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REal Knowledge Newsletter

KSeF for the accountants and not only?

The forthcoming obligations concerning electronic invoices (KSeF - National System of E-invoices), which will be applicable in general to all B2B transactions starting on 1 July 2024, have also profound impact on operational cycles of an organization, reaching beyond a sales process, with particular consideration of a P2P process, which involves receiving and processing of purchase documents to record them in the accounting books and prepare for payment. The changes will affect many different operational areas of a company: from the procurement, sales, payments to accounting processes. Businesses operating in the real estate sector, where some of these processes are performed by property managers will face additional challenge as to working out cooperation channels between those teams and the accounting team operating either in-house or through a professional external provider (outsourcing).

What will change?

Firstly, KSeF will change the way invoices are issued, received and processed. Companies will need to adjust the invoicing process to specific technical standards (which will entail changes in the data format and content) and also ensure safe and efficient document transmission. Not only the accounting systems will need to be adjusted in the organization to new requirements but also the sales systems and documentation flow will have to be updated. Many software suppliers, who offer sales recording, work on implementing the required changes to enable document transmission to the Ministry of Finance.

In the P2P process, businesses must ensure that they have access to the KSeF portal (a centralised platform managed by the Ministry of Finance) via secure authentication methods and are able to electronically search and download invoices and further integrate them (i.e. extract data from electronic invoices) into operational processes for verification, approval, entry into financial systems and their payment. It's worth emphasizing that additional actions may be required, or disclosures be made related to the implementation of requirements only for Polish purposes, i.e.:

- when making bank transfers referencing to e-invoices, an invoice's unique identification number assigned in KSeF will have to be given in a transfer order;
- the KSeF platform does not allow for enclosing attachments to an invoice, therefore additional information about a transaction, (which is not included in XML file) must be transferred by other communication channels;
- adequate connection of two flows related to RCP expenses (i.e. invoices for expenses incurred during business trips).

Due to the fact that entities operating in the real estate sector are usually part of large international groups, any interference with their IT systems to fulfil the listed local obligations may prove a significant challenge and a costly undertaking.

KSeF not for everyone...

The KSeF provisions will not apply directly to foreign entities, which don't have fixed establishment in Poland. These entities will not be obliged to issue sales invoices through KSeF; however, one cannot forget that these changes will affect purchase invoices (issued through KSeF) received by these entities from Polish suppliers. KSeF generates a unique identification number consisting of 35 characters (KSeF-ID) for each invoice issued in this system. In this respect, it is worth to conduct in-depth analysis whether the below obligation would require foreign entities to take any actions, as:

- KSeF-ID in Polish purchase invoices will need to be included in the title of payment for these invoices, and
- in accordance with the latest draft of legislation, KSeF-ID will have to be included in the Polish VAT reporting (JPK_V7 scheme will be extended to include the field for so-called KSeF identification number)

What will be the benefits?

In many cases, the tool used in companies may help to control if a complete set of purchase invoices is received as well as to eliminate the possibility to lose or destroy a document. Additional advantage of KSeF is that it may be used as an archive, in which documents may be stored for 10 years.

Considering the above, it's clear to see that large companies are adjusting to KSeF requirements by implementing their own solutions integrated with both the operational part of business and financial and accounting systems. The main purpose of these solution is to connect and exchange documents with the KSeF platform and at the same time to catalogue the processes existing in the company. However, in case of entities with limited operations in Poland, an efficient solution may be to use fully outsourced services. It would mean that organisations could skip adjusting the group systems to only Polish local requirements, which would require significant implementation effort, not to mention maintenance work involving the continuous monitoring and updating/upgrading of the system. Furthermore, engaging additional human resources by companies, with finance, tax and IT capabilities in the activities related to KSeF would not be required.

The KSeF implementation process is comprehensive, therefore we suggest that you already now start taking adequate measures to prepare properly and enter the world of e-invoices smoothly, especially the organisations where several teams are engaged in daily tasks related to invoice processing. The obligation to issue structured invoices can also be a good opportunity to develop a company technologically, as well as to streamline and expedite accounting or tax reporting processes.

