific work, internship or social welfare benefits.

Zero PIT: withholding agent's challenge

Regardless of our assessment of the PIT exemption available for the youngest employees and contractors, we must remember it will cause a number of practical issues related to the application of the exemption from the perspective of a withholding agent, necessitating the monitoring of calculations based on the new principles and income reporting changes.

Should you have any detailed queries regarding these changes, please do not hesitate to contact Deloitte experts.

Contact details

Joanna Świerzyńska
Partner in Tax Advisory Department
Tel.: +48 22 511 04 23
E-mail: jswierzynska@deloitteCE.com

Marcin Grzesiak
Senior Manager in Tax Advisory Department
Tel.: +48 22 511 07 96
E-mail: mgrzesiak@deloitteCE.com

Maciej Rosłoński
Senior Manager in Tax Advisory Department
Tel.: +48 22 511 03 21
E-mail: mroslonski@deloittece.com

New VAT rate matrix passed through Senate

On 2 August the Senate passed the final amendments to the draft bill amending the VAT Act. The new VAT rate matrix will probably come into effect in its current version.

Since November 2018 the Government and the Parliament have worked on a bill amending the VAT Act and introducing new regulations regarding the application of reduced rates (5% and 8%, respectively).

When the draft bill was submitted to the Sejm in March 2019, the work was postponed due to a number of controversies it raised. At present, it is nearing completion. Most probably, its contents will not change. If this is the case, the new act will come into effect on 1 November 2019.

Key assumptions underlying the new regulations

Key assumptions of the project in its current version include:

- Introducing the so-called **new VAT rate matrix**, i.e. new Appendices 3 and 10 to the Act, indicating goods and services taxed with reduced VAT rates (8 percent and 5 percent, respectively). Groups determined in the new tables are much wider and are intended to facilitate the classification of goods and services for VAT rate determining purposes.
- With regard to goods, the new appendices propose **moving from PKWiU 2008 classification to the combined**

nomenclature (CN). For service classification purposes PKWiU 2008 shall be replaced by PKWiU 2015.

- In practice, the above amendments shall mean a **number of changes in VAT rates** applicable to individual goods and services. Not all changes have been clearly identified yet (many will probably result from future interpretation of regulations and statistical classification). Nevertheless, at present the following industries can be indicated as most affected with the changes:
  - **food industry** (e.g. frutti di mare, bakeries and similar products, spices, sauces, fruit, vegetables, nuts and others);
  - **medical and hygiene products** (the changes may affect medical and pharmaceutical products, disinfectants and certain baby care and kids products);
  - **publishing** (the changes will include tax on books, e-books, magazines and e-magazines, etc.);
  - **production of fertilizers and pesticides**.
- Introducing **Binding Rate Information (BRI)**, a new tool in the form of an administrative decision issued by the Director of National Tax Information and providing binding confirmation of the correctness of applied VAT rates.
- The projected regulations include also **Binding Excise Information (BEI), which is to provide a certain level of protection regarding VAT.**
- The Act is coming into force on **1 November 2019.** As of that date, Binding Rate Information can be motioned for.
- **On 1 November 2019**, pursuant to a special transitional regulation, the 5 percent and 8 percent rate shall become applicable to selected goods and services (among others books, magazines and e-publications).
- The other rates arising from the new tables shall be applied to goods and services performed on or after **1 April 2020.**

Amendments introduced during proceedings in the Parliament

In the period from March to early August, the regulations were several times discussed in the Parliament. Finally, apart from purely technical amendments, the key ones introduced to the initial version proposed by the Government include:

- Resigning from the most controversial plan of the Ministry, resulting in an increase in VAT on fruit juice and nectar drinks (from 5 percent to 23 percent). Ultimately, the 5 percent rate shall apply to all drinks that include at least 20 percent of juice, the same as now.

- Introducing the 5 percent VAT rate on plant-based milks (made of soy beans, nuts, grains etc.). The current VAT Act does not include such provisions (certain types of plant-based milk use a reduced VAT rate as they include at least 20 percent of fruit juice).

- The basic 23 percent VAT rate shall apply to firewood in the form of logs, spill, sticks, etc. (instead of the formerly proposed 8 percent rate).

In the course of work, the new VAT matrix draft was combined with another amendment (introducing among others the split payment obligation). As a result, certain amendments we had discussed earlier were withdrawn,

such as reverse charge (since the other draft liquidates this mechanism) or joint and several responsibility (since the other draft substantially modifies the related regulations).

How to prepare for the changes?

