

## Recent developments in international taxation in Poland

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### Tax landscape

The dynamics of change in Polish tax law have slowed down considerably in the last 12 months.

The second half of 2019 brought a new law governing the resolution of double taxation disputes and conclusion of advance pricing agreements (APAs). A new programme of cooperation between individual taxpayers and the Head of the National Fiscal Administration ('NFA') was launched in 2020. Since mid-2019, we have observed a growing number of tax disputes over the application of the withholding tax exemption or tax rates reduced according to double taxation prevention treaties to dividends and interest paid by Polish companies.

The above is particularly important for large taxpayers. Still, a significant chunk of the public debate focuses on amendments to tax law introduced in the beginning of 2019, such as:

- the introduction of corporate and personal income tax on unrealised gains (exit tax);
- the introduction of mandatory disclosure rules;
- amendment of the rules governing tax withholding and introduction of the *pay-and-refund rule* instead of *relief at source* as the basic principle;
- amendment of transfer pricing regulations to bring them nearer international standards; and
- amendment of the general anti-tax avoidance rule.

The fierceness of change that took place in 2019 created an impression of fast-increasing fiscal and regulatory pressure on entrepreneurs and their tax advisers. The dynamics of change, have, however, resulted in a questionable quality of law, and made it very difficult for taxpayers to become compliant and for the tax administration to be ready.

Overall, the last 12 months have been a time of reorganisation and clean-up after the flawed changes of 2019. In the field of international taxation, the following developments are considered to be most relevant to taxpayers in Poland:

- deferral of the application of some provisions related to the withholding of tax at source regarding a significant number of cross-border payments, followed by an announcement of the Ministry of Finance that the law will be further modified;

- the trend in audits related to the targeting of tax remitters who did not withhold tax (or the appropriate amount thereof) on cross-border payments of dividends and interest; and
- the obligation to report cross-border arrangements that in most instances have already been reported once in the past.

For individuals practising tax law in Poland, the following changes are considered most relevant or interesting:

- the introduction of a new law on resolution of disputes related to double taxation and conclusion of advance pricing agreements;
- the launch of a programme of cooperation between selected large taxpayers and the Head of the NFA, which corresponds to the OECD cooperative compliance model;
- the introduction of a surcharge payable to the Polish Film Institute by entities providing audio-visual on-demand services amounting to 1.5 per cent of their revenue earned from fees charged on the access to resources or on broadcasting commercial messages (the so-called ‘Netflix tax’);
- the introduction of rules countering tax optimisation schemes related to the use of hybrid structures scheduled for 2021 to implement the Anti-Tax Avoidance Directive;
- changes in double taxation prevention treaties; and
- amendments to VAT regulations.

### **Deferral of a new withholding tax regulation**

A new regulation governing obligations related to withholding tax by Polish tax remitters was introduced in the beginning of 2019. The reform modified the definition of ‘beneficial owner’ by adding a condition to the effect that, to be considered a beneficial owner, an entity must be conducting business in the country of its registered address, if it receives payments related to such business.

If a payment to a single taxpayer (eg, dividends, interest, royalties) is subject to withholding tax and exceeds in a single year PLN2m (approx. EUR500,000), the tax remitter should withhold tax at a statutory rate. The refund will be processed in a dedicated procedure.

Alternatively, the tax remitter may apply an exemption, or a tax rate reduced according to a double taxation prevention treaty, if he conducts a survey and is able to state that ‘he does not possess any information justifying a suspicion that there are circumstances excluding the possibility of applying a [*reduced*] tax rate or not charging withholding tax’. It is a criminal offence to make a false statement.

An alternative is to apply to the taxation authorities for an official opinion confirming the correctness of the application of the withholding tax exemption. This applies only to tax exemptions set out in the Corporate Income Tax Act and does not apply to exemptions or reduced tax rates laid down by the taxation treaty.

The new mechanism was controversial even before it entered into force. Hence, its application has been suspended (with some exceptions) and remains suspended. In the meantime, the Ministry of Finance has announced that the law will be subject to further modifications. The direction of such modifications is not yet known but rumour has it that the regulation may become less restrictive.

The topic is widely debated, and many taxpayers and tax remitters apply to the tax authorities for individual tax rulings. It is fair to say that there is no firm and stable line of interpretation of the new regulation at this point.

### **Tax audits related to the correctness of withholding tax by tax remitters**

Hand in hand with the postponement of the entry into force of certain withholding tax provisions, the lack of reliable official guidelines and the announced revisiting of new controversial withholding tax regulations, we have observed a disturbing intensification of the tax authorities' interest in payments made by Polish tax remitters, which may be subject to withholding tax.

The Polish tax authorities focus on passive income payments – in particular, dividends and interest – made tax free by Polish companies to their foreign shareholders. We have noted that the authorities may be targeting companies with EU-based shareholders, seated in jurisdictions with a well-developed network of tax treaties, ultimately held by companies headquartered in non-EU jurisdictions. The approach of the Polish tax authorities is quite aggressive and aimed at challenging tax exemptions applied by Polish tax remitters. The main argument used by the tax authorities is that corporate structures are frequently artificial and established for the purpose of tax avoidance. Although domestic law has been providing for a seasonally adjusted annual rate (SAAR) to curb artificial structures since 1 January 2016, the tax authorities have also been challenging situations that existed in earlier tax years based on general principles that follow from recent CJEU case law and claim abuse of law or absence of beneficial ownership.