We invite you to contact Deloitte experts who would be happy to provide comprehensive technological and professional support for KSeF implementation. Businesses that do not opt for an in-house solution, may use our experts' help to design an effective process where different service providers perform various activities related to KSeF and to fulfil e-invoicing obligations properly.

If you need more information, you are welcome to contact the authors of the article:

Sylwia Toczyska
Partner Associate, Head of Real Estate in Business Process Solutions
Deloitte Tax & Legal
Email: stoczyska@deloittece.com

Przemysław Skorupa
Tax Director
Deloitte Tax & Legal
Email: pskorupa@deloittece.com

Marta Klincewicz
Senior Manager
Deloitte Tax & Legal
Email: mklincewicz@deloittece.com

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New draft explanations concerning WHT of 25 September 2023 - practical insights

When analysing the content of the draft explanations issued on 25 September 2023 **(Explanations, Draft)** on withholding tax **(WHT),** it is clear to see first and foremost their theoretical nature and lack of possibility of transmuting a significant part of topics raised there into specific cases within business reality. We can only hope that the final version of the Explanations, supplemented with the conclusions from the public consultations, will allow taxpayers to make business decisions with greater certainty regarding future tax burdens and to project returns on their investments in a predictable manner - as this is probably what market participants expect from this document in the first place.

To summarise the content of the Explanations, they are primarily concerned with the following WHT issues:

a. the status of a beneficial owner;
b. the "look-through approach";
c. the application of the obligation to tax a recipient on all their income at the place where it is earned (and no exemption on all their income regardless of where it is earned) for the application of withholding tax exemptions under Polish law (i.e. Articles 21(3) and 22(4) of the CIT Act).

Status of a beneficial owner of a payment

As regards the status of a beneficial owner, the Explanations:

1. Emphasise that the definition of a beneficial owner regulated in the CIT/PIT Act should be applied not only for the purposes of WHT exemptions regulated in the CIT/PIT Act, but also for the purposes of double taxation treaties (DTT), thus going against the approach indicating the autonomous nature of DTT;
2. Provide the exemplary criteria that a recipient entity should meet in order not to be classified as an "income administrator", which, in the opinion of tax authorities, is not entitled to preferential withholding tax rules.

The criteria analysed indicating the status of "income administrator" relate in particular to the following: the extent of the recipient's control over the payments, the actual business functions performed by the recipient, the structure within which the recipient operates - including their tax residence (particularly if the recipient's tax residence is in a country that is a "typical" holding jurisdiction).

3. Indicate cases where the recipient will not be the beneficial owner of a payment, i.e.: informal dividend policy regarding the dividend received from the recipient, the possibility of the recipient's shareholder to enforce the distribution of the payment received.
4. Indicate that, irrespective of the status of the beneficial owner, WHT preferences will not be granted if the structure under which dividends / interest / royalties are paid can be considered artificial (in particular if there is no viable business case for it) or even partly artificial.

Look-through approach mechanism - i.e. tax "bypassing" of intermediary entities in practice

With regard to the look-through approach mechanism (whereby, in principle, an entity other than the direct recipient may be treated as the recipient of a given payment for WHT purposes), the Draft indicates that:

1. Tax authorities are not obliged to apply the look-through approach - as it is not justified either by the provisions of the CIT /PIT Act or by the provisions of the Tax Ordinance. Importantly, our experience shows that, with the increasing requirements concerning the status of beneficial owner, this mechanism has been increasingly used in practice by taxpayers as well as by tax authorities;
2. It is possible to apply this concept in cases where it does not give additional preference to the WHT rates applied and is not used within structures that may be considered "artificial".

Criterion of taxation of a payment recipient

With regard to the widely commented criterion of taxation of a recipient as a condition for WHT exemption under the CIT/PIT Act, the Explanations indicate that:

1. Effective taxation in respect of dividends is to be understood as the absence of a subject-based exemption for a payment recipient;
2. Whereas, with regard to interest, both the absence of a subject-based exemption and the taxation of a payment itself should be taken into account, including the non-deduction of the received income by hypothetical costs and lack of possibility of obtaining a refund of tax charged on that income or of crediting such tax against other tax.

How to manage WHT topics in the light of the Explanations Draft?