The new VAT rate matrix comes into effect on 1 April 2020. However, due to the wide scope of changes, taxpayers would benefit from early analysis of their probable impact.

The work may commence from **comprehensive review of all goods and services** offered by an entity to "reclassify" them to groups defined in the new tables (unfortunately, the process may take a long time). As of 1 November 2019 taxpayers may **motion for Binding Rate Information (BRI)** to have problematic cases clarified (as of 1 April 2020, BRI shall become binding for tax authorities). The assumed five-month transition period may turn out to be insufficient, though. Alternatively, with regard to certain goods, taxpayers may consider motioning for **Binding Excise Information (BEI).** Further, training appropriate employees in new regulations and implementation of relevant procedures that allow determining correct VAT rates may be necessary.

Contact details

Paweł Mikuła
Senior Manager in Tax Advisory Department
Tel.: +48 32 508 03 25
E-mail: pmikula@deloittece.com

Marcin Mastalski
Senior Manager in Tax Advisory Department
Tel.: +48 32 508 03 15
E-mail: mmastalski@deloittece.com

Changes in excise regulations and the SENT system regarding trading in heating oil. President signed the amended Act

On 6 August 2019 the President signed the Act Amending the Act on Road and Railway Cargo Transport Monitoring System and Certain Other Acts of 19 July 2019 (henceforth: the "Amendment"). Some changes provided for in the Amendment shall come into effect on 1 September 2019, although the biggest ones may become binding even as late as at the end of March 2020.

Pursuant to the justification of the draft Amendment, its key objectives comprise:

- including heating oil transport and trade, regardless of its volume in transit and transaction status, in the monitoring system;

- allowing sellers and users of heating oil to make statements regarding the planned use of the oil in the system for excise tax purposes.

Nevertheless, as a rule, the changes will result in tight control of heating oil trade, performed by the State, even when it is purchased by individuals who do not carry out any business operations.

Changes regarding the SENT system and excise duty

Under the Amendment, both transport and trade in heating oil not exempted from the excise duty due to its planned use, to which a reduced excise rate applies due to the planned use for heating purposes, shall be monitored in the SENT system (which will be a condition allowing the application of the reduced excise rate). Thus, the excise duty act shall be closely aligned to the SENT system. Importantly, regulations regarding SENT extend the definition of "receiving party" to include an individual using heating oil for heating, and for excise duty purposes granted the status of an oil using entity.

Under the Amendment, two new entities are defined for excise duty purposes: the oil using entity and the oil agent. These entities are obliged to file a simplified registration request to the competent tax office head.

Importantly, terms allowing the application of a reduced excise rate for heating oil to be used for heating purposes shall change in respect to:

- the necessity to file the simplified registration request as indicated above;

- reporting the trade in or transport of heating oil in the SENT system, along with a special statement regarding its intended use.

Further, the Amendment provides for certain practical expedient for entrepreneurs selling small amounts or packages of heating oil. Nevertheless, as of today, many application aspects of the practical expedient are unknown.

Conditions underlying application of the reduced excise rate

Under the Amendment, in order to apply the reduced excise rate to heating oil used for heating purposes, as a rule, the following measures must be performed:

- monitoring the transport, as well as sales and purchase transactions not accompanied the physical transfer of heating oil using the SENT system;

- following a specific transaction pattern for these products;

- separate excise duty registration for transactions involving heating oils (the so-called simplified registration).

Further, the Amendment provides for the duty to keep a special excise record of sales of heating oil in small packages and amounts (unit packages smaller than 30 liters or kilograms, respectively; one-off transactions up to 100 liters/kilograms of such products).

Non-compliance with the requirements provided for in the Excise Duty Act will primarily result in the necessity to tax the heating oil with a higher excise duty rate, which may translate into higher prices of the purchased oil.

Most provisions of the Amendment come into effect on 1 September 2019. Nevertheless, under transitional regulations, until 31 March 2020

the current provisions regarding reduced excise on heating oil may be applied.

However, the proposed construction and the wording of the new regulations and transitional provisions give rise to serious **doubts related to the interpretation by and approach of competent bodies**, most of all, what will be the actual effective date of the new principles of monitoring the heating oil trade in SENT.

Follow-up

The Amendment extends the scope of state supervision over the trade in sensitive goods using IT tools. Therefore, considering its effect on business operations or even on everyday life of individuals not carrying out any business may prove worthwhile. Most of the new obligations will be performed in the web, using the PUESC Internet platform. Further, before commencing the registration activities as necessitated by the Amendment, it would be useful to analyze their impact on each obligation and their outcome, in particular with regard to transitional provisions or regulations regarding the new records kept in relation to the excise duty.

