Real Estate Tax Services News

Keeping you informed

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Polish taxes for real estate clients – hot topics

In brief

We are pleased to present to you an overview of key Polish tax issues which may be particularly important for real estate clients. We are focusing on closing of 2022 corporate income tax (CIT) reconciliations, recent legislative and case law developments, plus general hot tax topics relevant to the real estate industry.

Extension of the deadline for annual 2022 CIT return

The standard deadline for the annual 2022 CIT return (which typically was the end of March 2023) was extended to the end of June 2023. This does not mean that all end-March compliance deadlines are automatically extended, e.g., reporting of real estate companies (please see below). Also, draft financial statements will still be due within the standard deadline.

Reporting of ownership structure of Polish real estate companies – new developments

Polish real estate companies, as well as Polish or non-Polish taxpayers holding directly or indirectly at least 5% of shares in such companies, are obliged to notify tax authorities about the ownership structure of the company. The reporting for 2022 is typically due by the end of March 2023. To clarify the scope of the reporting together with some technicalities, on 28 February 2023 the Minister of Finance published a general tax ruling. In respect of the most controversial aspect of the obligations, which relates to non-Polish shareholders (on a CIT-N2 form), the Minister seems to indicate that the obligation applies where taxpayers are:

(i) direct shareholders in a real estate company, or
(ii) indirect shareholders in a real estate company **via tax transparent vehicle(s)**.

Although it is still not fully clear, it seems that taxpayers which are indirect shareholders in a real estate company **via non-transparent vehicle(s)** should not, as a rule, be obliged to file a report. In our view, this is a reasonable approach which we also applied last year. For most structures in the real estate market, it means **that reporting on a CIT-N2 form is limited to direct shareholders only** (assuming this direct shareholder is non-transparent), and that CIT-N2 forms do not need to be filed by entities above such a direct shareholder. Although the ruling does not clarify all uncertainties, we hope the above approach will be accepted by tax authorities - further developments should be monitored.

In respect of technicalities, **non-Polish** taxpayers who are obliged to file a CIT-N2 form also **have to register for CIT purposes in Poland and obtain a Polish tax identification number (NIP)**. Additionally, a certified electronic signature must be obtained by (foreign) individuals submitting the report or a special power of attorney should be arranged for.

Action point: Consider which foreign entities in the structure will be obliged to register for CIT purposes in Poland and file the report electronically – and whether these matters were already taken care of in your structures. Based on past reporting, the entire process (i.e., collection of documents, registration, obtaining the signature, reporting) can be time consuming. The registration itself can also take some time depending on the workload of tax authorities. Should this matter not be taken care of yet, it requires immediate action.

Tax-deductible depreciation of non-residential buildings – first court verdicts

Since 2022, tax depreciation write-offs recognised in relation to non-residential buildings cannot be higher than depreciation write-offs for accounting purposes. This was commonly interpreted in a way that if a given entity does not depreciate buildings for accounting purposes (but rather revalues the property to fair market value), tax depreciation of such buildings will not be deductible for CIT purposes on an ongoing basis – The Polish tax authorities have issued several rulings confirming this interpretation.

Nevertheless, in January and February 2023, the first verdicts of the District Administrative Courts regarding the new regulations were issued. In brief, the courts **challenged these regulations as being too vague**. In verbal justifications of the judgments (no written ones are available at this stage), it was put forward that any limitation of tax-deductible costs is of key importance for taxpayers and must be perfectly clear, and that any doubts should be resolved in favour of taxpayers. As a result, it was found that **the tax-deductible depreciation restrictions should not apply in their current form to taxpayers recognising properties as investments at fair market value** (hence, not subject to accounting depreciation).

Note that the verdicts are not final and can be appealed to the Supreme Administrative Court which currently requires up to three years to issue a final verdict. During this time there will still be uncertainty and the relevant regulations can be always amended / clarified by the legislator (this happened in Poland, e.g., regarding 30% tax EBITDA earnings stripping rule when the courts started to issue verdicts in favour of taxpayers).

As a result, in our view, currently the practical impact of the verdicts seems to be limited. Tax deduction of depreciation write-offs while applying the FMV investment approach for accounting purposes may still trigger a dispute with tax authorities, while the law can be potentially changed/clarified to the disadvantage of taxpayers from 2024.

Action point: Changing the accounting policy still seems to be a safer solution if the taxpayer would like to continue recognising depreciation write-off as a tax-deductible cost. Alternatively, consideration can be given to applying for a tax ruling confirming the approach expressed by the courts, with a risk that it will be negative at the level of tax authorities with a chance for a positive result at the court's level; in the long run, if the regulations will be further amended, the change of the accounting policy may remain the only option.

Transfer tax treatment of real estate transactions – ECJ resolution in a Polish case

The Court of Justice of the European Union (ECJ) issued a resolution in a Polish case (C-729/21) confirming that:

(i) a transfer of a going concern does not require for a purchaser to be a legal successor of a seller and the Polish VAT Law is compliant with the VAT Directive in this respect;

(ii) to qualify as a going concern, the set of transferred items does not have to cover all elements related to the going concern held by a seller, provided that the transferred items are sufficient to conduct business activities by this going concern on a standalone basis. The domestic court should decide if in the case at hand a going concern or assets on a piecemeal basis were transferred.

The resolution is important as it confirms compliance of the Polish VAT Law with the VAT Directive. In other aspects the ECJ's standpoint seems to be similar to the one presented by the Polish Ministry of Finance in the guidelines on taxation of real estate transactions from December 2018. Nevertheless, we should wait for the verdict of the Supreme Administrative Court which referred the matter to the ECJ to see if this particular transaction will ultimately be classified as

(i) covering a going concern (out of scope of VAT), or
(ii) assets on a piecemeal basis (subject to VAT and being the prevailing market practice).

The Supreme Administrative Court's decision in favour of outcome (i) may potentially disrupt the market situation. **This shows that in each transaction an individual tax ruling is strongly recommended to secure the transfer tax treatment upfront.**

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