WOLF THEISS CLIENT ALERT

June 2015

2015 brought significant changes in the field of corporate law. The two most important laws for the operation of businesses, the Act on the National Commercial Register and the Commercial Companies Code, received long-awaited amendments in December 2014 and January 2015. Additionally, two rulings important for entrepreneurs have been delivered: the Supreme Court ruling on a joint irregular proxy, and the European Court of Justice ruling on imposing a tax on civil-law transactions of partnerships limited by shares. The first has fuelled discussions over the widespread use of this form of a company's representation and the latter enables partnerships limited by shares to reclaim overpaid tax on civil law transactions.

SIMPLIFICATION OF REGISTRY PROCEEDINGS

When registering a new company or amending the data of a registered company, only one application has to be filed with the National Commercial Register (NCR). Previously

filed to the NCR, as well. Failing this, the address reported in the NCR will be deemed valid.

SUPREME COURT RESOLUTION ON A JOINT IRREGULAR PROXY

The Supreme Court resolution dated 30 January 2015 on a so-called 'joint irregular proxy' has fuelled discussions over the widespread use of this form of a company's representation. The joint irregular proxy is based on a reservation that the appointed commercial proxy may represent the company only jointly with a member of a management board. This was a popular solution to gain control over the proxy activities and although the judiciary have disagreed about its legitimacy, it has been accepted by many courts and entered into the corporate files kept in the NCR as a form of company representation. However, the Supreme Court ruled that entering a commercial proxy in the NCR with such reservation is inadmissible. However, all legal acts performed by such commercial representatives prior to the resolution date remain valid. The Supreme Court emphasized that even though the limitation of the scope of authorization of a proxy is inadmissible, a so-called "mixed" representation performed by a board member and a commercial proxy acting as a replacement of another management board member is still possible (unless the company's articles of association provide otherwise). In other words, the commercial proxy cannot be restricted with a countersignature of a board member, but the other way round is accepted. As a result, in order to gain control over the sole proxy activities, companies should appoint at least two commercial proxies to act jointly. The alternative is to establish joint commercial representation (e.g., two commercial proxies) with the other proxy not being appointed. In such a case, a commercial proxy cannot make declarations of will on its own, but still may act as a replacement of another management board member, if clearly provided for in the company's articles of association. However, it remains to be seen if such practice will be seamlessly approved by the courts.

EUROPEAN COURT OF JUSTICE RULING ON PARTNERSHIPS LIMITED BY SHARES

In accordance with the Polish Tax on Civil Law Transactions Act, upon a change of Articles of Association of a capital company a partnership is subject to tax on civil law transactions (TCLT). A change of the Articles occurs, for example, in the event of a merger, conversion or a contribution resulting in an increase of either a share capital, (in the case of a capital company and a partnership limited by shares PLS) or a partnership's assets, in the case of other types of partnerships. However, according to the Tax on Civil Law Transactions Act, such a change of the Articles is exempted from TCLT in the case of a (i) merger of capital companies, (ii) capital company conversion to another capital company, (iii) share-for-share transaction where a capital company obtains a majority of the voting rights in another capital company, or, holding such a majority, acquires a further holding, and (iv) in-kind contribution made by a capital company to another capital company in the form of an enterprise or its material ('organized') part.

The nature of a PLS is hybrid, as it is a partnership, but with some features of a capital company, including the existence of share capital. For this reason, it has been unclear and led to many disputes with Polish tax authorities as to whether a PLS should be regarded as a capital company for TCLT purposes and as to whether the above-mentioned transactions involving a PLS also enjoy the TCLT exemption. One of these disputes was subject to a European Court of Justice (ECJ) assessment. As a result, in a ruling dated 22 April 2015 (C-357/13), the ECJ concluded that a PLS is a capital company within the meaning of Council Directive 2008/7/EC concerning indirect taxes on the raising of capital.

As a consequence, currently taxpayers have the right to seek refunds of the TCLT paid on the above-mentioned transactions involving a PLS. For this purpose, depending on circumstances, taxpayers must file either an application for a TCLT refund (if no final tax decision has been issued by the tax authorities) or an application for a reopening of concluded tax proceedings.

Although the ECJ ruling has not yet been published, taxpayers already have the right to file an application for a tax refund. Moreover, we believe there are strong arguments supporting the standpoint that taxpayers should be entitled to file the application even if the standard tax liability limitation period has already expired (which is 5 years from the end of the year when the deadline for the tax payment lapsed).

CONTROLLED FOREIGN COMPANIES

There has recently been an amendment to the Polish corporate income tax law regarding controlled foreign companies (CFC). From 1 January 2015 Polish tax residents are required to pay tax on income generated by their CFCs. A foreign entity will be deemed to be a CFC if: (i) it is domiciled in a "tax haven" country (e.g., Lichtenstein, Hong Kong, Monaco, British Virgin Islands), (ii) it is domiciled in a country with which neither Poland nor the EU have concluded any international treaties, in particular double tax treaties, that would allow for obtaining information from the country's tax authorities or (iii) it meets all of the following conditions: (a) at least 25% of shares (or voting or profit rights) is owned directly or indirectly by a Polish tax resident for an uninterrupted period of 30 days; (b) it derives at least 50% of its income from, e.g., dividends, interest, royalties or capital gains resulting from the sale of shares in companies or receivables (so called passive income); (c) at least one type of its passive income listed above is subject to a tax rate at least 25% lower than the Polish 19% tax rate (i.e., 14.25% or lower) or is exempt or excluded from taxation in the country where it is domiciled (unless the exemption results from the EU Parent/Subsidiary Directive). The regulations also apply to activities in the form of foreign permanent establishments. As the aim of the amendments is to avoid harmful competition from so called "tax havens", CFC regulations do not apply to foreign entities that conduct active business activities.

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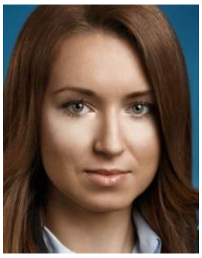

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