



## Deloitte Poland Tax News for Financial Institutions | August 2021

### **New Polish Deal – changes in CIT**

On July 26, 2021, the draft Act amending the Act on Personal Income Tax, the Act on Corporate Income Tax and some other acts (the so-called “Polish Deal”) was published. The planned effective date of amendments presented therein is January 1, 2022.

Changes to CIT crucial for financial institutions are presented below.

### **Tax capital group (TCG)**

The bill provides for a number of amendments related to the establishment and operation of TCG. The planned changes include:

- Reducing the average share capital requirement for each TCG company to PLN 250,000 (currently: PLN 500,000);

- allowing subsidiaries to hold shares in other subsidiaries included in the tax capital group (currently only the parent company may hold shares in other entities forming TCG);
- Eliminating the tax profitability condition for tax capital groups (currently 2% profitability is required);
- Eliminating the requirement to conclude a tax capital group agreement in the form of a notarial deed (an ordinary agreement concluded in writing will be sufficient);
- Changing rules for extending TCG after the registration of the agreement;
- Changing rules for reporting the extension of TCG duration.

The discussed draft amendment addresses the settlement of tax losses:

- By companies forming a TCG, if it loses its taxpayer status, if the loss is incurred before the group is established;
- By TCG, if a company from the group incurs a loss before the group is established.



### Defining the corporate office in Poland

The bill introduces a definition of the corporate office located in Poland, which is a condition forcing taxpayers to obtain the status of Polish tax resident and will be of importance for companies incorporated or operating abroad.

In line with the planned amendments, taxpayers who do not have their registered seat in Poland are assumed to have it if individuals or entities comprising their supervisory bodies, general meeting or management bodies:

- Have their residence on the territory of Poland, or
- Manage the matters of the taxpayer actually, directly or through other entities, including based on its act of incorporation, court decision or another document regulating its incorporation or operation, or based on the power of attorney or actual relationships between the taxpayer and such residents of Poland.

Based on the justification of the amendments, their purpose is to clarify that Polish tax residents whose whole income is taxable in Poland include not only entities that have their registered seat in Poland, but also those that do not have one, but are formally or actually managed by a Polish resident (residents).

### Filing accounting records in the electronic form

According to the planned amendment, CIT payers shall be obliged to maintain accounting (tax) records using computer software and to file them in a specified format on terms provided for in the Tax Ordinance within the deadline applicable to the filing of annual tax returns.

### Changes in transfer pricing regulations

The Polish Deal includes a series of changes planned with regard to transfer pricing. The key ones include:

- Postponing the deadline to prepare local transfer pricing file to the end of the tenth month following the end of a given fiscal year;

- Postponing the deadline to present transfer pricing information to the end of the eleventh month following the end of a given fiscal year (at present, this is the end of the ninth month);
- Eliminating the statement on the preparation of a transfer pricing file in the form of a separate document; in a modified form, the statement shall be included in the transfer pricing information;
- Postponing the deadline to file a local transfer pricing file if demanded by tax authorities from seven to fourteen days;
- Changes regarding transfer pricing amendments: instead of a related party statement, the taxpayer amending its transfer prices will be permitted to present an accounting voucher confirming that the related party has amended the transfer prices in question in the same amount as the taxpayer. The condition that the amendment should be confirmed by the taxpayer in the annual tax returns for the financial year the amendment pertains to will be cancelled;
- Changes in the safe harbour related regulation: the period during which the condition of being able to use the safe harbour mechanism is examined will include the fiscal year, not the financial year. Additionally, the bill addresses the date as at which a loan (bond) agreement must comply with financial safe harbour terms as regards interests: the conditions must be fulfilled each time a loan agreement is modified;
- Adding a regulation that determines the value of controlled transactions for entities without legal personality (partnerships): in such cases, the value should be determined as the total of partner contributions;
- Adding a provision that local transfer pricing files of entities without legal personality, joint ventures or similar arrangements should include adopted principles regarding the rights of partners or parties to the arrangement related to profit or asset sharing and loss absorption;

- Changes in the definitions of related party and significant impact (they are extended with a statement that they include cases of direct or indirect holding of at least 25 percent of shares or rights to absorb entity's losses).

