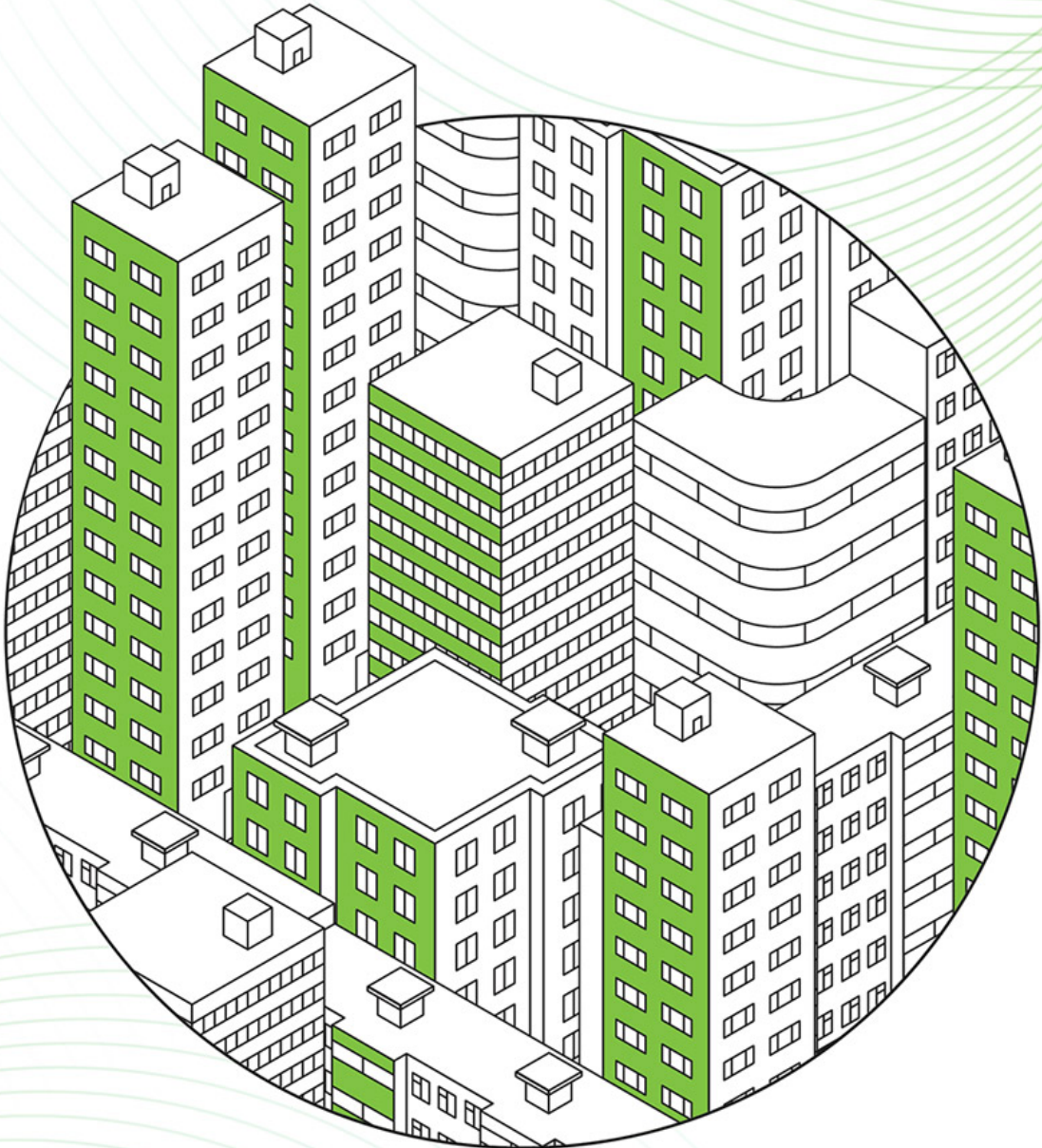


Deloitte.
Deloitte.
Deloitte.



