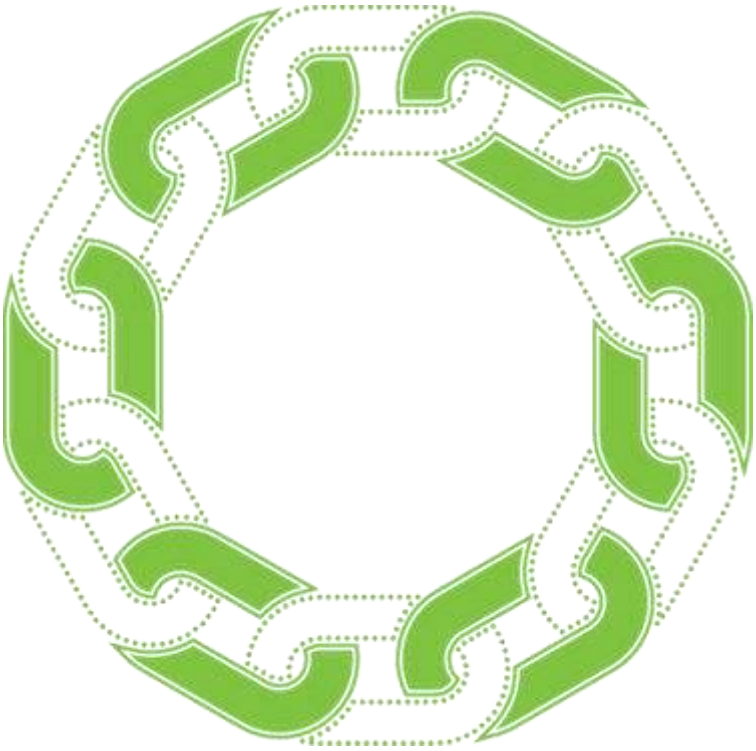

Changes in income taxes in the context of the White List, split payment and prevention of payment system gridlock. Restrictions on the tax deductibility of certain costs

Amendments restricting the tax deductibility of certain costs will come into force as from 1 January 2020. Potential negative consequences on the grounds of PIT and CIT regulations may occur for payments made to accounts not disclosed in the list of VAT taxpayers (White List repository), payments made outside the split-payment mechanism in a situation where the purchaser is obliged to make the payment, as well as the liabilities not settled within the deadline that results from the regulations on preventing payment system gridlock.

Payments made to accounts not included in the White List repository - transactions with foreign entities

Even though both the National Fiscal Administration and the Ministry of Finance have widely discussed the White List regulations, taxpayers still have many doubts as to the applicability of the new regime. Transactions

with foreign contractors registered as active VAT taxpayers in Poland are among the most widely disputed ones.

In line with the new CIT regime, the negative consequences, i.e. lack of tax deductibility, concern payments for service supplies or goods supplies effected based on an invoice by a service/goods supplier **registered as an active VAT payer** and **made by bank transfer to accounts not listed in the White List repository as at the payment order date.**

In view of the above wording it is unclear whether the discussed provision applies where the foreign contractor, registered as an active VAT payer in Poland, does not act in the given transaction as a Polish VAT payer. If this provision does apply, then each payment made **to a foreign entity registered as an active VAT payer in Poland would need to be made to an account recorded in the White List repository** - otherwise, the payment would automatically become non-tax deductible.

In practical terms, adopting the foregoing approach would require **a review and update of internal corporate procedures, among others, to verify case-by-case the company's foreign contractors' active VAT payer status in Poland and to update of all the relevant contracts**.

One should also take into account the individual tax ruling of 04 December 2019, which reads as follows: "*if a foreign contractor is registered for VAT in Poland, but does not act in the capacity of an active VAT payer concerning a given transaction, then Article 15d(1)(2) of the CIT Act will not apply to payments made in respect of that transaction. (…) In this situation, to treat the related expense (documented in the form of an invoice) as tax costs, the CIT payer in Poland, only needs to satisfy the condition of Article 15d(1)(1) of the CIT Act, namely make the relevant payment via a payment account.*"

Hence, it is worthwhile to monitor the policy pursued by tax authorities, and if analogous situations occur in your company's practice, to consider safeguarding the company's tax position by obtaining a relevant individual tax ruling.

