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LEGAL POLAND

Newsletter

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Tax on **shifted profits**

Provisions on shifted profits have been in force since 1 January 2022. They were intended to replace the previous regulations limiting the costs that could be incurred for the benefit of a related party (Article 15e of the CIT Act).

According to the Ministry of Finance, these new regulations already need to be amended and will therefore be modified from 2023.

In order to consider an expense as a shifted profit, the following conditions must be met:

1/ Related party conditions

- A given expense must have been incurred for the benefit of a related party within the meaning of the transfer pricing legislation. In the legislation in force from 2023, it is further clarified that only payments to foreign entities are subject to the shifted profits tax;

- The income tax actually paid by the related entity for the year in which it received the payment from the Polish taxpayer, in the country where the related entity has its registered office, management, registration or location, is at least 25% lower than the amount of tax the related entity would have paid if it were a Polish taxpayer, applying the 19% tax base rate. From 2023 onwards, the provision changes so that the specific income/revenue received by the foreign related party in connection with the transaction in question will be taxed at an effective rate lower than 14.25%;

- Related party revenues obtained from the taxpayer and taxpayer-related entities arising from qualified expenses incurred by the taxpayer constitute at least 50% of the related party's total revenues. From 2023 onwards, it is clarified that 50% of the revenue must come from Polish tax residents who are related parties; and

- A related party must transfer the relevant amount of revenue received from the taxpayer and its related parties to another entity: (a) recognising expenses on this account as tax deductible costs, or deducting these expenses/revenues from income, tax base or tax in any form, or (b) if these revenues comprise profits to be distributed as dividends or other income from sharing in corporate profits.

- With respect to eligible expenses incurred for the benefit of a related party from an EU or EEA Member State, it does not carry out substantial real economic activity in that state.

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2/ Polish taxpayer conditions

- The expense must be a deductible expense of the Polish taxpayer;
- The expense must fall within the catalogue of eligible expenses; and
- The sum of eligible expenses incurred for the benefit of related and unrelated entities exceeds 3% of the sum of tax deductible expenses recognised by the taxpayer. From 2023 onwards, not all eligible expenses, but only eligible expenses incurred for the benefit of a related entity will be counted towards the 3% of the sum of tax deductible expenses.
- If a given cost meets the definition of shifted profits, the Polish taxpayer is required to treat it as its own additional income and tax it at the 19% tax rate. The due date for the payment of tax on the shifted profits coincides with the due date of the taxpayer's CIT.

Payments to related parties in countries with preferential taxation will be particularly vulnerable to the new regulations, especially concerning further payments within a capital group or regularly distributed dividends (or distributed profits in some other form), for example, payments to holding companies, companies financing group activities, or "cost centre" companies within capital groups.

Agata Wleklińska
tax advisor

Remote work in labour law

One of the most significant labour law changes in 2023 in Poland will be the comprehensive regulation of remote work, which has become extremely popular in the wake of the COVID-19 pandemic. Remote work has become a permanent feature of workplaces, and enabling staff to work from home has become standard in the post-pandemic world.

Until now, remote work has been performed on the basis of specific legislation adopted in connection with the COVID-19 pandemic. Now, remote work rules will be introduced into the Labour Code.

The draft, in its agreed form, is expected to be enacted as early as December 2022, meaning that it is likely that the amendments will take effect in the first quarter of 2023. The effective date is set at two months from the date of publication in the Journal of Laws.

The introduction of a remote work system will be agreed between the employer and the employee. The employer will only be able to unilaterally instruct a particular employee to perform remote work in exceptional situations, both when executing the employment contract and during employment.

Arrangements made during the employment can be amended, but the initiative to stop working remotely must be agreed by both the employer and the employee. A relevant request to change the terms and conditions of the work will be binding on the other party. On the other hand, in the case of arrangements made when executing the employment contract, it will be necessary to enter into an agreement amending the terms and conditions of work (or to give notice of termination for amending the employment contract).

The terms and conditions of remote work should be included in the remote working regulations. This document should establish:

- The group of employees who have the option to work remotely;
- The rules for the reimbursement of expenses related to remote working (including a lump sum for increased consumption of utilities and an allowance for the use of the employee's own tools);
- The rules for communication between the employer and remote workers (including the method of confirming attendance at work);
- The principles of control of work performance;
- The principles of health and safety inspections;
- The principles for checking compliance with security and information protection requirements, including procedures for the protection of personal data; and
- The rules of installation, inventory, maintenance, updating of software and servicing of work tools provided with remote workers.

