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Newsletter

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TAX Alert: The Sejm amends the CIT Act

The Sejm amends the CIT Act.

On 15 September 2022, the lower chamber of the Polish parliament passed a bill amending the Corporate Income Tax Act (the "CIT Act").

Based on the explanations available on government websites, the amended CIT Act introduces regulations clarifying certain existing solutions.

The amendment is very important from the point of view of taxpayers. Notably, it abolishes obligations that posed many problems and were even unenforceable, while removing harmful provisions of law and correcting legislative defects.

With regard to transfer pricing provisions, the most important changes proposed in the bill include:

- repealing the provisions on applying the arm's length principle and documentation obligations for indirect tax haven transactions, i.e. transactions where the beneficial owner of a receivable is resident in a tax haven. The amendment is proposed to take effect from the date of the act coming into force, with a retroactive effect to 1 January 2021;
- raising the documentation thresholds to PLN 2.5 million for financial transactions, and to PLN 500,000 for other transactions, with respect to the documentation of direct tax haven transactions. Here, the thresholds are proposed to apply to both controlled transactions and other transactions.

In terms of withholding tax, the bill introduces a realignment and relaxation of the withholding mechanism in force since 1 January 2019, commonly referred to as the pay & refund mechanism. The draft provides for more flexible time limits for submitting a statement from the remitter by extending the deadlines for filing an initial statement and a follow-up statement and extending the validity of the initial statement until the end of the tax year. In practice, this means that remitters will have more time to prepare for the submission of these statements.

Once an initial statement is submitted, the pay & refund mechanism will not apply until the end of the remitter's tax year. In addition, remitters will be bound by their statements filed in 2022. The draft implies the application of extended deadlines in relation to payments made in 2022.

The catalogue of significant changes that will be implemented by the bill includes:

- the modification and postponement of minimum income tax provisions in connection with suspending the application of the new provisions during the years 2022-2023;
- the repeal of provisions governing hidden dividends, which restrict the tax-deductibility of certain expenses, including distributions to shareholders and related entities, but also to entities related to the corporate taxpayer;
- an amendment to the rules governing Polish holding companies;
- an amendment to the regulations on profit shifting taxation, the relaxation of regulations on charging debt financing costs as tax-deductible costs, the removal of the existing obligation to include an attachment to the tax return disclosing information on taking advantage of a VAT bad debt relief;
- an improvement of the regulations on lump-sum tax on corporate income (the Estonian CIT).

Changes affecting other taxes will concern the maintenance of VAT rates at the current level in connection with the continued increase in inflation and the negative implications of the war in Ukraine for the Polish economy and society.

Agata Wleklińska
tax advisor

Amendment to the duties of members of the management board of a Polish limited liability company

On 13 October 2022, an amendment to the provisions of the Polish Code of Commercial Companies (the "CCC") will come into force covering a number of provisions, including new obligations for members of the management board of a limited liability company. The amendment also introduces provisions that deal with two new aspects:

- keeping a record of resolutions of the management board
- the duty of loyalty owed to the company by members of the management board

Record of resolutions

Unlike the regulations applicable to a joint-stock company, the regulations concerning a limited liability company did not regulate any record of resolutions adopted by the management board.
As a rule, resolutions of the management board of a limited liability company should be adopted in matters that go beyond the ordinary course of business, or if at least one of the members of the management board objects to an action that goes beyond the ordinary course of business. There is no defined catalogue of actions that go beyond a company's ordinary course of business – this issue may be regulated by the company's articles of association or the regulations of the management board.

The provisions of the CCC specify when resolutions may be adopted, what majority of votes is necessary to adopt resolutions, in what form the members of the management board may participate in the meeting and how they may adopt resolutions, as well as the issue of adopting resolutions through another member of the management board. However, so far the regulations have not referred to taking minutes of resolutions in any way whatsoever. Now, the provision of Article 2081 of the CCC introduces new regulations in this respect.

Under the new provision, management board resolutions must be recorded and the minutes should contain: the agenda of the meeting, the full names of the members of the management board present at the meeting and the number of votes cast with respect to individual resolutions. The minutes must also indicate any dissenting opinions raised by any members, together with a statement of reasons. Importantly, the minutes must be signed by at least the member of the management board chairing the meeting or ordering the vote, unless the articles of association or the management board regulations provide otherwise.

In short, after the amendment introducing Article 2081 of the CCC comes into force, the management board is required to keep a record of any resolutions it adopts.

Duty of loyalty

The second amendment also places the members of the management board of a limited liability company in a similar position to the provisions already in force with respect to members of the management board of a simple joint-stock company. The new Article 2091 of the CCC will bring into law what are already generally accepted principles, i.e. the duty of loyalty owed by members of the management board to the company, as well as the fiduciary duty to maintain confidentiality, i.e. not to disclose the company's confidential information and trade secrets even after they are no longer serving on the board.

