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Newsletter

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Withholding tax in 2022

Under the laws binding in 2022, where the aggregate value of payments made to an affiliated entity exceeds PLN 2 million in any tax year, the tax remitter is required to withhold, on the payment date, a flat rate income tax at the rate determined in the CIT Act on any amount exceeding PLN 2 million.

These provisions were introduced to the CIT Act a few years ago, but their application was suspended until the end of 2021.

What is passive income?

This requirement applies to passive income from:

- interest; copyrights or neighbouring rights, the rights to invention designs, trademarks or decorative patterns, including income from the sale of such rights; fees for access to a secret formula or production process; the use or right to use an industrial, commercial or scientific device or a means of transport; and information connected with experience acquired in an industrial, commercial or scientific field (know-how),
- dividends and other income and other revenues from a share in the profits of legal entities with their registered office or place of management in Poland

where such payments are made to a related party.

The new filing requirements, which become effective from 2022 and apply to documentation prepared for 2022, are :

- Local File must be prepared by the end of the 10th month from the end of the fiscal year (previously this was nine months);
- Information on transfer pricing must be submitted by the end of the 11th month from the end of the fiscal year;
- a Local File must be submitted at the request of the tax authority within 14 days (it used to be seven days).

Based on the foregoing, the requirement to withhold the tax is, as a rule, obligatory, though there are two measures whereby:

- WHT is not collected – in accordance with a relevant double taxation agreement (DTA);
- a reduced rate is applied under a relevant DTA; or
- a WHT exemption is applied under the CIT Act (Article 21(3) or Article 22(4) of the CIT Act).

The first measure involves a WHT clearance opinion, which may be requested from the tax authority by the taxpayer or the tax remitter. The tax authority has six months in which to issue such an opinion, having verified whether the foreign contractor meets all the requirements necessary to apply a WHT exemption or a reduced WHT rate.

In practice, the applicant is required to provide a large number of documents and information to the tax authority, which is quite burdensome. However, an unquestionable advantage of the opinion is that it is valid for 36 months.

The second measure is for the tax remitter to submit, on the payment date at the latest, a relevant statement confirming that the taxpayer holds the documentation required by tax law regulations to apply a specific tax rate or an exemption, or conditions for not withholding tax, based on special laws or DTAs, and that the taxpayer has no knowledge, after a relevant due diligence verification, that would justify a presumption that any circumstances exist that would exclude the application of that tax rate, exemption or conditions for not withholding tax.

The statement is to be made by a manager within the meaning of the Accounting Act, indicating their function, and with full liability for the accuracy of the information included in the statement.

Agata Wleklińska
tax advisor

Polish Deal 2.0 – what is changing?

The Act Amending the Act on Personal Income Tax has been signed by the President and became effective as of 1 July 2022. The Act modifies the amendments introduced by Polish Deal 1.0, reducing the tax complexity to a certain degree.

Reduction in the tax rate from 17 to 12 per cent

The first key change is a reduction in the income tax rate for non-flat rate taxpayers from 17 to 12 per cent. As a result, employees may expect higher net salaries. It should be stressed that the 12 per cent rate will apply to income up to the annual tax threshold of PLN 120,000. The first tax threshold remains unchanged. With any higher income, PIT payers will enter the 32 per cent tax bracket.
The reduced PIT rate will be applied to salaries for July 2022. In addition, taxpayers will be entitled to settle their taxes for 2022 at a reduced rate, meaning that some people may expect tax refunds in 2023.

Tax relief for the middle class to be abolished

The recently introduced tax relief for the middle class will be abolished and taxpayers will not be able to use it from 1 July 2022. However, it will be possible to use the relief for 2022 if it proves more advantageous for a given taxpayer than the rules introduced by Polish Deal 2.0. This means that the head of the relevant tax office will be required to calculate the hypothetical tax for 2022.
Middle class relief will not apply to income earned from 1 January 2022. Tax remitters will not be required to make any adjustments to the already calculated relief and taxpayers will not be required to include the relief in their annual return for 2022 .

The tax-free allowance to remain unchanged

Polish Deal 1.0 introduced a new tax-free allowance of PLN 30,000. The second version of the Polish Deal does not change anything in this respect. Therefore, non-flat rate taxpayers will not pay this tax if their annual income after deductions does not exceed PLN 30,000. After crossing this threshold, taxpayers will pay tax on any amount exceeding PLN 30,000.

Change in the form of taxation during the year

Polish Deal 1.0 forced many taxpayers change the taxation regime from a non-flat rate to a rate of 19 per cent. Under Polish Deal 2.0, taxpayers will have the opportunity to reconsider their tax scheme and switch to a non-flat rate scheme.