According to the draft, remote working regulations will be introduced after consulting employee representatives.
At workplaces with trade unions, an agreement with these organisations will be necessary. If there is no such representation in the workplace, it will be necessary to hold a prior election of employee representatives.

An additional obligation for employers will be the need to carry out supplementary occupational risk assessments taking into account factors specific to the provision of work in a teleworking mode.

The remote working regulations will undoubtedly be an essential document from the point of view of the operation of a workplace – their preparation and introduction will require an analysis of the specific issues related to the provision of work outside the employer's premises.

At Ecovis, we provide full support to employers in introducing remote working in the workplace.

Michał Mieszkowski
attorney at law

A company's commercial representative – a few words about a proxy holder

In the course of running a business, it may be necessary to involve a person whose powers are similar to those of a person holding a leading position in the company.

A written power of attorney is usually granted for specific activities, in which the scope of the activities must be clearly indicated. If the business has special confidence in a given person and wishes to engage them for business-related activities, the most appropriate type of power of attorney is a special type called a commercial proxy (prokura).

This is a special solution regulated primarily under the Civil Code, according to which a commercial proxy is a power of attorney granted by a business and is entered into the Central Registration and Information on Business (CEIDG) or in the Register of Business Entities of the National Court Register (KRS). This power of attorney includes authorisation to perform court and out-of-court activities related to the conduct of the business. In view of the above, the function of a commercial representative is of particular importance in business transactions, as it is possible to present a copy of the CEIDG or KRS entry to prove one's powers. There is a public guarantee of the accuracy provided for such copies. An ordinary written power of attorney does not have this function.

In a sole proprietorship, a commercial proxy is granted by the business entered in the CEIDG. In a civil partnership, a commercial proxy is granted by the individual partners and not by the partnership itself, which means that legal acts performed by the commercial representative would have legal effect only in relation to that partner and not the partnership or the other partners. In partnerships, the appointment of a commercial proxy requires the consent of all the partners who have the right to manage the company, whereas in capital companies a commercial proxy is granted by all the members of the management board.

A commercial proxy must always be granted in writing or it will be invalid. It may be revoked at any time when the sole proprietor or one of the company's partners issues a statement to that effect. It is also possible for a commercial proxy to designate the commercial representative as a succession manager in the event of the death of the entrepreneur.

It is worth noting that in the case of the business owner, their loss of capacity or death does not imply the expiry of the commercial proxy.

The situations in which a commercial proxy expires include the de-registration of the business from the National Court Register, a declaration of bankruptcy by the company, opening the company's liquidation, the death of the commercial representative, or the total or partial loss of the commercial representative's legal capacity.

It is also important to note that a commercial proxy cannot be restricted with effect towards third parties, unless a specific provision provides otherwise.

A commercial proxy extends to all court and out-of-court actions. There is no distinction between transactions in the ordinary course of business and transactions outside the ordinary course of business. The provisions only introduce a few limitations on the power of the commercial representative. A commercial representative must hold a power of attorney for a particular action in the case of disposing of a business, for executing a legal act under which the business is given for temporary use to a third party, and for the disposal and encumbrance of real estate. A commercial proxy is therefore a perfect solution for those who intend to entrust a large part of the tasks of running a business to a given person, but do not necessarily want to appoint that person as a member of the management board or a partner.

Usually, the most senior positions in a company, e.g. chief accountants, general managers or sales directors, are appointed as commercial representatives. Giving such broad powers means that a high degree of trust is placed on a commercial representative by the board members or shareholders.

Michał Sobolewski
attorney trainee

Absence from work – how should an employee proceed?

Absences from work fall into two main categories – excused and unexcused (unauthorised). There are many reasons why an employee may be absent from work, including holidays, illness (a L4 sick leave) or donating blood. All these examples relate to the category of excused absences. Examples of unauthorised absence include oversleeping or the intentional abandonment of work by an employee, either without prior authorisation or any explanation.

In the case of excused absences that are not leave granted by the employer, it is necessary to inform the employer and present an explanation for the absence. This issue is regulated by the regulation of the Minister of Labour and Social Policy on the manner of justifying absences from work and granting leave to employees of 15 May 1996 (consolidated text in the Journal of Laws of 2014, item 1632) (the "Absence Regulation").

