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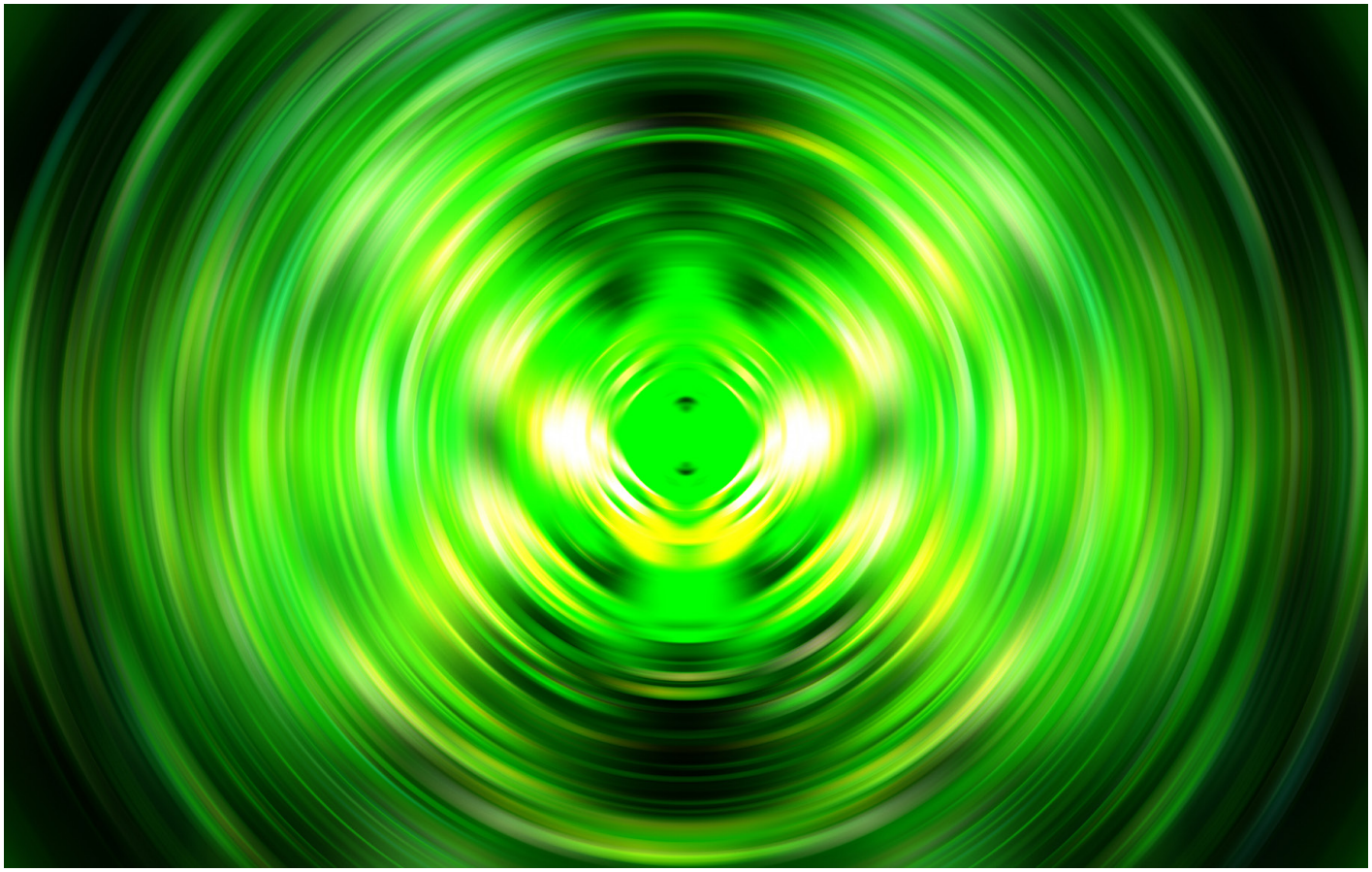


# Deloitte Poland Tax News for Financial Institutions | August 2020

Summer review of tax controversies: Polish tax authorities and court rulings on taxation of financial institutions

### 20% WHT on insurance or reinsurance premiums

Under the source rule Poland has the right to charge tax on certain payments transferred by Polish entities to foreign tax residents. Therefore, interest, dividends, royalties or consideration for some intangible services (e.g. advisory, control, management, accounting, legal, advertising, guarantee or surety services) paid to foreign tax residents are subject to 19% or 20% withholding tax (WHT) in Poland. However, a lower (e.g. 5% or 10%) or no WHT rate (0%) should be collected if provided for in a local regulation or in a double tax treaty and a payment recipient files its tax residency certificate (to prove its tax residency in a specific jurisdiction).