Taxpayers paying tax on registered income without deductibles will be able to change the tax scheme either:

- effective as of July – from 22 August 2022, a taxpayer should submit a statement on leaving the flat-rate scheme and complete two returns at the end of the year, namely a PIT-28 form for flax-rate payers (for the period from January to June) and a PIT-36 form for taxpayers taxed according to the general rules (for the period from July to December); or
- effective for the entire 2022 – a taxpayer may change the tax scheme between 1 January and 2 May 2023 by filing a PIT-36 form. Taxpayers will need to set up and complete a revenue and expense ledger for the entire 2022. No PIT-28 form should be filed for 2022, since it would mean continuing the flat rate scheme.

Partial exclusion of the healthcare contribution

Most of the rules introduced by Polish Deal 1.0 will not be changed with respect to deducting healthcare contributions. Certain modifications will be introduced for 19 per cent flat-rate taxpayers, taxpayers paying tax on registered income without deductibles and lump-sum taxpayers.

- taxpayers paying tax at 19 per cent may deduct healthcare contributions of up to PLN 8,700 as a deductible cost;
- taxpayers paying tax on registered income without deductibles will be entitled to deduct 50 per cent of their healthcare contributions as their deductible cost; and
- lump-sum taxpayers may deduct 19 per cent of the healthcare contributions paid.

Maria Kotaniec
tax advisor

Termination of employment relationship due to redundancy of elimination of the position

The economic situation often forces businesses to take measures aimed at cutting costs. With budgets being squeezed, employers might be looking to reduce headcount. However, an employer who has decided to downsize must carry out layoffs in compliance with the applicable laws.

Firstly, it is important to remember that termination due to redundancy or where the position in question is being eliminated are not due to any conduct on the part of the employee. This means that the termination procedure in Poland must be followed in line with the Act on Mass Layoffs (i.e. the Act on Special Rules of Terminating Employment for Reasons Not Attributable to Employees of 13 March 2003).

Technically, redundancy (or cutting jobs) means a reduction in the number of employees doing the same job, whereas the elimination of a position applies to the situation where the employer no longer needs anyone performing a specific job.

The Act on Mass Layoffs, contrary to what the name suggests, applies to any termination of an employment relationship due to reasons not attributable to an employee. It means that, even in the event of terminating the employment relationship with an individual due to redundancy/job elimination, the employer must observe the provisions of the Act on Mass Layoffs.

At the same time, it must be remembered that the Act on Mass Layoffs does not apply to employers employing less than 20 people. Typical mass layoffs (involving the termination of employment with a group of employees) are procedurally more complex than individual dismissals.

Another important requirement that must be met is to state redundancy/job elimination as the reason for the termination of the employment contract. This must be stated in the termination notice (Article 30 § 4 of the Labour Code).

Given the specific nature of the termination process, special attention must be paid to redundancy. Since a redundancy occurs when an employer requires fewer people to carry out a certain kind of work, clear reasons should be given on how the individuals being made redundant were selected (there is no such need when the employer eliminates a unique job position).

The employer's selection criteria for redundancy must be appropriate for the situation, and must be objective and non-discriminatory (appropriate criteria may include length of service, education and experience, performance and KPI achievement).

IIt is crucial to follow a fair redundancy selection process. First of all, information on the rules of termination is an element of the termination procedure – it should be presented to the employee in the redundancy notice.

Courts have found that a redundancy notice must contain the selection criterion for redundancy, unless the criterion is obvious or already known to the employee. The need to specify the selection criterion for redundancy is also due to the labour courts, which will verify whether the employer used correct redundancy selection criterion.

In this context, it should be remembered that termination of employment relationships under the Act on Mass Layoffs, as with any other forms of termination, may be contested in court. An employee who has been made redundant may seek the same remedy as an employee who has been dismissed under the standard procedure – a claim for reinstatement or compensation.
If the grounds for termination are incorrectly articulated, and specifically with reference to redundancy without correct criteria or job elimination in the case of an employee doing a job that is not unique in the employer's structure, may result in a dispute where the court will likely consider the grounds for termination as irrelevant or false, and the termination wrongful. As a result, the employer will be forced to reinstate the employee or pay compensation (even if he or she has already received severance pay in connection with the redundancy / job elimination).

Therefore, employers should exercise utmost care and diligence when terminating employment relationships due to redundancy/job elimination – since any defects or underperformance of the termination procedure, and specifically indicating incorrect selection criterion for redundancy, may turn out to be more expensive than expected.

Michał Mieszkowski
attorney at law

Sobriety at work

What can an employer do if an employee reports to work drunk?

First of all, the employer must not allow an employee to perform their job while drunk, including an employee who is unfit for work as a result of consuming alcohol before coming to work or an employee who has drunk alcohol while at work.
This obligation not only comes from the employer's duty to ensure the employees' health and safety at work (Article 94 section 4 of the Polish Labour Code, Article 207 of the Polish Labour Code), but also directly from the Act on Upbringing in Sobriety and Counteracting Alcoholism (Article 17 section 1).

It is sufficient for the employer to have a reasonable suspicion that an employee has consumed alcohol at work or prior to reporting to work. A reasonable suspicion of being inebriated or under the influence of alcohol might include the employee's behaviour or the smell of alcohol. The circumstances underlying the employer's decision not to allow the employee to work must be clearly presented to the employee.