Mandatory split payment and compensation
The amended provisions of the VAT Act, which have been binding since 01 November 2019, introduce an obligation to make payments under the split payment mechanism in the cases specified in the Act. At the same time, according to the wording of the relevant provisions, **the split payment obligation does not arise in the case of offsets referred to in Article 498 of the Civil Code.**

It must be highlighted that the exception provided for by the legislator concerns only one form of offsetting used in business trading, the so-called **statutory offset** (as a rule, made when both debts are due).

As a consequence, it is unclear if taxpayers are also obliged to apply the split payment mechanism to contractual deductions, when both parties may freely determine the offsetting point or offset debts that are yet undue.

As a result of introducing the obligation to use the split-payment mechanism in respect of offsets, it seems viable to treat the dues offset that way as tax deductible costs. This is so because pursuant to Article

15d(1)(3) of the CIT Act, **taxpayers will not recognize the expenditure as deductible in the part in which payment for an invoice covered by the split-payment mechanism is made outside of this mechanism**

Taking it literally, the CIT implications depend not only on the VAT treatment of the specific transaction, but also on the fact whether the relevant invoice contains a note: "split-payment mechanism". By implication, it is worthwhile to analyse in detail **the contractual provisions concerning mutual offsets in terms of their impact on tax settlements.**

Failure to comply with the payment deadline in the light of limiting payment system gridlock regulations

The provisions of the Act amending certain acts in order to reduce payment system gridlock, which modify, among others, the Act on income taxes and the Act on payment dates in commercial transactions, also limit the tax deductibility of certain costs.
According to the new regime, payment dates in commercial transactions cannot, as a rule, exceed 30 days when the debtor is a public entity that is not a healthcare entity, and **60 days when the debtor is a large entrepreneur and the creditor - a micro, small or a medium-sized company.**

The status of a company is determined in accordance with the guidelines contained in Annex I to Commission Regulation (EU) No 651/2014 of 17 June 2014.

According to these guidelines, the category of micro, small and medium-sized enterprises ('SMEs') is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million (subject to the rules for taking into account the partner and related enterprises).

A large enterprise is an enterprise that is not a micro, small or a medium-sized enterprise. It should be noted that a large enterprise debtor is obliged to provide the other party to a commercial transaction with a declaration of its status of a large enterprise. The said declaration should be submitted not later than at the moment of concluding the commercial transaction - in the form in which the transaction is concluded. Moreover, the amended regulations impose an obligation on the largest CIT taxpayers **to submit reports on the payment limits they apply to the minister competent for economy**.

Failure to pay a liability previously classified as tax deductible within the time limit specified in the invoice or in the agreement (where the said time limit does not exceed the statutory limit) will result in the necessity to **increase the tax base** (or reduce the loss) in the tax period in which 90 days have elapsed since the deadline for payment of the liability. In the event of a subsequent payment of the liability, the debtor has the right to make an adjustment for the period in which the liability was cleared.

On the other hand, **the unsatisfied creditor will be entitled to reduce the tax base** by the value of the claim for unpaid pecuniary performance included in the due revenues. This reduction may be made in the tax period

in which 90 days have elapsed since the payment deadline. If the deduction amount is higher than the tax base, the remainder may be deducted in subsequent years, not longer than for a period of 3 years from the end of the tax year concerning which the right to deduction occurred.

Thus, in view of the above changes, as of next year, the obligation to adjust the tax costs or the right to reduce the tax base may depend on an analysis of the counterparties' statuses, examination of the detailed contractual provisions concerning payment terms and the issue of making statements and potential liability for untrue statements.

In the nearest future these issues will most likely be examined in detail by experts, disputed by taxpayers and further clarified by tax authorities. For that reason we recommend that companies should regularly monitor the developments in this area.

Contact

Robert Nowak
Partner
Tel.: +48 695 215 592
rnowak@deloitteCE.com

Paweł Komorowski
Senior Manager
Tel.: +48 662 227 654
pkomorowski@deloitteCE.com