In our view, the Explanations may impact the practice of tax authorities concerning WHT, thus, it is worth considering whether to modify a strategy taking into account their content. We would be happy to share our thoughts on this with you.

If you need more information, you are welcome to contact the authors of the article:

Maciej Mucha
Partner Associate
Deloitte Tax
Email: mamucha@deloittece.com

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Tax pitfalls in PRS sector

We are watching closely the growing interest of investors in the Private Rented Sector (PRS). At the same time we would like to point to the fact that when planning a PRS investment, its tax implications should be considered in advance because tax burdens may significantly impact the profitability of such investments. We are presenting below selected tax issues, which should be taken into account when planning an investment in the PRS sector. When drafting this list, we've focused primarily on matters which differentiate a PRS investment from other standard real estate investments.

When CLAT at 6% rate

As of 1 January 2024, amendments to the act on tax on civil law transactions (hereinafter: CLAT) will come into force, according to which, the purchase by the same buyer of **at least six residential units** or shares in such units, constituting separate properties in one or several buildings erected on a single land property **subject to value added tax,** will be subject to a 6% tax rate on the sale agreement for the sixth and each subsequent such unit in that building or buildings or a share thereof.

It should be noted that the legislator introduced in this new regulation an exception from the existing rule, according to which, transactions subject to VAT are not subject to CLAT.

As announced, the aim of these changes is to prevent the institutional investors from buying out flats on a large scale. However, still in accordance with the proposed provisions, CLAT at a 6% rate should not be applied to transactions for the acquisition of entire residential buildings, companies which hold PRS assets, or forward funding investments.

Acquiring a ready PRS project and appropriate VAT rate

When determining the VAT rate applicable to a given building delivery, it should be noted that what decides about the appropriate VAT rate is the classification of a building to the relevant group based on the Polish Classification of Types of Constructions (PKOB).

The 8% tax rate may be applied, among others, to the delivery of a building, construction, renovation, modernisation, thermo-modernisation, remodelling or maintenance works for structures, or parts thereof included in the social housing programme.

The social housing program includes, among others, single-family residential buildings or residential units up to specified area (300 m2 and 150 m2 respectively) as well as residential buildings (classified in the Chapter 11 of PKOB) and parts thereof - excluding commercial units. Accordingly, the sale of buildings or residential units meeting the above definition will be subject to the 8% VAT rate.

Which VAT rate for provision of basic PRS services

VAT taxation applicable to services, which will be provided using the acquired/constructed real property may significantly impact the profitability of a given PRS project. It is so because it has a direct impact on the investor's ability to recover input VAT on the purchase of real property, construction services or other services and goods in connection with the conducted business activity.

At the same time, the determination of the appropriate VAT rate (VAT exemption, 8% or 23% rate) can be affected by several factors determining the nature of services provided. Indeed, it should be noted that renting a residential property for residential purposes is, as a rule, subject to VAT exemption (with certain exceptions as regards the purchaser of a service), while the provision of accommodation services classified in Section 55 of the Polish Classification of Goods and Services (PKWiU) is subject to the 8% VAT rate. Therefore it is crucial to classify the provided services correctly.

If there is any doubt with regard to a VAT rate to be applied, this may be confirmed by obtaining an **individual tax ruling and/or binding VAT rate information** (a type of procedure will depend on a specific situation). The best would be to confirm the appropriate VAT rate for offered services by obtaining the above-mentioned legal instruments by an investor before the services are provided.

Impact of the rate applied to a PRS basic service on the right to deduct VAT on costs incurred

As a general rule, a VAT taxpayer may deduct input tax to the extent that the goods and services purchased are related to activities subject to VAT (such a right is not available in connection with VAT-exempt activities).

Therefore, as mentioned above, the application of the correct VAT rate for services provided (23%, 8%, or VAT exemption) will affect the deductibility of VAT incurred on the purchase or construction of an investment. Accordingly, the impact of VAT on the profitability of private rented business should be taken into account from the start when developing a financial model for investing in the PRS market.

