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Newsletter

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Estonian CIT – an option worth considering

CWhat has come to be known as Estonian CIT – a flat rate on corporate income – is becoming a more and more interesting form of taxation every year. The name for this method of taxation comes from the fact that a similar system was first introduced in Estonia. The effect was to almost double the rate of economic growth.

Estonian CIT rules can be applied by joint-stock companies, limited liability companies, limited partnerships, limited joint-stock partnerships and simple joint-stock companies as long as, among other things:

- they employ at least three people for at least 300 days in a tax year;
- the shareholders or partners of the businesses are exclusively individuals who do not hold shares in the capital of other companies, participate in an investment fund or a joint investment institution, or all of the rights and obligations in a company that is not a legal entity ; and
- report their decision to be taxed at a lump-sum rate to the head of the relevant tax office by the end of the first month of the first tax year in which they are to be taxed at a lump-sum rate.

With Estonian CIT, there is no need for tax accounting, tax deductible expenses or calculations of tax depreciation. Monthly advance tax payments do not apply here – in Estonian CIT, tax is paid when distributing profit from the company (dividends).
This undoubtedly has a beneficial effect on the company's liquidity.

In addition, at the time of taxation, i.e. at the time of distributing the profit/dividend, the effective tax rate will be 20% instead of 26.29% for small taxpayers, and 25% instead of 34.39% for other taxpayers.

Lump sum taxation on corporate income covers income determined as:

- Net profit generated during the lump-sum rate taxation period to the extent that it is distributed to shareholders or partners (distributed profit income) or to cover losses arising in a period prior to the lump-sum rate taxation period (profit income intended to cover losses)
- Hidden profits in the form of cash or in-kind benefits made to shareholders, partners or to entities directly or indirectly related to them, in particular in the form of: (a) loans granted by the company to a shareholder or partner, together with interest, commissions, remuneration and fees on such loans ; (b) benefits performed by the company for a private or family foundation; (c) the company paying more than the market value in a transaction with a shareholder or partner or related entity; (d) the company repaying additional payments to shareholders in an amount higher than the original additional payment; (e) the redemption of shares paid from profit to a shareholder; (f) using profits to increase the share capital; (g) donations, including gifts and grants of all kinds; (h) entertainment expenses.
- Non-business expenses
- Overpayments of assets acquired or contributed in kind over the tax value of those assets (income from a change in the value of assets) – in the case of mergers, demergers, transformations or contributions in-kind in the form of an enterprise or an organised part thereof
- The value of income and expenses subject, in accordance with accounting regulations, to be booked in the tax year and included in net profit (loss), which were not included in that net profit (loss) (income from undisclosed business operations)

- Additional capital payments returned in the event of a merger or division
- Interest on a shareholder's share of the capital
- Profit allocated to replenish a shareholder's share of the capital
- Cash and non-cash benefits paid when a shareholder's share in the capital is reduced
- And in the case of a taxpayer who stops applying the Estonian CIT, the sum of the net profits made in each tax year of applying the lump-sum rate taxation that were not distributed or allocated to cover losses (net profit income).


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By the end of the third month of the tax year, a taxpayer must submit a declaration on the amount of income earned for the previous tax year.

This declaration must be submitted to the tax office electronically – on the CIT-8E form.

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Use of the National e-Invoice System – analysis of the proposed regulations

Following consultations, the Ministry of Finance has decided to postpone the effective date of the mandatory use of the National e-Invoice System by six months. Accordingly, the use of the National e-Invoice System (Polish: Krajowy System e-Faktur, KSeF) will become mandatory from 1 July 2024, otherwise documents issued by other means will not be recognised as VAT invoices.

Structured invoices will be issued according to a template based on a logical structure, known as the .xsd schema, established by the Ministry of Finance. Invoices issued in this way will be stored and processed by the KSeF, which in turn will decide whether or not to accept the invoice – depending on the correctness of the information sent.

Ultimately, this will be the only possible form of documenting the activities carried out by VAT taxpayers with their registered office or permanent place of business in Poland. The Minister of Finance will be able to issue an executive regulation exempting certain taxpayers from the obligation to issue structured invoices.

