

September 2020

Amendments to regulations regarding WHT expected to enter into force on 1 January 2021 announced by the Polish Ministry of Finance

On 4 September 2020, the Ministry of Finance held a pre-consultation meeting on the planned amendments to the regulations regarding withholding tax (WHT).

The review of the currently applicable rules and the key amendment proposals given by the Ministry are presented below.

Deferred implementation of the WHT reform (the current state of affairs)

Pursuant to the Act of 23 October 2018 amending the Personal Income Tax Act and the Corporate Income Tax Act (Journal of Laws, item 2193), which introduced the new WHT collection procedure, **Polish tax remitters paying out interest, dividends, royalties or payments for certain intangible services to foreign taxpayers in the amounts exceeding PLN 2 million annually (per a single recipient/taxpayer)** are first obliged to collect WHT **(at the standard rate of 20 percent or 19 percent)** and only once it is collected, foreign taxpayers or the remitters themselves (if they bore the economic burden of tax) may apply for a refund of the collected WHT **(the “pay and refund” mechanism)**.

Moreover, **regardless of the amount of the payment**, Polish remitters may apply an exemption or preferential taxation rate only on condition that they exercise due diligence in verifying the application of an exemption or a preferential withholding tax rate.

In order to apply the WHT exemption or preferential WHT rates for payments exceeding the PLN 2 million threshold, the remitter will have to submit a **relevant statement**. The statement shall be signed and submitted by the head of the remitter's entity, as understood for accounting purposes **(i.e. all the members of the management Board)**.

To verify eligibility for exemption from withholding tax on interest, dividends and/or royalties paid out to qualified entities (pursuant to Article 21(3) and Article 22(4) of the Corporate Income Tax Act), the taxpayer or the remitter (if they bear the economic burden of tax) may also submit **an application to the tax authority for a WHT clearance opinion**. The WHT clearance opinion remains valid for **36 months**, unless the background described in an application changes in due course.

These revolutionary changes to the WHT collection procedure sparked controversy. The general view was that the amendments required further elaboration and consultation with the interested parties. In fact, it was one of the reasons why their entry into force has already been postponed four times, most recently **until 1 January 2021** (except for the amended due diligence obligation, in force since 1 January 2019).

Proposed amendments

The current proposal of the Ministry of Finance is that **the pay and refund mechanism would apply only to “passive” income payments – meaning interest,**

dividends and royalties made between related entities. Thus, payments made in consideration for services (regardless of the nature of relationship between the remitter and the taxpayer) and other payments made between unrelated entities (including “passive” income payments) would be excluded from the scope of the new WHT collection mechanism.

However, the obligation to exercise due diligence shall remain applicable, regardless of the amount paid out and the nature of relationship between the remitter and the taxpayer (subject to the restrictions described below).

Importantly, the premise of “exercising significant influence” within the meaning of transfer pricing provisions will not be used for the assessment of the existence of links between entities.

Furthermore, the Ministry of Finance announced **that the pay and refund mechanism would not be used for dividends (and other income from shares in profits of legal persons) paid out between Polish entities**.

Additionally, it proposed that the statement regarding non-collection of withholding tax or the use of WHT preferential rate would be **signed in line with the principles of representation of the remitter**, and not by all members of the management Board. However, the possibility of signing it by person acting in the capacity of an authorised signatory or an agent shall remain excluded.

What is more, under the amendments, **penalties for making false or inaccurate WHT statements would be decreased** (and the common rules shall apply).

Additionally, **the amendments bring changes to the definition of a “beneficial owner” (BO).**

The due diligence requirement provides for verification of the beneficial owner status of the payment's recipient, regardless of the amount involved.

The requirement of not being an intermediary, representative, trustee or other entity obliged to transfer all or part of the payment to another entity, which the recipient of the payment (the taxpayer) must meet to be recognized as a beneficial owner, will remain in force. However, the provision will no longer mention a “factual or legal obligation” to make such a transfer.

Nonetheless, the beneficial owner will still be expected to carry out a genuine economic activity in the country in which it is seated.

Any possible differentiation of the requirements in this respect, depending on the type of the taxpayer's business activity, is to be the subject of official explanatory notes.

The explanatory notes (i.e. official interpretation accompanying the provisions) are also to be issued for the “look-through” approach, i.e. a concept which allows for the WHT relief to be applied to an entity being the beneficial owner of payments who is not the direct payment recipient.

The amendments will also revise the provisions on due diligence exercised by the payer when examining the conditions for applying an exemption or preferential tax rate. **For payments made to related entities, the conditions of exercising due diligence will be stricter than for payments made to unrelated entities.**

The Ministry of Finance also proposed that **the official WHT clearance opinion could also apply to WHT preferences resulting from the provisions of double taxation treaties (in relation to “passive” payments to which the pay and refund mechanism is to be limited).**

This means that the name of the device will change, and the device itself will be also used partially on the grounds of the PIT Act.

The validity period (36 months) of clearance opinions issued before the new provisions become applicable will start to run only from the date of their final entry into force. Thus, as a rule, the opinions issued before 1 January 2020 will remain valid until the end of 2023.

Further developments

The Ministry of Finance announced that the amended regulations would enter into force on **1 January 2021**. The draft law containing the details of the changes should be made available and subject to public consultations in the coming weeks.

The Ministry also announced that the works on **the final version of tax official explanatory notes regarding the withholding tax and incorporating the proposed amendments were underway** (so far only a draft of the notes has been published). The notes should become available in the **first half of 2021**.

If you would like to learn more about the issue discussed, please do not hesitate to contact us at: mampytanie@kpmg.pl

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