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New strict WHT rules in Poland from 2019 – cash flow may be adversely affected

23 October 2018: the Polish Senate passes the bill amending the Personal Income Tax, Corporate Income Tax, Tax Ordinance and other regulations (the “Bill”). Once signed by the President and announced, the Bill comes into force as of 1 January 2019. What does it mean for taxpayers? Major changes in terms of the withholding tax (“WHT”) regime. New rules may have a negative cash-flow impact and trigger additional administrative burden.

New WHT collection rules

Under the new rules, different approach will apply depending on the amount paid to the same recipient.

If the total amount of qualifying payments does not exceed PLN 2M in a tax year, the Polish payer will be entitled to apply a WHT exemption or reduced rates similarly as under the current rules, as long as (new requirement) due care is ensured in verifying whether the reduced WHT rates were correct.

If the total amount of qualifying payments exceeds PLN 2M (ca. EUR 465K) in a tax year, as a rule the Polish payer will be obliged to collect and pay WHT at domestic rates – at 19 percent for dividends and 20 percent for interest, royalties and certain types of intangible services (e.g. advisory and management fees). WHT domestic participation exemptions and DTT reliefs would be disregarded at this

stage. This would apply to the amount in excess of PLN 2M.

Example:

- Fee for management services paid by A (PL) to parent B (DE): PLN 5.25M (ca. EUR 1.22M)
- Withholding tax collected:
 - (a) for PLN 2M - no tax (based on the treaty);
 - (b) excess over PLN 2M – WHT of PLN 650K (ca. EUR 151K) collected (at 20% rate)

After WHT has been remitted, the taxpayer (in some cases - the tax remitter) will be entitled to seek a WHT refund. Procedures may take at least 6 months.

In order to avoid that, two solutions may be pursued.

Providing the tax authorities with WHT remitter's statement

The taxpayer and the remitter may benefit from WHT exemptions and reduced rates (also to payments above the PLN 2M ceiling) if a specific statement is lodged by the tax remitter prior to the payment made. This statement must be signed and submitted by the head of the entity (as understood for accounting purposes; generally management board).

The statement should confirm that all formal requirements for the given WHT relief have been met as well as the remitter is not aware of circumstances excluding application of WHT relief in the given case.

The remitter is allowed to make further payments (with WHT relief) to the same recipient (taxpayer), but no longer than until the end of the second month following the date of lodging the statement. After that, in the following month, a supplementary statement needs to be submitted confirming compliance in the whole period.

Additional penal tax liability of 10 percent would apply to payments where the statement lodged had been untrue (the penal rate may be higher in certain cases).

Obtaining a WHT clearance opinion (only for the WHT exemptions under the Interest and Royalty and Parent Subsidiary Directives)

In order to avoid collection of domestic WHT rates and the burdensome WHT refund process, the taxpayer (or in some cases – the Polish remitter) may apply for a WHT clearance opinion from the Polish tax authorities. Such an opinion would enable to benefit from WHT exemption under Interest-Royalties and Parent-Subsidiary Directives' regime (no advantage with respect to treaty benefits).

Such an opinion should generally be issued within 6 months and is valid for 36 months (unless the state of affairs changes in due course).

The tax authorities may refuse to issue the WHT clearance opinion if they challenge e.g. beneficial owner status of the taxpayer, genuine character of his business activity or due to application of SAAR/GAAR.

Other changes important from WHT perspective

Beneficial owner definition changes.

The beneficial owner will be also expected to carry out a genuine economic activity in the country in which it is seated as per CFC regulations (e.g. the entity has qualified staff, necessary premises and assets required to conduct business activities, it does not create an artificial structure detached from economic reasons, there is a proportion between the business activities carried out and the assets owned etc.). Beneficial owner should also decide on his own about income received and bear economic risk associated with loss of receivable. Entities receiving payments subject to WHT should be reviewed to assess whether they meet these requirements.

Anti-abuse clause (SAAR) extended. The withholding tax exemption will not apply if: (i) its aim would be contrary in the given circumstances to the object or purpose of the exemption, (ii) the main purpose or one of main purposes of an arrangement or transactions and actions was to benefit from WHT exemption and the actions undertaken were artificial.

Practical implications:

- Obligation to collect WHT (also on certain types of services) may have an adverse cash-flow impact (refund may take 6 months or longer).
- Review of payments/flows to non-residents is recommended to assess potential WHT costs in Poland as from 2019.
- WHT relief for payments above PLN 2M would only be possible when burden of proof is shifted by a non-resident taxpayer to the Polish WHT remitter

or when the non-resident taxpayer/remitter obtains WHT clearance. This would require implementation of new policies in the area of WHT (including observation when the 2M thresholds are exceeded).

- Payments benefitting currently from WHT exemption should be analyzed in view of potential application of anti-abuse provisions (extended SAAR) and beneficial ownership concept.

The planned changes mean that it will be necessary to carefully verify whether the conditions for benefiting from the preferential WHT are met and to implement new WHT collection procedures. Please contact us if you require more information on this regulation or discuss its potential impact for you or your firm.

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