Tax&Legal Highlights

Poland

Draft of a new Tax Ordinance

After over two years of works of the General Taxation Law Codification Committee, the Ministry of Economic Development and of Finance issued a draft of a new Tax Ordinance. The draft modifies the existing institutions and introduces a number of new solutions to the tax law.

New Tax Ordinance

On 23 October 2017 the Ministry of Economic Development and of Finance issued a draft of the new Tax Ordinance which is set to replace the existing legislation.

It is the effect of over two years of work of a team of tax experts from the General Taxation Law Codification Committee headed by Professor Leonard Etel. The new more extensive law will replace its over twenty-year-old and frequently amended predecessor.

Along with the draft of the new Ordinance, the Ministry of Economic Development and of Finance presented drafts of 42 implementing regulations and provisions. The implementation will involve amendment of over 140 other legal acts.

The draft will be first discussed within the Ministry and will be then subject to public consultation. Afterwards it will move through the legislative process — parliamentary committees, the Sejm and the Senate.

The new law is scheduled to be enacted on 1 January 2019.

Draft's assumptions
The Committee's main assumptions were to focus on:

- restoring the confidence in mutual relationships between the taxation authorities and taxpayers; and
- lowering the costs of tax proceedings (increasing the effectiveness of tax collection).

To this end, the existing institutions will be modified and brand new ones will be established. These include:

- summary proceedings;
- cooperation agreement made by the taxation authorities and the taxpayers of great economic importance;
- discussion of the tax consequences of transactions by the taxpayer and the taxation authorities;
- tax agreement comprising mutual arrangements and concessions concluded as part of tax proceedings between the taxation authorities and the taxpayer;
- referring the case examined in the tax proceedings to mediation;
- protection of reasonable expectations formed based on information on one's rights and duties provided by the taxation authorities.

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A watercraft not to be treated as a tax warehouse

Tax warehouses need to be in located in immovable property. According to the Supreme Administrative Court (NSA), the Excise Duty Act does not allow the possibility of running a tax warehouse under a movable formula (e.g. on a barge) - see: decision of 03 October 2017.

Disputed issue
The issue resolved by NSA concerns a taxpayer conducting business activity in the scope of trading in energy products (marine fuels) which are exempt from excise due to the intended use. The taxpayer uses barges (bunkering boats) in its operations.
As indicated by the taxpayer, bunkering boats are used for the purpose of transporting marine fuel to recipients. They are not self-propelled and need

to be moved by pusher-ships. During fuelling up, bunkering boats are berthed in a designated location.

The taxpayer's intention was to start the process of marking and adding dye to marine fuel in the bunkering boat under the excise-suspension procedure. Considering that in accordance with the excise duty law, this procedure is equivalent to manufacturing excise products and by the same token it can only be carried out in a tax warehouse, the taxpayer applied for an individual tax ruling to confirm the assertion that bunkering boats can be treated as a tax warehouse. The taxpayer's argumentation was that since bunkering boats are not self-propelled and are moved with the use of pusher-ships, they could be deemed amphibious containers/ warehouses, which in turn could be seen as a tax warehouse. In addition, as argued by the taxpayer, the Excise Duty Act that regulates the granting of permits to operate tax warehouses and the rules of their operation does not expressly provide that a tax warehouse needs to be immovable property. In the context of the warehouse's location, the regulations of the law only refer to 'places' and 'rooms'.

The Director of the Tax Chamber in Bydgoszcz, and then also the Provincial Administrative Court (WSA) in Gdańsk and NSA did not corroborate the taxpayer's standpoint on the matter.

Position of tax authorities and administrative courts

In the tax ruling decision the Director of the Tax Chamber in Bydgoszcz emphasised the special status of a tax warehouse in the tax law system. This special status is associated with the need to impose the appropriate level of control and monitoring. If a tax warehouse in the form of a bunkering boat is, for example, at sea, then it is not possible to exercise control and supervision on an ongoing basis. On the other hand, NSA focused in its deliberations on the notion of a 'room' as used in the excise duty regulations with reference to tax warehouses. In line with the argumentation used by NSA, the dictionary definition of the word: 'room' (i.e. a building or its separated part that has a specific purpose) implies that this word directly refers to unmoveable property. As a consequence, NSA indicates that the legislator does not provide for the possibility of operating a tax warehouse otherwise than from immovable property.

It needs to be pointed out that EU Directives do not prohibit the possibility of establishing tax warehouses on barges. According to the EU regulations, member states should individually decide what conditions need to be met in order for an entity to be able to operate a tax warehouse. For that reason other European countries, such as the UK or Denmark, permit establishment of a tax warehouse on a ship or a barge. However, in the opinion of NSA, this solution is inadmissible under the Polish legal regime.

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Ban on commercial activity on Sundays effective as from 01 January 2018

The Sejm standing subcommittee for labour market issues has accepted almost all modifications introduced by MPs to the citizen-initiated bill on restriction of commercial activity on Sundays.