Where the services provided are subject to VAT, the input tax on the purchase or construction of a building should in principle be recoverable. However, when the services provided are exempt from VAT, then, as a general rule, it is not possible to recover input VAT arising from invoices issued by the seller of a property or suppliers of other goods and services.

It is important to note, however, that **non-deductible input VAT may be tax -deductible cost for CIT purposes for an investor providing rental services classified as VAT-exempt.**

Tax depreciation of residential buildings

As of 1 January 2023, a total exclusion of tax depreciation of residential buildings took effect.

In such a situation, it is particularly important to correctly classify and separate fixed assets at the stage of an investment commissioning or at the time of acquiring an investment through an asset deal, bearing in mind that the exclusion of tax depreciation does not apply to structures or equipment which are fixed assets separate from the building.

It is worth mentioning at this point that the division of buildings into residential and non-residential in the Classification of Fixed Assets is based on the Polish Classification of Types of Constructions (PKOB), and buildings with at least half of their total floor area used for residential purposes are classified as residential buildings. Otherwise, the building is classified as non-residential.

However, if the intended purpose of a building has changed, it is possible to convert a residential building into a non-residential building based on adaptations carried out. In such a case, if the intended purpose of a building has changed as a result of these adaptations, a tax depreciation rate applicable to non-residential buildings may apply for tax purposes following such a change.

Tax on revenue from buildings (so-called minimum tax)

Income tax on revenue from a fixed asset being a building which is owned or co-owned by a taxpayer, **which has been given in whole or in part for use based on a lease, rental or other contract of similar nature** and is located in the territory of the Republic of Poland is 0.42% of the tax base (total revenue from individual buildings less PLN 10 million) on an annual basis.

Depending on the line of business, important issue in determining if a building will be subject to the tax on revenue from buildings is whether the contracts that will be entered into with customers constitute a **lease, rental or other contract of a similar nature.** In particular, the open nature of the reference to "contracts of a similar nature" raises questions of interpretation. This wording of the regulation raises concerns about the application of an extensive interpretation, whereby contracts that have few features in common with a lease or rental contract may be considered to be similar to them and thus buildings used on the basis of such contracts would be subject to the building revenue tax.

The practice of tax authorities and jurisprudence in this matter is still evolving, but the recent judgment of the Supreme Administrative Court in this regard should be treated as favourable. In the ruling of 4 July 2023 (ref. II FSK 71/21), the Supreme Administrative Court ruled that a hotel contract is not a contract of a similar nature to a lease or rental, and therefore the tax on revenue from buildings does not apply in such a case.

Real property tax - what rates to apply

The maximum rates of real property tax that will apply in 2024 have increased once again.

Although large cities, where the PRS market is predominantly present in Poland, may apply by way of a resolution the lower rates of real property tax than those indicated as bound rates in the Act on local taxes and levies, they most often apply the maximum rates in practice.

Increasing real property tax burdens from year to year are a major challenge for the Polish real property market, including the growing PRS sector. Although the cost of real property tax is often passed on economically to a tenant, in effect, as it affects the cost of the overall service, its reduction improves the competitiveness of offering, so we should not underestimate its impact on the PRS investment model.

There is a clear trend for local tax authorities to seek to tax properties rented for residential purposes at the highest real property tax rate associated with conducting the business activity. However, this trend is rather controversial.

Indeed, according to the literal wording of the provision, the concept of "buildings connected with conducting business activity" has a broader meaning than the concept of "buildings occupied for conducting business activity". Furthermore, in the context of the Act on local taxes and levies, the position according to which **residential buildings rented for residential purposes** are only connected with conducting business activity and not directly occupied for conducting business activity (due to fulfilling the residential purpose) seems to be more supported by their literal wording, which should, in principle, allow the application of a lower property tax rate, i.e. the one envisaged for residential buildings. This position has recently been upheld in a favourable judgment of the Supreme Administrative Court of 12 July 2023 (ref. III FSK 250/23), in which the Supreme Administrative Court ruled that the property tax rate provided for buildings used for business activities cannot be applied to a building or residential units in which residential needs are satisfied on a permanent basis.

If you need more information, you are welcome to contact the author of the article:

Maciej Mucha
Partner Associate
Deloitte Tax
Email: mamucha@deloittece.com

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