### **Mandatory reporting of tax arrangements**

In contrast to most European countries, in the beginning of 2019, Poland introduced a regulation regarding mandatory reporting of tax arrangements. The characteristic feature of the Polish regulation is that it is wider than the European one – it covers both cross-border and other than cross-border arrangements, includes additional hallmarks, distinguishes between two subcategories of subsidiaries (promoter and supporting party), and renders non-compliance related to mandatory reporting subject to high criminal and financial sanctions (at least in theory).

The reporting obligation was already in place in 2019. However, this year, the reporting obligation must be fulfilled again, to the extent where tax arrangements are reportable cross-border arrangements and the first steps taken in relation to such arrangements were taken before 30 July 2020. The reason for this obligation is that the reporting will be done on a new schema. Due to Covid-19, the reporting deadline was postponed until the end of the year.

### **New law on the resolution of disputes related to double taxation and conclusion of APAs**

After many years when regulations were either dispersed over multiple pieces of legislation or non-existent, the matter of resolution of disputes related to double

taxation and conclusion of APAs has finally been assembled in the second half of 2019 into a brand new law.

The enactment of the law is a result of several factors, in particular the necessity of implementing the Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union. Bearing in mind a continuously increasing number of tax disputes related to transfer pricing as well as a large number of APAs in progress, it was also necessary to add clarity to applicable procedures, and formal requirements as well as the expectations of the authorities.

In the last two years, the domestic regulation on limits in the tax deductibility of expenses (in particular, related to intangible services) resulted in Poland in a massive increase in the number of APA applications. The Finance Ministry advises that there were over 300 pending cases in mid-2020.

### **Cooperation programme**

Lawmakers created a programme to facilitate cooperation between the tax administration and taxpayers by relying on the cooperative compliance model promoted by the Organisation for Economic Co-operation and Development (OECD).

The programme at this stage is designated to a small group of selected large corporate income taxpayers with revenue that exceeded EUR50m in the previous tax year. Accession to the programme requires the taxpayer to establish an internal tax supervision framework and to submit to a preliminary audit. Taxpayers participating in the programme are required to act transparently, actively communicate any misgivings regarding tax settlements and report potential tax benefits. Participation in the programme is sealed by a cooperation agreement executed between the taxpayer and the Head of the NFA.

In turn, the taxpayer may expect fewer audits conducted by the Head of the NFA, access to an individually appointed contact person representing the tax administration and reduction of the financial and penal-fiscal risk related to tax settlements. The taxpayer may additionally apply to the Head of the NFA for resolution of an individual case by agreeing to the particular interpretation of tax law, determination of transfer prices, non-application of general anti-tax avoidance rules, forecasting of the corporate income tax liability for the following year, etc.

### **Netflix tax**

The Cinematography Law has been amended to introduce a quarterly surcharge to the benefit of the Polish Film Institute payable by entities providing audio-visual services on demand. The surcharge is equal to 1.5 per cent of revenue earned from fees charged on the access to resources or broadcasting commercial messages – whichever is higher in a given tax settlement period. The surcharge was introduced on 1 July 2020. The new regulation covers entities seated in Poland as well as entities providing audio-visual media services on demand which have their registered address in another EU Member State as long as they earn revenue in Poland. Estimates show that the Polish Film Institute will collect in this way PLN15m by the end of 2020 and at least PLN20m in subsequent years. The largest contributor to the Institute's budget will be Netflix with revenue of approximately PLN430m, which translates into PLN6.5m of surcharge. For this reason, the surcharge is commonly known as the Netflix tax.

Double taxation prevention treaties

The last 12 months have brought little in the way of news in the field of treaties on the avoidance of double taxation.

The agreement between Poland and Sri Lanka signed in 2015 became applicable in its preponderant part on 1 January 2020.

Other developments involve the rollout and application of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) Multilateral Convention to double taxation prevention treaties with a further group of countries. The Finance Ministry advises that in the last 12 months the MLI has started to apply to double taxation prevention treaties signed with Malta, Singapore, Ireland, Finland, Luxembourg, United Arab Emirates, India, Belgium, Norway, Ukraine, Canada, Iceland and Denmark. Even before that, the MLI started to apply to Austria, Slovenia, United Kingdom, New Zealand, Serbia, Sweden, Slovakia, Japan, France, Israel, Australia and Lithuania.

### **Rules countering tax optimisation related to the use of hybrid structures**

The Polish Corporate Income Tax Act will have a new chapter addressing the use of hybrid structures as a tax optimisation tool, effective 1 January 2021. The set of new regulations is a part of the implementation of Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, that has been amended by a directive addressing hybrid mismatches with third countries.

### **Implementation of quick fixes into Polish VAT regulations**

Due to the change of the Council Directive 2006/112/EC on VAT, the national regulations have also changed. Starting 1 July 2020, Poland introduced changes to the rules regarding application of the zero per cent VAT rate in the intra-Community supply of goods, modified certain rules governing intra-Community chain transactions, and replaced consignment warehouse procedure with the call-off stock procedure. The delay in implementation has been fixed by a communication from the Finance Ministry allowing direct implementation of the EU law since 1 January 2020.