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Poland ratifies amending protocols to double taxation agreements (DTA) with the Netherlands and Malta

The Polish President ratified the amending protocols to the DTA with Malta (on November 15, 2021) and with the Netherlands (on November 22, 2021). Both protocols are aimed at combating tax base erosion.

The key amendments to the treaty between Poland and Malta include:

1. dividends (as a rule subject to a 10-percent withholding tax rate) to also include income from redemption of units/certificates in an investment fund or own shares in a company,

2. WHT rate on interest to be reduced from 5 to 4 percent,

3. payments for technical services (managerial or consultancy services) to be subject to a 5-percent WHT (like royalties),

4. extension of the real estate-rich company clause —taxing right to be extended to cover gains derived from the alienation of shares or comparable interests, such as interests in a partnership or trust, or certificates or participating units of an investment fund, if at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50 percent of their value directly or indirectly from immovable property,

5. directors' fees and other similar payments to be taxed only in the country of such director's tax residency,

6. credit method to replace exemption method regarding all incomes of Polish residents,

7. a new article incorporating the principal purpose test (PPT) — a benefit under the DTA not to be granted, if it is reasonable to conclude that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit (unless it is established that granting that benefit would be in accordance with the object and purposes of the relevant provisions of the DTA).

The most important amendments provided for by the protocol between Poland and the Netherlands are:

1. a real estate-rich company clause provided for in the protocol introduces taxation of gains derived by a Dutch tax resident from sale (or other disposal) of shares in a company (or comparable interests) if, at any time during the 365 days preceding the disposal, these shares derived more than 75 percent of their value directly or indirectly from immovable property located in Poland (indirect shareholding should also be considered in this context). This amendment is particularly important considering that Dutch entities are often used to structure real estate investments in Poland,

2. introduction of a transparent entity clause,

3. introduction of the definition of a recognized pension fund to be subject to a 0-percent WHT on dividends and interest,

4. dividends (as a rule subject to a 15-percent withholding tax rate) to include also income received in connection with distribution of certificates or participating units of an investment fund, and a purchase of own shares by a company,

5. introduction of a principal purpose test (PPT) — a general anti-avoidance provision,

6. changes related to a permanent establishment and preparatory or auxiliary activity exemptions and a permanent establishment triggered by means of a dependent agent.

Both protocols will apply to income earned starting from the first day of January of the year following the date when the protocol comes into force. This is likely to be January 2023.

Tax on shifted profits

The amendment of the CIT Act introduces a new 19-percent tax on profit shifting (formally it is an element of the corporate income tax).

The tax will be charged and paid annually (starting from the tax for 2022 to be paid by March 31, 2023) by Polish tax-resident companies (and some partnerships), if significant costs are incurred for the benefit of a related party, and the related party is preferentially taxed (14.25% or less) and "shifts those costs" further. The Polish Ministry of Finance indicated Double Irish or Dutch Sandwich as the taxable arrangements which should be targeted by the new tax.

To be precise, the following conditions should be met jointly for the tax to be due on costs incurred by a Polish tax resident (a service recipient) for the benefit of a related party (a service provider):

1. income of the related party (the service provider) is effectively taxed at a rate of 14.25% or less, and

2. the related party (the service provider) is:

a. either from a non-EU/non-EEA state, or

b. is established in an EU/EEA country, but does not have significant economic activity there, and

3. the costs are incurred in connection with, inter alia, consultancy, management, control, royalties, financing, transfer of functions, assets or risks — and those items (costs of the service recipient and revenues of the related party/the service provider) are:

a. distributed as dividends, or

b. constitute tax deductible costs for the service provider (because the service provider itself purchases these services from another entity), and

4. the costs represent at least 50 percent of the service provider's taxable revenue, and

5. after adding up similar costs incurred also for the benefit of unrelated parties, the costs represent at least 3 percent of the total tax costs of the Polish taxpayer (the service recipient).

The tax base is the amount of the costs incurred (see point 3). The tax rate is 19 percent. The tax can deducted by withholding taxes collected upon the same payments.

The tax on shifted profits is charged regardless of one's CIT position (it is due even if a company incurs a tax loss).

We recommend that you analyse your structure to assess the potential impact of the new tax on your tax liabilities.

The Polish Supreme Administrative Court: tax authorities to interpret mandatory disclosure rules (MDR)

The rules regarding reporting taxable arrangements (implementing the sixth EU directive on administrative cooperation, EU Directive 2018/822, commonly referred to as DAC6) are complicated and subject to various interpretations. In the meantime, Polish tax authorities have been consistently refusing to explain MDR by means of individual tax rulings, claiming that taxable arrangements do not refer to tax obligations per se, so tax rulings do not apply to them.

The Polish Super Administrative Court ruled on December 8, 2021 (case no. III FSK 4548/21) that Polish tax authorities must issue individual tax rulings on provisions regarding taxable arrangements (MDR/DAC6). Now the authorities are obliged to issue their first individual tax rulings which can help taxpayers to comply with MDR.

Please note that in Poland penalties for non-compliance with taxable scheme regulations are very severe.
We recommend that you analyse your tax position to mitigate the tax risk.

Contact us

Jakub Żak
Partner
Tax Advisory Department
e-mail: jazak@deloitteCE.com
tel: +48 513 136 220

Agnieszka Ostrowska
PartnerAssociate
Tax Advisory Department
e-mail: aostrowska@deloitteCE.com
tel: +48 604 949 986

Przemysław Skorupa
Director
Tax Advisory Department
e-mail: pskorupa@deloitteCE.com
tel: +48 502 788 720

Paweł Skorłutowski
Senior Manager
Tax Advisory Department
e-mail: pskorlutowski@deloitteCE.com
tel: +48 734 166 431

Przemysław Borowiec
Senior Manager
Tax Advisory Department
e-mail: pborowiec@deloitteCE.com
tel: +48 664 718 664