Contact details

Anna Wibig
Senior Manager in Tax Advisory Department
Tel.: +48 668 825 804
e-mail: awibig@deloitteCE.com

Mateusz Jopek
Manager in Tax Advisory Department
Tel.: +48 668 825 804
e-mail: mjopek@deloitteCE.com

Material modification of Article 15e of the CIT Act and APA regulations

A failure to file an APA motion by the end of 2019 shall result not only with disability to use the exemption under Article 15e regarding tax-deductibility of intangible assets for 2018, but also expenses incurred in 2019.

A new draft act on settlement of disputes regarding MAP and APA is published on the Government Legislation Center website.

The draft introduces material changes in regulations related to:

- disputes regarding Mutual Agreement Procedures (MAP);
- advance pricing agreements (APA);
- restrictions under Article 15e of the CIT Act regarding costs of intangible services.

Further, it introduces a cooperation agreement based on the horizontal monitoring concept, among others adopted in the Netherlands.

Despite former declarations, the draft does not include regulations regarding simplified advance pricing agreements (sAPA) aimed at an accelerated APA procedure, approving costs of services and licenses only for the purpose of exempting from the restriction under Article 15e of the CIT Act.

Below we present the selected elements of the draft that we consider the most interesting.

Amending Article 15e of the CIT Act

The draft act modifies the wording of Article 15e of the CIT Act, allowing the exemption of costs included in APA from the restriction in the basic protection period and in the year preceding the filing of the motion, provided **it is filed** by 31 December 2019.

Example

XYZ purchases intercompany services and licenses regarding trademark of substantial value. The modified APA protection under Tax Ordinance (Article 95 of the draft act) allows inclusion of the transaction performed since the beginning of the fiscal year. XYZ considers the filing of a motion for APA. Under Article 119 of the draft act, upon obtaining APA, ***ABC will be able to classify costs of intercompany services*** *and trademark related* ***licenses*** *incurred in 2018 and 2019* ***as tax deductible expenses****, exempted from the restrictions arising from Article 15e,* ***if the APA motion is filed by the end of 2019****.*

In line with the draft, regulations amending Article 15e of the CIT Act with regard to costs for 2018 and 2019 being classified as tax-deductible expenses is limited to APA motions filed by 31 December 2019.

Since as of 1 January 2020 Article 15e.16 of the CIT Act shall be deleted, motions filed in 2020 will allow exemption from the restrictions resulting from Article 15e solely in relation to costs incurred after 1 January 2020 (of course provided that an APA decision is issued).

Therefore, if an APA motion is filed in 2020, costs incurred in 2019 will not be exempted from the restriction under Article 15e of the CIT Act by the APA decision, regardless of its issue date.

Please note that regardless whether a taxpayer holds an APA or not, it is obliged to appropriately document the incurred expenses and prove its relation to income.

Advance pricing agreements (APA)

The draft act introduces a number of changes of key importance for the efficiency and user-friendliness of the APA procedure. One involves amending the provision that disallows the filing of an APA motion for transactions included in an inspection or tax proceedings. For long-lasting inspections regarding transactions to which the restriction of Article 15e of the CIT Act applies, many entities were unable to motion for an APA, and thus, in light of wording of that article, were unable to classify costs of intangible assets and licenses as tax deductible expenses, even if they pertained to the current period and if the inspection regarded e.g. year

2013. Under the draft, the APA decision cannot be issued for inspected transactions, commenced prior to the motion filing date, which as at that date are included in tax proceedings, inspection, tax and customs inspection or proceedings before an administrative court for any of two latest fiscal years preceding the fiscal year in which the motion was filed.

Cooperation agreement

The cooperation agreement is to ensure the taxpayer's compliance with tax law, transparency of commenced measures, as well as mutual trust and understanding between taxpayers and tax authorities, considering the nature of business operations performed.

The procedure applies to taxpayers with annual revenue of EUR 50 million+. Under the cooperation agreement, an entity may conclude a tax arrangement with the Head of National Fiscal Administration, among others regarding interpretation of tax regulations, transfer pricing, no reason to apply Article 119a.1 (GAAR) or the amount of CIT liability projected for the coming fiscal year,

Such arrangements shall allow exemption from the restriction under Article 15e with regard to purchased intangible services, the same as APA. Unlike the remaining provisions, the regulations regarding cooperation and arrangements shall come into effect on 1 July 2020.

The act determines the effective date of all regulations at 14 days of their publication date. The above regulations may be expected to come into effect soon after the end of the parliamentary summer break.