Polish taxpayers, tax authorities and courts cannot reach an agreement, though, on whether insurance or reinsurance premiums paid to foreign insurers or reinsurers are subject to 20% WHT in Poland as a remuneration for a guarantee-like service.

Most of double tax treaties concluded by Poland treat premiums as business profits and as long as a beneficial owner of such premiums does not have a permanent establishment in Poland, no WHT is due in Poland (however, the rule does not apply to the double tax treaty concluded between Poland and Malta). Still, for a company to benefit from a double tax treaty, it must meet certain formal requirements (e.g. hold a valid tax residency certificate, identify beneficial owners of payments, etc.). In practice, therefore, it is crucial to determine whether the Polish WHT regime includes premiums, especially reinsurance ones, as many reinsurers are located in tax havens or in territories not covered by double tax treaties concluded by Poland (so no double tax relief can be applied).

In individual tax rulings issued to Polish taxpayers (mainly to the policyholders that pay insurance premiums abroad) Polish tax authorities claim that an insurance policy should be treated as a service similar to a guarantee, so unless all requirements to benefit from a double tax treaty are met, 20% WHT should be collected by a Polish tax remitter and paid to a tax office. Polish taxpayers do not agree with that standpoint and appeal against it to Polish courts.

Unfortunately, Polish administrative courts issue inconsistent verdicts in this respect. Some find similarities between a guarantee and an insurance, and accept the tax authorities' decisions to charge 20% WHT on premiums (e.g. the verdict of the Administrative Court in Poznań of August 7, 2020, case no. I SA/Po 87/20).

On the other hand, certain court rulings (probably a majority of them) support the view that differences between a guarantee and an insurance are so distinctive and crucial that no tax should be collected on payments of insurance or reinsurance premiums regardless of the tax residency of an insurer / a reinsurer or lack of its tax residency certificate. The decision issued by the Administrative Court in Bydgoszcz on August 4, 2020 (case no. I SA/Bd 249/20) illustrates this view.

To solve the issue we would probably need to wait for a verdict of the Polish Supreme Administrative Court.

### Limitation on tax-deductible costs incurred by shared service centres

Since the beginning of 2018, the Polish CIT Law has imposed significant limitations on tax deductibility of "intangible-related expenses" applying to certain types of intangible services (i.a. advisory, market research, marketing and advertisement, management and control, data processing, insurance, guarantees and similar, copyright, license and know-how fees) purchased from related parties and tax haven residents.