In turn, the KSeF will remain optional for entities with their registered office or permanent place of business outside Poland. If a structured invoice is used outside the National e-Invoice System, the taxpayer will be obliged to mark the invoice in a way that enables the verification of the data contained therein. An executive regulation will be issued, setting out the way in which invoices are to be marked. In this regard, the Ministry of Finance plans to use QR codes, making it possible to verify the invoice in the KSeF.

In contrast, structured invoices will not be available to taxpayers using:

- the non-EU procedure for certain services (OSS);
- the special scheme for the supply of international occasional road passenger transport services; or
- the special scheme for distance selling of imported goods (IOSS)

Non-availability of the KSeF and crisis situations

The proposed provisions further provide for the following:

- failure of the KSeF – issuing invoices according to the .xsd schema and then sending them to the purchaser bypassing the system. The Ministry of Finance Public Information Bulletin will make an announcement regarding the failure, and, within seven days of the end date indicated in the announcement, the issuer will be required to send invoices issued outside the system to have identification numbers assigned.

- the occurrence of an extraordinary crisis situation (e.g. resulting from sudden and unforeseeable events or an infrastructure failure) – invoices (including invoices and adjustment notes) can be issued as before, but only in the area affected by the crisis situation and only until the crisis situation has passed. It should be stressed that in this case there is no obligation to send invoices issued during this period afterwards.

- issuing structured invoices outside the National e-Invoice System – mandatory transmission to the buyer of an invoice issued outside KSeF in a situation where the place of supply of the service is outside Poland or the recipient of the invoice is not required to use the National e-Invoice System

Penalties for non-compliance

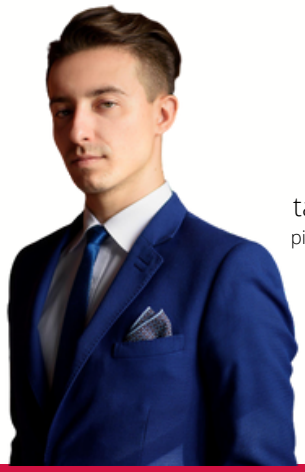
A taxpayer who fails to issue a structured invoice where obliged to do so, or who issues an invoice that does not comply with regulations or deadlines that apply in the event of a KeSF failure, will be subject to a fine, the amount of which may be:

- up to 100% of the amount of tax shown on that invoice; or
- in the case of an invoice with no tax shown, up to 18.7 per cent of the total amount due, as shown on the invoice.

However, each time the fine will be no less than:

- PLN 1.000 in the event that an invoice is not issued or is issued wrongly during a KSeF failure; or
- PLN 500 in the event of failure to send an invoice issued during a KSeF failure to the system on time. This means, therefore, that fines can be particularly severe for taxpayers issuing a large number of invoices, even if they contain small amounts.

With this in mind, fines will be threatened not only for issuing an invoice in the wrong form, but for any failure to issue an invoice by the prescribed deadline.



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ACTIO PAULIANA

The principle that agreements must be kept (pacta sunt servanda) is not always respected – it often happens that debtors fail to meet their obligations and creditors are forced to pursue their rights in court. However, even the most favourable judgment will become a Pyrrhic victory if it cannot be enforced because the debtor may, before, during or even after obtaining a final judgment, become insolvent by disposing of his assets.

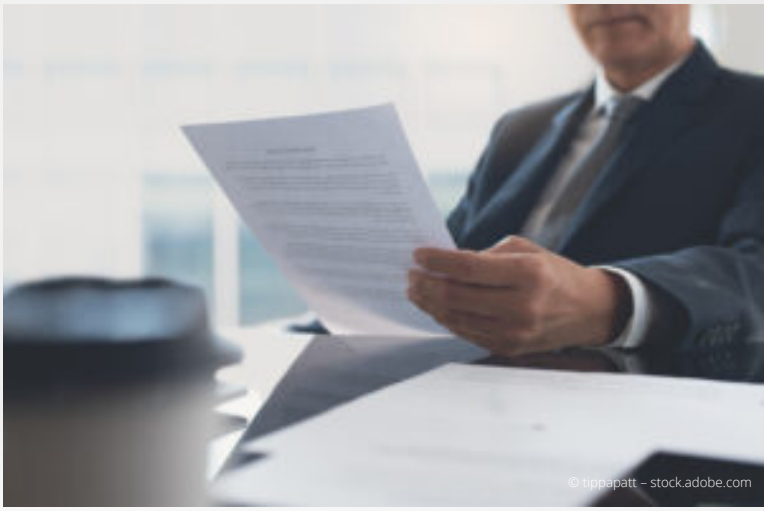
The actio pauliana is an institution that is supposed to limit the risk of harming creditors.

