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Poland: Selected Brexit tax implications

As of January 1, 2021, the Brexit transition period has ended and the United Kingdom (UK) is no longer treated as a member state of the European Union (EU). Neither is the UK in the European Economic Area (EEA). As a result, transactions with entities from the UK are generally treated as transactions with a third country (a non-EU country).

Brexit has profound economic, political and geopolitical implications, including legal and tax consequences. Below we present selected important tax consequences of Brexit for financial institutions.

We would like to underline that the rules below should be treated as a general outline of taxation in Poland and the UK, and any specific tax consequences need to be analysed on a case by case basis.

Civil law activities tax (CLAT): an issue for UK investment firms

Poland imposes 1% civil law activities tax ("CLAT"; in Polish "*podatek od czynności cywilnoprawnych*" / "PCC", commonly called Polish transfer tax) inter alia on purchases of Polish shares and securities (except for treasury bonds). Consequently, contracts to sell securities or other financial instruments are subject to 1% CLAT charged on the fair market value of the sold items (as a rule reflected in the sales price), to be paid to the Polish tax office by the buyer.

Transactions covered by VAT (taxed with VAT or exempt from VAT) are generally not subject to CLAT, with some exceptions (for example, CLAT on the sale of shares is not dependent on the VAT treatment of the sale).

Furthermore, there are four basic CLAT exemptions applied to trading in securities or other financial instruments:

1. sale within the framework of Polish organized trading (on a Polish stock exchange or on Polish a multilateral trading platform called 'ASO' in Polish); or
2. sale to an EU / EEA investment firm; or
3. sale by the agency of (through the intermediary of) an EU / EEA investment firm; or
4. a sale by a EU / EEA investment firm with respect to financial instruments acquired by the firm within the framework of Polish organized trading (stock exchange / MTF).

From January 1, 2021, British brokers (like US brokers) are not treated as MiFID investment firms and basically they do not qualify for the CLAT exemptions mentioned above. Therefore, 1% CLAT may be imposed specifically on:

- sale of securities made by UK investment firms, or
- sale of securities made to UK investments firms (if not sold from a EU / EEA investment firm that purchased securities on the Warsaw Stock Exchange / Polish OTF).

CLAT may be also charged on give-up agreements if a UK broker is engaged.

One should also bear in mind the Polish anti-tax avoidance regulations (GAAR), especially if the flows are solely designed to circumvent the Polish CLAT.

Value added tax (VAT): an opportunity for increased input VAT deduction

Financial services are generally VAT-exempt which means that financial institutions cannot recover input VAT on goods or services acquired. Input VAT is also irrecoverable if the place of supply of financial services for VAT purposes is within the EU. For example, a Polish bank granting loans to an EU client or a Polish insurer providing insurance to a EU client are not entitled deduct input VAT.

However, there is an exception for financial or insurance services provided to entities in third countries (like the US). As the UK is treated as a third country from January 1, 2021, that exemption also applies to the UK. Therefore, the input recovery rate of financial institutions with the UK clients may increase.

It is an opportunity for Polish taxpayers providing VAT-exempt services (e.g. loans, insurance, payments, transfers, guarantees, financial intermediary services), if they provide services to clients from the UK.

Corporate income tax (CIT) and withholding taxes (WHT)

The Polish CIT law allows a general exemption for mergers, share for share exchanges, demergers, in-kind contributions and other restructuring, if the transfers constitute a transfer of a going concern ("TOGC"). However, to ensure tax neutrality, the transferor and the transferee should be corporate entities established under the laws of their EU / EEA member state and they should be tax residents in an EU / EEA country.

Since UK companies can no longer benefit from the EU / EEA company status, their restructuring may be subject to CIT in Poland. In the event the transaction is not executed under the tax neutrality regime, any potential capital gains may be taxed in Poland at a rate of 19%.

Furthermore, withholding tax (WHT) costs for some groups may increase post-Brexit, since exemptions provided for in EU directives and implemented into Polish domestic law may not be available.

The 2006 Poland-UK double taxation convention in principle provides for 5% WHT on interest (0% in exceptional situations such as in the case of interest on bank loans) and 5% WHT on royalties. Within the EU / EEA, under specific conditions, the 0% rate could be applied to interest or royalties paid between related companies.

0% WHT on dividends under the Poland-UK double tax treaty may be still applicable after Brexit, provided that the UK recipient meets the minimum holding percentage and holding periods requirements (otherwise 10% WHT on dividends would be due).

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