WT

Tax aspects of the amendment to Poland's Code of Commercial Companies in domestic company reorganisations

06 November 2023

The amendments introduced to the Code of Commercial Companies on 15 September 2023, which provide for new domestic and international restructuring options, prompted a review of the provisions of the Polish Tax Ordinance System Act. Tax advisers believe that the amendments to the CCC should have been accompanied by changes to the tax laws that would have addressed the tax implications of the reorganisations. In the absence of these changes, several ambiguities arise, and their consequences may lead to interpretation disputes between the taxpayer and the tax authorities.

1 Taxation of a domestic division by separation

One of the most significant changes to the Commercial Companies Code for entrepreneurs is the introduction of a new mode of dividing commercial companies – division by separation. This new mode eliminates the cumbersome procedure of making in-kind contributions and, instead, focuses on the entity's share rights using the principle of general succession. However, when attempting to apply the provisions of the Corporate Income Tax (CIT) Act concerning division by spin-off (wydzielenie) to the division by separation (wyodrębnienie), several important practical issues arise, along with a number of interpretative doubts.

The first issue is that the company to which the property of the company being divided is separated, does not issue shares to the shareholder of the company being divided. So far in existing divisions, the entity receiving the spun off property has been obligated to issue shares to the shareholder of the company being divided. In division by separation, there will also be a capital increase in the receiving company and new shares will be issued by this company. However, it will be the company being divided that takes up the newly issued shares in this case. This means that one of the two key provisions for division by spin-off, i.e. Article 12(1)(8d) of the CIT Act, cannot be effectively applied to the division by separation. Pursuant to this provision, the taxable revenue of the company to which the property is spun off is the market value of the property of the entity being divided, determined as at the date preceding the division, received by the acquiring company in excess of the issue value of the shares assigned to the shareholder(s) of the company being divided. Since no such issue takes place, as it is directed to the company being divided itself, does this mean that the total market value of the property received by the acquiring company is taxed? Such an approach would imply a lack of tax neutrality with regard to division by separation, which is not acceptable. In practice, the entire property received by the company to which the organised part of the business is transferred would be subject to income tax at 19%!

It therefore seems more pertinent to take an approach in which applying this provision to the division by separation is rejected altogether. In such a case, Article 12(1)(8c) would be exclusively applicable. In accordance with said Article, revenue for the acquiring company is the market value of the property received from the company being divided, determined as at the day preceding the date of division, in a part exceeding the value adopted for tax purposes of the components of such property, not exceeding the market value of such components. However, it

Wolf Theiss

remains a legislative demand for the legislator to amend Article 12(1)(8c) in such a way as to include provisions for the issue of shares to the company being divided itself.

The second issue is related to the fact that a division, in order to be tax neutral, requires that both the activity that remains in the company being divided, and the activity transferred to another entity as a result of the division, constitute organised parts of the business. It is precisely the question of whether the activity spun off and remaining in the company being divided exhibits an organised and independent nature that is the focus of interest for tax authorities and the subject of numerous interpretative queries. Meanwhile, in the case of a tax-neutral in-kind contribution, it is sufficient that the object of the spin-off is an organised part of the business. The property that remains in the company making the in-kind contribution need not be of this nature. Therefore, compared to the division by separation, tax-neutral in-kind contributions might offer an easier method of spinning off the property from a company and transferring it to a controlled entity. Consequently, the advantage of the division by separation will primarily pertain not to the tax aspects, but to the succession of rights and obligations by the company into which the property of the company being divided is separated.

2 Simplified domestic merger of sister companies

Similar doubts also arise in connection with the new type of simplified merger of companies provided for in the amendment to the CCC, i.e. a merger of sister companies that does not require the issue of new shares to their shareholder(s). The tax provisions take into account the case of a merger between a parent company and a daughter company that does not require a capital increase in the acquiring company. The regulations also define the tax consequences for the acquiring company in such a scenario – Article 12(1)(8f) of the CIT Act defines what constitutes revenue for the acquiring company in that case. To a significant extent, the cited provision refers to the share of the acquiring company (parent company) in the capital of the acquired company (daughter company), which in practice means that it cannot be applied to the new type of simplified merger of sister companies. Hence, it is necessary to look closely at the provision under Article 12(1)(8d) of the CIT Act, already referred to when discussing the divisions. However, this provision too does not seem to be adequate for a merger of sister companies as well. This is because in case of a new type of a merger no new shares would be issued. Therefore, the above-mentioned article, in my opinion should not be applied. This is because pursuant to Article 12(1)(8d) of the CIT Act, the taxable revenue of the acquiring company is the difference between the market value of the property it receives and the issue value of the shares issued by the company. If this provision was to be applied to a simplified merger of sister companies, the acquiring company would be essentially obligated to recognise revenue at the market value of the property received to pay a 19% tax on it.

About Wolf Theiss

Wolf Theiss is one of the leading European law firms in Central, Eastern and South-Eastern Europe with a focus on international business law. With more than 360 lawyers in 13 countries, over 80% of the firm's work involves cross-border representation of international clients. Combining expertise in law and business, Wolf Theiss develops innovative solutions that integrate legal, financial and business know-how.

For more information, please contact:

Karolina Stawowska
Partner

E karolina.stawowska@wolftheiss.com
T +48 512 266 167

This memorandum has been prepared solely for the purpose of general information and is not a substitute for legal advice. Therefore, Wolf Theiss accepts no responsibility if – in reliance on the information contained in this memorandum – you act, or fail to act, in any particular way. If you would like to know more about the topics covered in this memorandum or our services in general, please get in touch with your usual Wolf Theiss contact or with:

Wolf Theiss, Schubertring 6, AT – 1010 Vienna, www.wolftheiss.com

Sign up
to receive our
latest updates
and insights