An actio pauliana is an action against a person who has acquired property from a debtor, e.g. a buyer of real estate. If the creditor is unable to satisfy a claim from the debtor due to ineffective enforcement, they can bring an action against the buyer of the real estate and obtain satisfaction from the property that the debtor has disposed of (e.g. enforce against the property that the debtor has sold). A judgment in actio pauliana proceedings opens up the possibility to extend enforcement to property that no longer belongs to the debtor.

The prerequisites for filing an actio pauliana are proof of the claim (preferably by an official document, in particular a court judgment, although this is not an exclusive means of proof) and of the insolvency of the debtor, which is most likely to be confirmed by the bailiff's decision to discontinue enforcement, though this prerequisite can also be demonstrated otherwise.

In addition, it must be proven in court that the debtor, when disposing of the assets, was aware of the prejudice that the act caused to the interests of the creditor, i.e. they could have assumed that the transaction would undermine the ability to pay the debt.
Furthermore, it must also be shown that the beneficiary could have realised that the transaction would lead to the debtor's insolvency.

Most often, the disposal of assets involves close relatives or entities connected by business relations. For this reason, the regulations provide the creditor with a presumption that the third-party beneficiary was aware that the debtor's act would be prejudicial to the creditor.



The creditor may also use similar advantages if the debtor disposes of an asset on the basis of a donation agreement.

An actio pauliana may be brought within five years of the act that led to the debtor's insolvency; it may be brought not only against the direct buyer of the asset, but also against any subsequent buyers. A condition for the action to be effective, however, is that all the prerequisites specified in the regulations are met in relation to the defendant.

Before or upon filing an actio pauliana, it is worth trying to seek an injunction until the end of the proceedings.
In the injunction order, the court may prohibit the defendant (the beneficiary) from disposing of the property, which will improve the creditor's chances of being satisfied from the property.

An actio pauliana is a creditor's last resort in trying to get paid – despite a complicated formula for applying this mechanism – and it is worth considering using it against disloyal business partners.

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Obligation to correctly identify companies in letters and commercial orders

It is not unknown for entities entered in the National Court Register (KRS) to incorrectly provide their registration details.

Sometimes they do not even include such details at all, despite the obligation set out in the Commercial Companies Code and the Act on the National Court Register that letters and commercial orders submitted by a company in paper and electronic form, as well as information on websites, must contain:

- the company's business name, registered office and address;
- the designation of the registration court where the company's records are kept and the number under which the company is entered in the register;
- the company's tax identification number (NIP);
- the amount of the share capital, and for companies that used a template articles of association, information that contributions to the share capital have not been made – until the share capital has been paid in full.

In addition, from 13 October 2022, limited joint-stock partnerships, limited liability companies and joint-stock companies are also required to include information on their group of companies, if applicable.
A group of companies is understood to be a parent company and one or more subsidiaries – companies with common share capital and guided by a common strategy to pursue a common interest, further to a resolution on participation in a group of companies, where he parent company exercises unified management over the subsidiaries. It is therefore worth analysing whether a company belongs to a group of companies.

"Letters and commercial orders" should be understood very broadly. It covers any offers, communications or even outgoing correspondence from the company. For example, any employee sending external email correspondence should include the above information in the footer. In addition websites, price lists, receipts, calls for payment and company orders should all contain such basic details.

Electronic documents may simply include a link to the company's website, where the necessary information is provided.

This obligation is intended to help third parties identify and subsequent verify the company. With this data, counterparties can easily find the company information they are interested in in the KRS or in the RDF repository.

SANCTIONS FOR IMPROPER IDENTIFICATION – in relation to limited liability companies and partnerships

A breach of the above identification obligations may lead to a fine of up to PLN 5,000 by the registration court.
Note that the fine is not on the company itself, but on the individuals responsible for the failure to perform the obligation – i.e. typically the members of the management board, but under the Act on the National Court Register, a fine may also be imposed on anyone who is responsible for not performing this obligation, for example, an employee in charge of sending out offers on a regular basis.

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