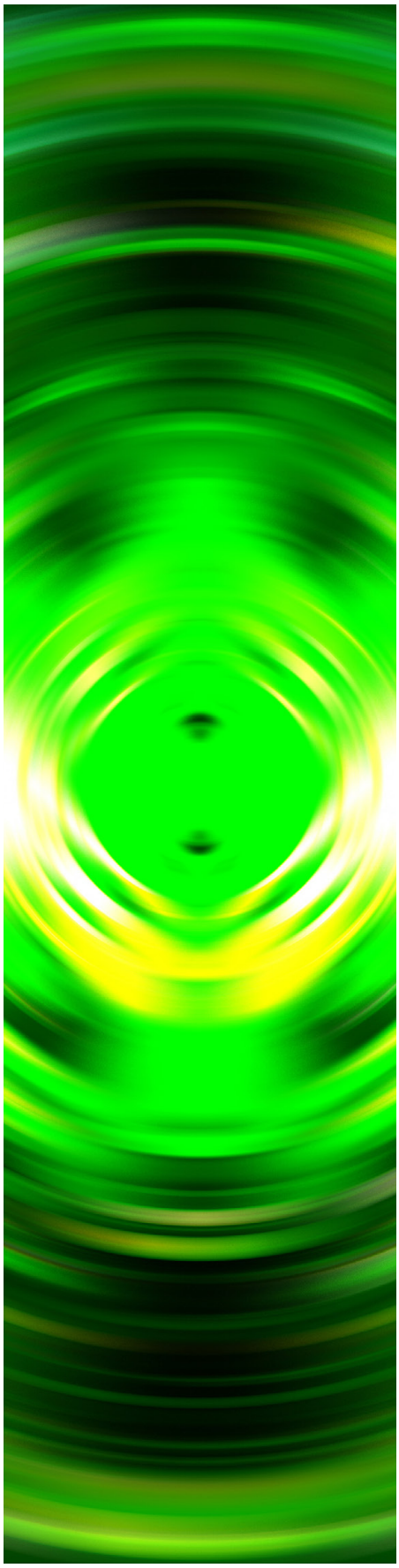
As a rule, such expenses are deductible up to the total of PLN 3m + 5% * taxable income (excluding interest and amortization / depreciation, the so-called tax-EBITDA), per annum. Expenses exceeding the limit should be considered as non-deductible. This requirement (imposed by Article 15e) is a practical issue for multinational companies that outsource functions within a capital group that includes shared service centres (SSC).

Certain individual tax rulings issued by Polish tax authorities indicate that shared service centres may qualify for the limitation even if costs incurred by them are recharged to service recipients under the cost-plus transfer pricing method. According to tax authorities, the relation between costs and revenues is too vague to exclude application of Article 15e.

To taxpayers' benefit, Polish administrative courts deny the position of tax authorities. For example, the Administrative Court in Kraków in the verdict of August 13, 2020 (case no. I SA/Kr 392/20) clearly states that the nature of a shared service centre implies is the existence of a direct link between costs and revenues, so that Article 15e is excluded based on the exception referred to in Article 15e.11.1.

This ruling (as does the verdict of the Supreme Administrative Court of January 23, 2020, case no. II FSK 1750/19) significantly limits the practical application of Article 15e.

Let's hope that this trend will continue in future.



### VAT exemption of capital market services

Implementation of VAT Directive 2006/112 in Poland exempts transactions concerning shares or securities (including negotiation) from VAT (with some exceptions, such as advisory or management services that are charged with 23% output VAT).

Nevertheless, we have recently identified individual tax rulings issued by Polish tax authorities stating that certain capital market services cannot be VAT-exempted. Tax authorities argue that the services are of technical nature (and according to them only services directly creating or transferring securities can be VAT-exempted).

For example, according to Polish tax authorities, 23% output VAT should be charged on:

- issuing sponsor services (the tax ruling of July 7, 2020, file no. 0114-KDIP4-3.4012.245.2020.1.IG),
- issuing agent services (the tax ruling of March 4, 2020, file no. 0114-KDIP4-3.4012.20.2019.2.EK),
- preparing an offering memorandum (the tax ruling of June 4, 2020, file no. 0114-KDIP4-3.4012.116.2020.1.KM).

Effective from March 2021 all shares in Polish joint-stock companies (S.A.) and limited joint-stock partnerships (S.K.A.) will be dematerialized and exist only as electronic records.

Taking into account the anti-VAT-exemption rulings of Polish tax authorities referred to above, it is unclear whether the keeping of the record of stock and other security owners qualifies for VAT exemption (such services would be provided mainly by banks and brokerage houses).

### No tax rulings on mandatory disclosure rules (MDR / DAC6)

Polish tax authorities consequently refuse to explain rules regarding reporting taxable arrangements (implementing the sixth version of the EU directive on administrative cooperation, EU Directive 2018/822, commonly referred to as DAC6) by the means of individual tax rulings. They claim that taxable arrangements do not refer to tax obligations per se, so tax rulings do not apply to these regulations.

Polish administrative courts do not agree with the view: the Administrative Court in Gorzów Wielkopolski (on April 20, 2020 case no. I SA/Go 61/20) and the Administrative Court in Warsaw (on April 30, 2020 case no. III SA/Wa 2474/19) decided that Polish tax authorities should issue individual tax rulings in cases regarding MDR since the regulations refer to statutory obligations of Polish taxpayers.

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