Importantly, this provision also introduces the business judgment rule – i.e. a rule of law that excludes the civil liability of members of the management board and protects their decisions from judicial scrutiny in most cases. According to the explanatory memorandum to the bill, the newly introduced provision is intended to allow the actions and decisions made by members of the management board of a limited liability company to be assessed from the perspective of a reasonable business risk, whereby such decisions and actions must be based on information, analyses and opinions that should be taken into account when making a diligent assessment of the circumstances.

The provision aims to protect members of the management board who perform their duties in accordance with the duty of loyalty and make decisions on a day-to-day basis regarding the company's actions, which may not always turn out to be accurate and may cause a loss to the company. Under the new regulation, the liability of members of the management board will be assessed based on the "best judgment" basis, considering the information available at the time and their loyal action, rather than being based on the consequences of their decisions.

By introducing this duty, the legislator has directly linked it to the exclusion of the liability of members of the management board. If the business judgement rule is applied to a decision/action made by a member of the management board of a limited liability company, that member will not be held liable for the negative consequences.

Agnieszka Slowikowska
attorney trainee

Overtime for managers

The Labour Code regulates working hours differently for those employed in a managerial position. Unlike standard employees, employees who manage people on behalf of the employer, as well as managers of separate organisational units are expected to perform work, when necessary, outside of normal working hours without being paid extra remuneration or overtime allowance. An exception to this rule is overtime worked on Sundays and holidays, if the employee does not receive an extra day off in lieu of overtime.

The idea behind this regulation is to motivate people in managerial positions to manage the work and the team of people in an efficient manner to ensure that ongoing tasks are performed during normal working hours.
However, the vagueness of this provision may raise some questions. It should certainly not be viewed strictly, as such individuals may, in certain cases, be entitled to overtime pay.

Above all, a person who performs a managerial function and who, due to specific organisational characteristics, cannot complete work in normal hours cannot count on additional remuneration, especially where that person also has a real influence on the organisation and functioning of the work.

Additional remuneration may be due, for example, if a managerial employee is charged with a number of tasks that cannot be completed in the basic time frame, or if they perform, over a longer period of time, duties that are not related to the managerial function, i.e. for example duties intended for another lower-level position. The poor organisation of the employer's work also cannot be an argument for a manager not being entitled to overtime pay.

For example, if a manager makes staffing requests for a position and the employer ignores these requests, despite real staffing shortages, such an action may lead to the manager having to work overtime through no fault of their own. In such a case, overtime pay would probably be due, as the overtime work is not the result of mismanagement by the manager and is not their independent decision.

It should also be emphasised that overtime work should not be permanent in nature. The phrase "when necessary" should be seen as an exceptional need justified by special circumstances or unforeseen, and not as something standard, belonging to one of the duties of a managerial position.

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Supervisions of corporate email

TSince employers have the right (and obligation) to ensure the smooth operation of the company, they may also supervise the manner in which their employees perform their duties. Such supervision specifically includes business correspondence exchanged by the employee using a corporate email account.

This right of the employer results directly from the Polish Labour Code. Pursuant to Article 223 § 1 of the Labour Code, if necessary in order to ensure work organisation in a way ensuring the full use of working time and the proper use of work tools provided to the employee, the employer may inspect the employee's corporate email (email monitoring).

At the same time, Article 223 § 2 of the Labour Code introduces an explicit prohibition on breaching the secrecy of correspondence and employee's other personal rights by establishing limits on the level at which the employer may inspect the employee's corporate email correspondence.

This means that the employer must formally regulate access to the employee's corporate email account – the employer must notify the employee in advance of using email monitoring. The minimum notice period that must be observed by the employer before introducingemail monitoring is 14 days (a newly retained employee must be informed, in writing, about the purpose, scope and manner of the monitoring before commencing work). The email monitoring policy must be included in the workplace regulations.

The relevant policy provisions included in the workplace regulations must specify the objective of email monitoring, with detailed reasons for an inspection.
Additionally, the employer must specify the scope of monitoring, i.e. what data is to be collected. The scope of data must be in line with the monitoring objective.

If it is sufficient to collect information on email senders and recipients, the time and date of sending and receiving emails, and on the subject of emails, then the content of the correspondence should not be reviewed.

Nevertheless, employees must be notified of the detailed scope of data that is to be collected using monitoring.
The email monitoring policy must also specify the manner of using monitoring, i.e. the manner in which inspections of emails are to be conducted, as well as the rules of using the data collected from the inspection. Specifically, the employer must specify the circumstances and frequency of inspections.

In addition to these obligations concerning the introduction of the email monitoring policy, the employer must also comply with the requirements on employee personal data protection (specifically, the obligation to provide information under Article 13 of the GDPR).

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Law and taxes in Poland

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