13th Edition of REal Knowledge
Newsletter

Deloitte.
Deloitte.

Withholding tax (WHT): has there been a revolution in practice applied by tax authorities and administrative courts with regard to opinions on the preferential treatment?

As a recollection – since 2022, a new WHT collection mechanism (**pay&refund**) has been introduced, under which the preferential WHT treatment (based both on the Polish CIT Act as well as applicable double tax treaties) for the so-called passive payments (dividends, interest, license fees and intangible services fees -

among other payments) in excess of PLN 2 million during a given year may be relied on provided that:

1. the remitter (or taxpayer) obtains a tax authority clearance opinion confirming the applicability of the preferential WHT treatment

2. the taxpayer files-in a special WHT statement (**WHT Statement**) with the tax authority (which involves a risk of imposing a material penal fiscal sanction against its signatories).

Motions for an opinion regarding the preferential treatment – current practice

A practice has been observed so far where for the purpose of issuing the opinions on the preferential treatment ("**WHT Clearance**") both – the tax authorities and administrative courts focused primarily on the analysis of the status of the beneficial owner of the payment recipient. In particular, it was confirmed whether the payment recipient:

1. actually "automatically" transfers the received payments to other entities;
2. has sufficient resources (such as employees, bank account, office and other assets etc.) to carry out independent business activity within the state of its residence, i.e. if the payments recipient has the so-called "business substance".

Nevertheless, recent judgements of the Voivodship Administrative Court (**VAC**) in Lublin as well as approach of the tax authorities in the course of ongoing procedures for the purpose of issuing WHT Clearance has now expanded onto additional aspects of WHT exemption reliance.

Judgements of VAC in Lublin – is this a new jurisprudence trend?

At the turn of 2022 and 2023, within its judgements, VAC in Lublin begun referring to the judgement of the European Court of Justice of no. C-448/15 dated 8 March 2017 (regarding a background where the entire income of the payments recipient was taxed with 0% rate).

As a result, a jurisprudence line of VAC has emerged with regard to dividend and interest payments, under which:

1. **firstly**, the legal and technical condition necessary to allow for the exemption of dividend / interest payment from WHT under the CIT Act must be satisfied, i.e. **The recipient does not rely on an exemption from income tax on its worldwide income (wherever it arises)** - it is satisfied **only when the recipient pays income tax within its country of residence**. In order for the condition to be met the tax must actually be charged on the payment recipient. Up to now,

this condition has been understood as a lack of full tax exemption relied on by the payment recipient (e.g. as available to open-end investment funds).

2. **secondly**, VAC seems to suggest that **tax exemption of received dividend / interest in the payment recipient's state of residence** with no occurrence of other CIT-taxable operations **may disallow to rely on a WHT exemption**.

It should be pointed out that in course of pending proceedings regarding the WHT Clearance issue, the tax authorities begin to verify whether the dividend / interest to be covered with a WHT Clearance is subject to tax in the payment recipient's state of residence.

As an example, the above-described line has been demonstrated in the following judgements: no. I SA/Lu 100/23 dated

05.04.2023; no. I SA/Lu 136/23 dated 05.04.2023; no. I SA/Lu 279/22 dated 28.10.2022; no. I SA/Lu 316/22 dated 21.09.2022.

It should be pointed out that the above judgements have not been issued based on backgrounds where:

1. dividend / interest was tax-exempt in the payment recipient's state, however
2. the payment recipient paid effectively income tax from other titles / streams.

Furthermore, Lublin VAC judgements do not seem to refer directly to such backgrounds.

What these judgments mean in practice and what measures should be undertaken?

Taking the above judgments and their arguable claims into consideration, prior to submitting a motion for a WHT Clearance (or before the WHT Clearance is issued) or prior to signing a WHT Statement, it should be verified whether

these may affect the tax treatment of interest / dividend payments and assess possible risk related to WHT settlement.

Feel free to contact us to discuss shared experiences regarding WHT.

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