On 12 October 2017 the standing subcommittee for labour market issues finished its work on the citizen-initiated bill concerning restriction of commercial activity on Sundays. Generally, almost all modifications proposed by MPs are now accepted, and the bill has been transferred for discussion to the Social Policy and Family Committee.

Certain other amendments were suggested during that subcommittee meeting (e.g. extension of the commercial ban to include cash&carry entities), but they were not discussed - the issues in question would be debated and voted on during the Social Policy and Family Committee's session.

What do we know about the ban?

The ban will take effect on **01 January 2018,** and it will apply to **24 Sundays per calendar year**. All outlets covered (retail, wholesale, etc.) **will be able to operate on the second and fourth Sunday** of each calendar month. The ban will also apply in respect of bank holidays, so if a bank holiday falls on 'a commercial Sunday', the ban will be applicable.

The bill introduces a separate regime concerning **24 December and Easter Saturday - commercial activity will be prohibited on those days after 2:00 PM**. As per the new regulations, employees will be entitled to compensation for reduced working time. It is uncertain whether that provision should be taken to mean that on such days the employer cannot schedule work in a reduced time until 2:00 PM so as not to bear the economic burden associated with the ban (by moving the hours not worked to a different day of the settlement period).

According to MPs, working on Sundays should be understood as working **over the period of 24 consecutive hours between 00:00 on Saturday and 00:00 on Sunday**. This provision is different from the original one which extended the ban until 6:00 on Monday. Restoring the provision to its original wording was advocated during the meeting of the subcommittee.

The ban will apply to trading and **trading-related activities** in points of sale (POS). The draft regulations provide that POS include shops, stores, wholesale outlets, departments stores, commercial centres, etc. As for now, we are unable to confirm whether distribution centres fall outside the scope of the ban or not, considering that the new version of the Act introduces a very general definition of trading/commerce and trading-related activities, and at the same time - a very specific definition of a point of sale.

In line with the new version of the bill:

- a point of sale (POS) is a unit where trading (commerce) **as well as trading-related activities** take place;
- trading (commerce) **is a sales process consisting in exchange of goods or products for money**;

- performance of trading-related activities means **performance of activities that are directly linked with trading, by an employee or a hired individual in a POS** and **performance of activities linked with storage and physical count of goods by an employee or a hired individual in a POS**.

The representatives of the commercial sector point out that the definitions introduced in the modifications proposed by MPs are inaccurate and need to be fine-tuned by the Social Policy and Family Committee.

The list of exceptions from the ban on Sunday trading and entrusting work on Sundays has been amended by removal of the spatial criteria based on which POS could be exempted. Under the current version of the Act, no norms (related to turnover, area, etc.) apply in certain respects, whereas in others, exemptions may be based on the prevailing business activity. The trading ban does not apply to POS if trading is carried out by the entrepreneur in line with Article 1.2 (i.e. the definition of an entrepreneur contained in the Act on freedom of economic activity), where the entrepreneur is a natural person who conducts trading **only in person and in its own name** (regardless of the area of the POS concerned).

The ban will apply to **entrusting employees or hired individuals with work** in trading and in trading-related activities, also free of charge. **An employee** in the meaning of the Act is an individual employed in a POS pursuant to an employment contract, or a temporary worker delegated to perform work in a POS. On the other hand, the bill defines **a hired individual** as a natural person not performing business activity, that provides work in a POS on the basis of a civil law contract, or an individual working based on such a contract and **delegated to work in a POS by a temporary work agency**. The Act does not refer to (we do not know whether it is intentional or not) the status of individuals employed by an employment agency and delegated to a POS under staff outsourcing.

Finally, the representatives of the National Labour Inspectorate are authorised to conduct **unexpected inspections** of POS any time, during the day or at night. The representative of the Inspectorate made it known in the course of the subcommittee meeting discussions that many more inspections will be conducted in commercial networks after 01 January 2018 to check whether the Sunday trading ban is adhered to.

The Act provides for fines to be imposed by the Inspectorate in the case of ban violations, **ranging from PLN 1,000 to 100,000**. The responsibility for breaching the ban will burden the individual who has defied the ban rather than the organization, and the fine amount will not be conditional upon the proceeds of the breaching POS. When adjudicating on the amount of the fine, the court will exclusively refer to the gravity and scale of the breach, which are not directly linked with the economic status of POS. The bill additionally includes regulations on the criminal liability in case of persistent breaches.

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Tax on shopping malls and offices

A bill tabled for discussion in the Sejm

The new commercial real estate tax announced several months ago (further called "CRET') is taking shape.

On 04 October 2017 *a draft act amending the Act on personal income tax, the Act on corporate income tax and the Act on lump-sum income tax on certain incomes obtained by natural persons* (further called "**the Draft Act**") was submitted to the Marshal of the Sejm. If the Draft Act is adopted in its current version, the tax burden on many entities operating on the real property market may increase significantly.
What do we know about this tax?