### New taxation regime for Polish holding companies

The planned amendments include:

- 95 percent of the amount of dividends received from a holding company from its subsidiaries being CIT-exempt;
- Gains on sales of shares in subsidiaries to unrelated parties being CIT-exempt in whole.

The regulations are to provide an alternative to the current exemption from dividend payment. In our view, the planned amendments are based on the assumption that a taxpayer operating as a holding company can choose from the following options:

- Using the currently available dividend exemption (Article 20.3 and Article 22.4 of the CIT Act), or
- Using the exemption offered under the planned holding regime. In such a case, taxpayers shall be entitled to have their income on sales of shares in subsidiaries exempt from CIT.

The above principles shall apply only if an entity is classified as a holding company.

In line with the bill, a holding company is a Polish tax resident operating as a limited liability company or a joint stock company and fulfilling the following additional conditions:

- Directly holding (owning) at least 10 percent of shares in a subsidiary for at least one consecutive year;
- Not participating in a tax capital group;
- Not using tax exemptions (such as special economic zone or decision on support);
- Actually carrying out business operations;



- Its shares not being held (directly or indirectly) by a shareholder whose registered seat or corporate office is located in a territory or country:
  - listed in the Regulation of the Minister of Finance regarding countries and territories that apply harmful CIT competition;
  - included in the EU list of non-cooperative tax jurisdictions accepted by the Council of the European Union;
  - with whom the Republic of Poland has not concluded an international treaty, in particular a double tax treaty, or with whom the EU has not concluded an international treaty that would entitle it to obtain fiscal information from the state's tax authorities.

### Changes in regulation on the exchange of shares

The bill provides for a series of changes in the taxation of reorganisation changes, including the tax treatment of share exchange transactions.

The planned changes include extending the list of conditions that must be met in order for a taxpayer to be able to apply preferential taxation of income related to the exchange of shares.

Two new conditions are added to the CIT Act:

- The shares contributed by a shareholder / partner have not been acquired or assumed as a result of a share exchange transaction or allocated in a merger or split-up;
- The value of shares acquired by a shareholder / partner determined for tax purposes does not exceed the value of shares contributed by this shareholder / partner that would be determined for tax purposes had no share exchange transaction occurred.

### Changes in regulations addressing corporate merger and split-up

The Polish Deal provides for material changes in the taxation of a merger and split-up. As a result the number of cases when such transactions are subject to CIT (in particular to be paid by the shareholding entity or the acquirer) shall

grow considerably. The new provisions will regard the method of calculating taxable revenue related to merger and split-up transactions. In principle, such transactions will be tax-neutral, provided they meet additional conditions determined in the Polish Deal. An important change in this respect will involve the right to classify as non-taxable revenue earned by a shareholder / partner of the acquiree or a split entity and accounting for the issue value of shares allocated by the acquirer or a new company only when:

- the shares in the acquiree or the split-up entity have not been acquired or assumed as a result of the exchange of shares, or another acquisition or split-up transaction; and
- the value of shares allocated by the acquirer or a new company determined by a shareholder for tax purposes does not exceed the value of shares in the acquiree or the split-up company that would be determined for tax purposes without the acquisition or split-up.

The bill includes new, more challenging income taxation and tax exemption mechanisms (conditions) to be introduced in relation to an acquirer participating in a merger or split.

### Taxation of income shifting

The planned amendments include provisions introducing tax on entities taxable in Poland (Polish tax residents) in relation to income shifting. The tax rate will amount to 19 percent. The shifted income shall include specific costs incurred directly or indirectly with regard to a related party and accounted for as its receivables if:

- CIT actually paid by the entity for the year in which the amount receivable was obtained in its country of residence, corporate office or location is 25 percent lower than the CIT amount charged based on the 19 percent tax rate. The actually paid tax is understood as the amount non-refundable or non-deductible in any form, including to another entity; and
- If these costs:
  - are classified as tax-deductible expenses or tax relief in any form; or

- are paid by the related party in the form of a dividend or other profit sharing revenue in the year of obtaining the amount receivable

And account for at least 50 percent of the revenue generated by the entity, determined in line with the regulations on the corporate income tax or by the accounting regulations.