What does a state indicating the use of alcohol mean? What does intoxication mean?

As far as the alcohol level at which an individual is considered to be legally impaired is concerned, Polish law distinguishes between a state indicating the use of alcohol (stan po użyciu alkoholu) and a state of insobriety (nietrzeźwość).
A state indicating the use of alcohol is where the content of alcohol in the body is or leads to:

- a blood alcohol content (BAC) between 0.2 and 0.5 permille (‰); or
- a breath alcohol content (BrAC) between 0.1 and 0.25 mg of alcohol in 1 cubic decimetre (1 litre) of blood.

Please note that in many countries, including Poland, BAC is measured and reported as grams of alcohol per 1000 millilitres (1 litre) of blood (g/1000 mL). In the UK, for example, BAC is reported as milligrams of alcohol per 100 millilitres of blood (mg/100ml).

Intoxication is where the content of alcohol in the body is or leads to:

- a blood alcohol content (BAC) above 0.5 permille (‰); or
- a breath alcohol content (BrAC) above 0.25 mg of alcohol in 1L of breath (250 micrograms of alcohol per litre of breath).

Can the employer test alcohol content using an evidentiary breath testing device (EBT), commonly referred to as a breathalyser?

Under the current laws, employees cannot be forced to take drug and/or alcohol tests.

Pursuant to Article 17 section 3 of the Act on Upbringing in Sobriety and Counteracting Alcoholism, at the request of the employer or the employee concerned, an alcohol test may be administered by a relevant law enforcement authority (the police), or in the case of blood tests – by a qualified person (a nurse).

The main reason behind the current legal framework is that alcohol tests administered by employers may not be reliable given the variety of different devices used and producing different readings, such as sobriety testing machines, breath test machines or breathometers or breathalysers, etc. This may make testing unfair to the employee, so administering objective tests by an external agency would help eliminate any such uncertainty.

Are there any changes expected in terms of sobriety testing at work?

There is a new bill before the Polish Parliament to amend the Labour Code in connection with employee sobriety testing rules. The most important changes include:

- for the first time, a proposal has been lodged to regulate employee testing rules not only to test whether an employee has consumed alcohol, but also other substances of similar effect (it may be concluded that it includes drugs, designer drugs, etc.).

- based on the amendments, an employer could administer alcohol tests to employees. The rules on taking such tests and the testing procedure (the types of devices used, the duration of a test, testing frequency etc.) should be determined in a collective agreement or in the workplace regulations (and if an employer is not required to introduce workplace regulations, then by means of a workplace announcement).

- the proposed amendment contains the basis for the processing of personal data of employees, included in the results of tests administered by the employer. In accordance with the recommendation of the president of the Polish DPA, employers will have legal grounds to process (and store) personal data concerning an employee's sobriety.

- To avoid any doubt, under the new rules, accredited calibration/verification certificates will be required for all test devices (breathalysers).

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Physical defects of real property

It sometimes happens in conveyancing that the actual area of the land or property differs from the area initially declared by the owner, or even from the area registered in the official documents (the land and mortgage register or the land register).

Most often the difference is disclosed in a survey and then the parties make a relevant price adjustment. Specifically, in the case where the area of land is misrepresented by the seller, the transfer price will be reduced.

However, even if no survey is made (for whatever reason), the buyer still enjoys legal protection if the property (or premises) is smaller than declared – the buyer can make a claim for a physical defect against the seller (Article 556 § 1 of the Polish Civil Code).

In the latest decisions of the Polish Supreme Court, the judges directly stated that any difference between the actual area of real property and the area declared in the property purchase agreement is a physical defect within the meaning of Article 556 § 1 of the Civil Code (a judgment of the Supreme Court of 25 February 2022, II CSK 109/22).

In this case, it does not matter whether the seller was aware that the premises are actually smaller than contractually declared or registered in the official documents (since the seller's liability under warranty for physical defects is based on statutory implied warranty, so the seller's subjective knowledge on the transferred property is not relevant to a claim for defects).

In this situation, the claim most in line with the buyer's material interests is a price reduction (Article 560 § 1 of the Civil Code). The buyer's claim to restore the equality of mutual considerations in the contract by adjusting the price actually paid by the buyer to the price that should have been paid for the property (premises) with a smaller area. If the seller fails to refund the money voluntarily, the buyer may bring a claim before court.

Please note that claims for property defects expire five years after the release of the property to the seller (Article 568 § 1 of the Civil Code) – if the defect is detected later, the buyer will no longer have claims under statutory warranty (though may attempt to make a claim on other legal grounds, specifically for underperformance of the contract, but this may be more difficult to process).

Naturally, the buyer will not have any claims against the seller if the buyer was aware that the area of the transferred property is smaller than declared or registered (Article 557 § 1 of the Civil Code).

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→ Law and taxes in Poland

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