Contact details

Iva Georgijew
Partner in Tax Advisory Department
Tel.: +48 22 511 08 24
E-mail: igeorgijew@deloitteCE.com

Rafał Sadowski
Partner in Tax Advisory Department
Tel.: +48 22 511 09 65
E-mail: rsadowski@deloitteCE.com

Agnieszka Mitoraj
Partner in Tax Advisory Department
Tel.: +48 61 882 42 06
E-mail: amitoraj@deloittece.com

Agnieszka Walter
Partner Associate in Tax Advisory Department
Tel.: +48 32 508 03 12
E-mail: awalter@deloittece.com

Tomasz Adamski
Partner Associate in Tax Advisory Department
Tel.: +48 22 511 07 43
E-mail: tadamski@deloitteCE.com

Future of non-public joint stock companies Substantial changes in the code of commercial companies

On 19 July 2019 the Sejm passed an important amendment to the Code of Commercial Companies, now awaiting the sign-off by the President. Joint stock companies, in particular the non-public ones, so far operating as closed corporations with a small number of shareholders, may expect material changes.

The new regulations, as explained in the justification, are necessary since: "At present no one can ensure the exchange of tax information regarding holders of bearer shares since they cannot be identified".

The changes will be substantial enough to undermine the continued operation in the form of closed corporations, if shareholders do not plan an IPO, commencing share-based incentive schemes or commencing the few types of operations that do not require the legal form of a joint stock company.

At present non-public joint stock companies operate as a result of certain historical events (such as delisting) or regulations allowing anonymous shareholding structure. If registered shares were issued, only the Management Board knew the shareholders (if a book of shares was held at all), and for bearer shares, there was no tool in place allowing identification of shareholders. In practice, non-public joint stock companies often issued no share certificates and *in fact* did not much differ from limited liability companies.

The current amendment to the Code of Commercial Companies shall pose a material challenge for non-public joint stock companies and shall make them substantially differ from limited liability ones. **Most importantly, these companies will be obliged to dematerialize all shares, i.e. record them in the register of shareholders, kept for example by a brokerage house. The obligation to dematerialize will apply to both registered and bearer shares. All transactions on shares, both sales or pledging, shall be performed through the agency of a brokerage house. Further, as a rule, dividend shall be paid through a brokerage house, too.** Thus, the dematerialization shall increase both the security of trade and the related costs. The shares shall be traded, so to say, outside the company, which may result in certain practical issues. In particular, if the register of shareholders kept by a brokerage house includes an entry regarding someone who is not an actual shareholder, the purchase of shares from such a person shall be effective only if the buyer acts in good faith (Article 169 of the Civil Code). In this context, share trade limitations introduced in articles of association (e.g. the required approval of the company) gain additional importance.

Access to the register of shareholders, i.e. to each shareholder's data, will be provided to the company and its shareholders, and, as presented in the justification to the draft amendment, to state bodies, on the same terms as in the case of banking or broker secrets.

Another important change involves obliging a joint stock company and a limited joint-stock partnership to open a website with a place designated

for correspondence with shareholders, and to publish all announcements required by law on the website. **Thus, announcements previously published in Monitor Sądowy i Gospodarczy only shall be as a rule published on the corporate website, being additional encumbrance for companies, to be remembered about upon each change of management board composition or articles of association.** Consequences of a failure to make such an announcement are unclear.

As far as the effective date of these regulations is concerned, the amendment obliges management boards of joint stock companies to five times call shareholders to submit their share certificates. The first call should take place by 30 June 2020 at the latest. A failure to call is subject to a fine of up to PLN 20,000. No guidance is provided with regard to such a call if an entity did not issue share certificates at all, which is a fairly common practice, in particular with regard to registered shares. The existing share certificates shall expire as of 1 January 2021.

The issues indicated above do not exhaust the scope of the amendment, but allow a conclusion that non-public joint stock companies will become more formalized, with shareholders no longer anonymous.

The new regulations coming into effect will certainly necessitate the commencement of appropriate preparatory work, as well as amendments to articles of association. Further, at least some joint stock companies may decide to change their legal form - for example transform into limited liability ones, to make their operations cheaper and less formalized.

Contact details

Edyta Garlicka
Attorney at Law,
Partner, Deloitte Legal
Tel.: +48 691 980 974
E-mail: egarlicka@deloittece.com

Agata Jost
Attorney at Law,
Managing Associate, Deloitte Legal
Tel.: +48 32 508 03 39
E-mail: agjost@deloittece.com