CRET will be charged on office and commercial buildings, such as shopping malls, independent stores and boutiques in the meaning of the Classification of Fixed Assets, if their initial value (not taking into account depreciation reductions) exceeds PLN 10,000,000. The excess of the initial value over the aforesaid threshold will constitute the tax base (example: an office building with the initial value of PLN 50,000,000 will be subject to taxation based on the amount of PLN 40,000,000). According to the current version of the draft Act, the tax rate is 0.035% of the tax base a month (0.42% a year).

Hence, referring to the example quoted above, CRET on the office building with the initial value of PLN 50,000,000 will amount to **PLN 168,000 a year.**

The rationale underlying CRET is fairly straightforward and as a rule, there are no exemptions safe for the following: exemption of fully depreciated property and property used for the taxpayer's own purposes. As a consequence, the new tax generally will not apply to production enterprises, because in line with the Draft Act, office facilities in production plants are not liable to tax, if they are not subleased. The tax should not apply to service delivering entities that operate from their own office or commercial facilities either.

Importantly, the Draft Act provides for the possibility to deduct CRET from the income tax calculated according to the general rules. In practical terms, it means that CRET should not - as a rule - burden the property, if its owners generate income subject to income taxes.

Problem with unoccupied property
The structure of CRET will adversely affect the owners of property that, for various reasons, generates losses (e.g. vacancies resulting from long- or short-term lack of lessees). In such situations the fixed costs of running business will increase, and, in addition to administrative expenses linked with the maintenance and real estate tax (approx. PLN 22 per sq.m of the building, regardless of whether occupied or not) owners of unleased buildings will have a new tax to pay. If we consider the real property market in Warsaw, we may come to a conclusion that such situations are far from rare. According to

estimates, approx. 14% of office space in Warsaw is not leased, which translates into several hundred thousand square meters of vacancies. Other Polish cities are in a similar situation.

CRET is likely to take effect as from **01 January 2018,** which does not leave us much prep time. Verification (from the perspective of the income tax legislation) of the initial value (i.e. the tax base) of buildings seems advisable. As regards unleased buildings, it may also be worthwhile to check the real estate tax settlements, to determine whether there are any overpayments leading to inflated costs of property maintenance.

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The Commission of Public Finance has finished works on the draft bill on amending the Personal Income Tax Law. Currently, the draft legislation is still under review of the Parliament.

Compared to the previous version of the draft, the Commission has introduced important modifications as regards the application of 50% deductible cost of earnings to remuneration of employees transferring copyrights to works executed within their employment duties to their employer, as well as to taxation of employee incentive share plans.

Application of 50% deductible cost of earnings

As regards remuneration of employees creating works within their employment, the above-mentioned amended provisions introduced an increased double limit for application of the 50% cost of earnings, as announced previously. As of January 2018, individuals transferring copyrights to their employers will be able to decrease their revenue by a maximum amount of PLN 85,528 per annum (as compared to the currently binding limit of PLN 42,764).

Nevertheless, the modifications introduced by the Commission of Public Finance have also introduced a limitation as regards the types of business activity income from which can be decreased by the 50% cost of earnings. According to the new version of the draft, as of 1 January 2018, the deduction will be applicable solely to income received from the following types of activities:

1) creative work in the field of architecture, interior architecture, landscape architecture, city planning, literature, fine arts, music, photography, audio-visual arts, computer programs, choreography, making artistic instruments, folk art, and journalism;
2) research & development and academic / educational activity;
3) artistic activity in the field of acting & performing, directing for theatre / entertainment purposes, dancing, circus art, conducting, singing, playing instruments, costume design, scenography;
4) audio-visual production activity of directors, screenplay writers, camera and sign operators, editors, stuntmen;
5) journalistic writing.

Incentive share plans

The new provisions provide for a wider group of companies shares of which can be granted to employees on the basis of incentive share plans with a possibility of deferring the moment of taxation until sale. In the previous draft bill, the tax deferral applied solely to companies seated within EU / EEA (same as it is now). After the amendments, the tax deferral should also apply to companies with their seat in all countries, which Poland has concluded Double Tax Treaties with.

In case of such incentive share plans, if they meet conditions provided in the provisions, the taxation should be deferred until the moment of sale of shares acquired under those plans (i.e. they are taxed as capital gains at 19%).

Further steps

The proposed modifications, if they are confirmed and passed as a law, may have a big impact for entities, which apply the above-mentioned solutions. In case of companies using the 50% cost of earnings deduction to remuneration of their employees due for transfer of copyrights, it is recommended that they analyse in detail to what extent the proposed amendments are going to impact their remuneration structure and the possibility of applying the 50% cost of earnings. As for entities that have incentive share plans in place, they also need to analyse the possible consequences of the new provisions with respect to them as tax remitters, as well as to their employees participating in those plans.

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