According to the Absence Regulation, an employee is required to inform the employer, in advance, of the reason and expected duration of their absence from work, if they knew or could have foreseen in advance that the reason resulting in their absence from work would occur.

Unfortunately, in everyday life, it is sometimes difficult to foresee in advance the possible situations for taking time off work, and in order to address this risk, the legislator has provided in the Absence Regulation that employees should notify the employer immediately – and no later than the second day of absence from work. In addition, in exceptional circumstances, an employee may be excused even if they notify the employer after that deadline (i.e. after the second day of absence). Exceptional circumstances include, for example, serious illness where no household members are able to inform the employer of the situation.

Can the employer organise certain issues?

The employer may use the work regulations, or the information on the terms and conditions of employment (if no work regulations are adopted at the employer), to regulate the manner in which the employee reports their absence. The regulation sets out examples of ways of informing the employer, such as: in person, by another person, by telephone or other means of communication, or by post.

The employer may specify the ways it considers acceptable, e.g. it may consider that the employee cannot report their absence through another person, or it may indicate that the employee must send an email to a special address or call an HR person.

Donating blood – as an example of an excused absence

According to the Absence Regulation, the employer is required to grant an excused absence to employees for the time specified by the blood donation station to donate blood. The employer is also required to release an employee who is a blood donor from work for the time necessary for the periodic medical examinations prescribed by the blood donation station, if these cannot be performed during the employee's free time. According to the Absence Regulation, the following frequency of blood donation is possible:

- Women – a maximum of four times a year;
- Men – a maximum of six times a year;
- The interval between donations must not be shorter than eight weeks.

Importantly, in the case of an employee donating blood, as long as there is an epidemic or a state of epidemic emergency – and there is currently an epidemic emergency – the employee is entitled to two days off, i.e. on the day of the blood donation and the following day. If an employee donates blood on a Friday, for example, the second day off would be a Saturday and the employee would not be entitled to an additional day off at work on another date.
At all other times, i.e. outside the state of epidemic or a threat of an epidemic, the employee is entitled to one day off.

Agnieszka Slowikowska
attorney trainee

Hungarian company created for the purpose of a cross-border merger

According to the Hungarian Act CXL of 2007 on Cross-border Mergers of Limited Liability Companies, it is possible to set up a special limited liability company with its registered office in Hungary specifically for the purpose of cross-border mergers. Below is a summary of the main provisions applicable to the company to be established under these specific rules.

When setting up such a company, it must be declared in the application for registration that it is being set up for the purpose of participating as a receiving company in a cross-border merger. Already for this application, you must attach a joint draft of the merger agreement and the merger report.

An interesting arrangement is that no manager is appointed, no supervisory board is set up and no auditor is elected when this company is formed. Until the date of the merger with the foreign company, the founder or the designated founding member also performs the management and representation functions within the scope of his membership or may grant a general power of attorney to a third party to perform these functions. Such general authorisation must also be attached to the application for registration.

The founder, the designated founder member or the owner representative shall be the registered representative of the acquiring company to whom the disqualification and liability rules applicable to the chief executive officer shall apply.

It is also specific that the acquiring company does not open a cash account. A declaration by the representative, countersigned by a lawyer, certifying the payment of the financial contribution must be attached to the application for registration.

During the registration procedure of the acquiring company, the tax authority will examine the conditions for issuing a tax number during the tax registration procedure, but will not issue a tax number to the company. Furthermore, the company will not be given a statistical number.

The court registers the name of the company with the suffix "incorporated for the purpose of merger".

Until the date of the cross-border merger, the company thus formed may not enter into any civil law relationship with third parties, may not assume any obligations or acquire any rights and the acquiring company or the person representing it may only take decisions or act in the interests of the merger.

From the date of registration, the only changes that may be made to the business particulars of the merging company are those relating to the company name, the registered office, the representative and the member. The company has no tax liability other than tax registration until the date of the merger.

If the merger is not registered within one year of the date of the registration of the Hungarian company in the commercial register, the merger will normally be automatically struck off the commercial register without succession.

If the transformation is a merger, the continuing Hungarian company is the transferee, and if it is a merger, the resulting (third) legal successor company operates from the date of registration of the transformation. During the change registration procedure for the registration of a cross-border merger, the successor company will receive a tax number and a statistical number. The business year of the succesor company starts on the date of the merger.

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