Under the amendment, the above taxation principles shall not apply if the costs are incurred in respect to a related party whose whole income undergoes taxation in an EU member state or in an EEA state in which the related party actually carries out material business operations.

### Depreciation / amortisation in real estate entities

In line with the planned amendments, real estate entities, i.e. those generating most of their revenue or income from real estate they own, shall be entitled to treat depreciation and amortisation charges on their assets as tax-deductible expenses up to the amount of depreciation / amortisation charges calculated in a given financial year in line with the current regulations on the use of tangible assets, and charged to the entity's profit/loss in the same year.

The above change may adversely affect taxpayers who, due to the accounting classification of their real estate, do not recognise depreciation changes for accounting purposes.

### Changes in withholding tax regulations

The Polish Deal projects amendments to the regulation regarding the withholding tax. They include restrictions to the WHT refund on passive revenue (income) paid to related parties and a permission to issue an opinion on exemption (reduced tax rate) based on DTT provisions, currently permitted only with regard to Polish WHT regulations.

Other changes include withholding tax explanations to be prepared by the Ministry of Finance.



### Costs of performances provided by a related party shall not be tax-deductible

Under the planned amendments, costs related to the performances whose direct or indirect beneficiary is a shareholder or an entity directly or indirectly related to the shareholder or to the taxpayer, if a performance or an obligations giving rise to it has not been granted on the same terms in part or in whole to this entity or shareholder, are not classified as tax-deductible.

Currently, such costs shall not be treated as tax-deductible also if, had the performance not been provided, the taxpayer would obtain a net profit for the financial year (as determined in the binding accounting regulations) in which the performance was recognised in profit / loss. Since the bill does not include the entire regulation, changes to the proposed contents thereof may be expected.

### R&D relief

The bill introduces changes to regulations on R&D relief. If the amendments come into force:

- A taxpayer paying PIT advances and lump-sum PIT on salaries of its employees or contractors will be able to deduct them from taxable income as eligible R&D expenses, if not deducted as a result of a former loss or because its income was lower than the deductions available;
- The amount deductible will increase;
- A taxpayer paying PIT advances and lump-sum PIT on salaries of its employees or contractors will be able to deduct them from taxable income as eligible R&D expenses, if not deducted as a result of a former loss or because its income was lower than the deductions available;
- Taxpayers will be able to use the R&D relief and IP Box relief at the same time and on the same income.

### Consolidation relief

Based on the justification of the bill, projected regulations regarding the consolidation relief are to provide tax incentives for taxpayers interested in business expansion in Poland and abroad in the form of purchasing shares in companies that operate on these markets.

In line with the Polish Deal, taxpayers who incur "eligible expenses" on the purchase of shares in foreign businesses (limited liability or joint stock companies) will be entitled to deduct them from taxable income in the year in which they have been incurred. The maximum deduction amount cannot exceed PLN 250,000 in a fiscal year. The "eligible" expenses include:

- Legal support of share purchase transactions including valuation (due diligence);
- Direct taxes on the transaction;
- Notarial, court and fiscal charges.

The price paid for the shares and costs of debt financing related to the purchase shall not be eligible. Taxpayers will be able to use the relief if the following conditions are met:

- The company whose shares are purchased by the taxpayer is a legal person with its registered seat or corporate office in a state with whom the Republic of Poland has signed a valid double tax treaty, which entitles Polish tax authorities to request tax information from tax authorities of this state;
- The core business of this company is the same as the core business of the taxpayer that purchases its shares, or can be reasonable considered auxiliary to the business operations carried out by the taxpayer (and cannot include financial activities).

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