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Legislation changes: DAC6 / Mandatory disclosure rules

Following Council Directive 2020/876 of June 20, 2020 on deferring reporting of taxable arrangements (so-called DAC6 or MDR), Poland has adopted a regulation to extend the time limit for disclosing tax schemes until December 31, 2020 or later (specific deadlines will depend on the type of the scheme and the role of the entity involved in the reporting process).

At the same time, the Polish Minister of Finance has also published a new schema according to which all arrangements should be reported. That new schema should be used to report (in some cases the reports will be duplicated) cross-border tax schemes for which the first implementation activity (i.e., the trigger) was carried out between June 26, 2018 and June 30, 2020.

In Poland, most of domestic tax arrangements that are disclosed by financial institutions (also foreign) are high-value payments of interest and dividends, as well as proceeds from sales of listed shares (also short sale), though no tax optimization is involved.

On the other hand, Polish tax administration consequently refuses to issue individual rulings on MDR matters, leaving that to inconsistent interpretations of taxpayers and tax advisors.

Announcement of changes upcoming in 2021

Estonia in Poland

The Polish government has announced that starting from 2021, Polish companies will be allowed to choose the so-called Estonian solution in Corporate Income Tax (CIT), i.e. CIT taxation of corporate profits will be postponed until the profits are distributed (so no CIT will be due as long as companies' earnings are reinvested).

However, considering the criteria to be met in order to use that solution (for example only companies with an annual turnover up to PLN 50m /ca. EUR 11m/, solely with shareholders being natural persons and with no shares in other companies would be eligible entities), it will be unavailable to financial institutions.

SLIM VAT

Another pro-taxpayer regulation to come into effect is "SLIM VAT" (where SLIM stands for simple, local and modern). This is a simplification package with respect to VAT. The new regulation will cover i.a.: common foreign currencies exchange rate for CIT and VAT purposes, extending deadlines to deduct input VAT on an on-going basis and simplification of correcting invoices. The changes are to enter into force in the first half of 2021.

Recent rulings of Polish tax administration or courts

Loss on sale of bonds non-deductible for tax purposes

The Director of the National Tax Information in its recent individual tax ruling of May 21, 2020 issued to a Polish bank ruled that a loss on disposal of any debt securities (for example bonds) cannot be deductible for tax purposes in Poland.

The rationale behind that position is that debt securities should be treated as a type of a loan receivable, and according to the Polish general income tax regulations, the sale of loan receivables cannot generate losses for tax purposes. That ruling runs counter to the long-standing market practice and may lead to a decrease in Polish securities' yield. The ruling has been appealed against to an administrative court.

Standard VAT (no exemption) on legal services provided to a fund

The Administrative Court in Warsaw in the decision of June 24, 2020 (case no. III SA/Wa 2031/19) ruled that legal services provided to an alternative investment fund cannot be treated as management of investment funds. As the result, VAT exemption of such services was denied.

However it should be noted that in the past, Polish administrative courts in their rulings tended to interpret broadly the concept of "management of funds" required for VAT exemption. For example, the investment advice (case no. I FSK 281/17), specific IT-financial solutions (case no. I FSK 281/17) or even bookkeeping (case no. I SA/Kr 609/19) were treated as VAT-exempted.

Taking into account that funds are as a rule not entitled to deduct any input VAT, a decrease of the VAT burden on their purchases should lead directly to a reduction of costs.

Special issue: taxation of branch offices

Many financial institutions operate in Poland as branches. A branch and its headquarters (mother company) are one entity for legal purposes. A branch has no separate legal personality, cannot run business on its own and does not conduct economic activities independently. Therefore, as a rule, a branch is not a taxpayer separate from its headquarters and the transactions performed between a branch and headquarters should be generally out of the scope of taxation.

However, taxation of branches raises many doubts in practice, some of which are presented below:

VAT

The Court of Justice of the European Union ruled in the FCE Bank plc case (C-210/04) that supply of services between a main establishment and its branch does not constitute a transaction for VAT purposes. An exception to that rule occurred in another CJEU case (Skandia, C-7/13), where it was stated that in fact, such supply of services is within the scope of VAT provided that a branch is in a VAT group.

Polish tax authorities follow this interpretation (even though it is not literally provided for in the Polish law). On the other hand, if the headquarters are in a VAT group (Poland has no VAT grouping rules), but the branch is not (this is the so-called reversed Skandia case), the general terms apply. So, there should be no taxable supply between a branch in Poland and its headquarters abroad if the headquarters are a member of a VAT group.

This standpoint may be found controversial (e.g. in some EU countries reverse Skandia leads to VAT taxation) and taxpayers in Poland should secure their VAT positions with the help of individual tax rulings.

Last but not least, a rule of non-taxation of activities between a branch and a mother company may not apply, if services are provided by a third party and then only their cost is recharged by the branch or the mother company. This arrangement may result in a supply of services subject to VAT, even though financial reconciliations are made between the headquarters and the branch.

Profit allocation

Taxpayers that do not have their seat (registered office) or place of management in Poland (i.e. Polish tax non-residents) should be subject to the Polish CIT charged only on the incomes which they earn within the territory of Poland. Poland, as the host country of the branch, may tax profits of the branch (i.e. profits of the permanent establishment, "PE"). Still, the taxing rights of Poland are limited to the profits that are attributable to the branch. The right to tax does not extend to the profits that the enterprise may derive from Poland, if such profits are not attributable to the branch (there is no so-called "force of attraction" principle). In order to determine the profits of the branch (subject to CIT in Poland), a legal fiction has to be used that the permanent establishment (the branch) is a separate enterprise and that such an enterprise is independent from the rest of the enterprise of which it is a part, as well as from any other person. This fiction refers to the arm's length principle which is also applicable for the purpose of adjusting profits of associated enterprises.

The above rules, complicated as they are, may also be made more difficult by Polish domestic regulations concerning the moment when certain costs become deductible and revenues taxable, or whether certain costs are deductible for Polish CIT purposes. To give an example – Polish tax officers insist that costs of purchased intangible services (e.g. advisory services or license) may be deductible only if a taxpayer can prove that such costs were actually incurred and were related to taxable activities. That rule may be also extended to the costs allocated to a branch.

Article 15e

Since the beginning of 2018, the Polish CIT Law imposes significant limitations on tax deductibility of "intangible-related costs" 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 entities from tax havens.

As a rule, such costs (incurred directly or indirectly to related parties) should be deducted up to total: PLN 3m + 5% * taxable income (excluding interest and amortization / depreciation, so-called "tax" EBITDA), per annum. The costs exceeding the limit should be considered as tax non-deductible.

From our experience, the above requirement (imposed by Article 15e) is a practical issue for multinational companies that outsource functions within a capital group.

In the tax practice of tax authorities and administrative courts there is a doubt whether Article 15e of the CIT Act should be applicable to the relationship between a branch and its headquarters. Tax authorities generally argue that the rule should not apply in 2019, but it must be followed from 2019 onwards (because of the change in the definition of a related party).

That view is controversial and should certainly be subject to judicial review.

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