



MERGERS AND ACQUISITIONS

Poland

Taxation of Cross-Border
Mergers and Acquisitions

2010 Edition

TAX

Poland

Introduction

The Polish tax and legal systems have undergone substantial changes since the early 1990s, first to address the needs of a market economy and second to adjust to European Union (EU) law as required by Poland's accession to the EU on 1 May 2004. The tax provisions relating to corporate restructurings have changed significantly (mainly to address perceived abuses), but the law still has some gaps, particularly where more sophisticated structures are concerned.

Poland has fully incorporated the EU Parent-Subsidiary [90/435/EC], and the Merger [90/434/EC] directives. The Interest and Royalties Directive [2003/49/EC] and the EU-Swiss Savings Agreement (signed on 26 October 2004 in Luxembourg) have been implemented from 1 July 2005, but Poland has been granted an eight-year derogation period for full implementation.

Recent Developments

Generally there were no significant developments impacting M&A transactions in 2008 and 2009. However during this time more sophisticated structures (such as tax-free step ups) became more popular in Poland.

The step-up procedure in an investment process usually involves making an in-kind contribution to a newly established or existing company in the form of real estate/project in progress, which can offer the possibility of setting the initial value of this contribution to market value. This measure allows significantly higher tax-deductible costs to be generated without bearing them in the economic sense – either through higher depreciation on the increased value of the in-kind contribution, or by increasing the tax-deductible cost of selling the project. This option has been confirmed by numerous rulings issued by the tax authorities, though at present the Ministry of Finance has started changing these standpoints (therefore, special care during the implementation is strongly recommended). The step-up reorganizations could also be used for intellectual property (IP) rights such as trademarks.

However, due to the proposed changes to the Corporate Income Tax (CIT) Act for 2011 presented by Ministry of Finance, certain methods of tax optimization

(including certain methods of IP step-up) may be closed. It is also planned by the Ministry of Finance to limit the list of the income which may qualify for the same exemption as dividend payments [it is planned that the liquidation proceeds would not qualify for this exemption]. The planned changes are in the early stage therefore there is no certainty that these would be implemented starting from 2011.

Asset Purchase or Share Purchase

An acquisition in Poland could take the form of a purchase of the shares of a company, its business or particular assets. However there is no one preferential form of the acquisition, as the chosen form could depend on many circumstances and different objectives of the entity concerning the considered transactions.

Purchase of Assets

Minimal formalities usually mean a purchase of single assets is a swift procedure if no real estate is involved. Only technical issues related to the transfer of the assets will affect the timing and signing of the sale agreement.

Purchase Price

The sale price should be based on the market value of the assets.

Goodwill

No goodwill arises for tax purposes on such a transaction.

Depreciation

For the purchaser the acquisition price of the fixed assets and intangibles will be the base for tax depreciation purposes. Individual depreciation rates (higher than the standard rate) can normally be applied to second-hand assets.

Tax Attributes

Tax losses are not transferred on an asset acquisition, as they remain with the seller.

For the seller, a profit on the sale of assets is added to the mainstream income subject to corporate or personal income tax at normal rates. On disposal, the taxpayer

can deduct the net value of the assets. No relief is available to reduce the tax burden. If the selling company has any losses, these can be used to offset any profit (subject to the normal restrictions).

From 1 January 2009, the purchaser of assets not constituting a business or an organized part of a business is no longer jointly and severally liable with the seller for the tax liabilities that arose prior to the purchase of such assets.

Value-Added Tax (VAT)

VAT arises on the sale of goods (such as stock and equipment) and certain intangibles. The standard VAT rate is 22 percent. If the goods are regarded as second-hand (that is, movable property used for six months by the seller) and the seller has no right to recover the input VAT on their purchase, the sale would be VAT exempt. Generally, based on the new VAT provisions in force since 1 January 2009, the sale of buildings, constructions, and their parts is VAT exempt (except if the sale is performed in principle before the period of two years from the first occupation expires). However, in most cases the taxpayer can waive the exemption if the special conditions are fulfilled. Supplies of buildings, and constructions or their parts are also exempt from VAT if the supplier had no right to deduct input VAT on acquisition of this building or construction, and certain additional conditions are met.

Transfer Taxes

If the sale is VAT-exempt, it is usually exempt from transfer tax (stamp duty), except for land and buildings (purchase of real estate is subject to 2-percent transfer tax even if VAT-exempt).

A sale of assets outside the scope of VAT would be subject to transfer tax of 1 percent or 2 percent payable by the purchaser.

There is no separate stamp duty land tax in Poland.

Purchase of a Business or Organized Part of a Business

Income Tax

The sale of a business or an organized part of a business gives rise to taxable income for the seller on the difference between its acquisition cost for tax purposes and the sales price taxed at normal corporate rates. For an individual the profit would be taxed in the same way as normal business income.

Minimal formalities mean the purchase of a business or organized part of a business is very quick if land is not included. The main complication is the need to prepare detailed lists of assets and liabilities, and arrange for the transfer of agreements. In certain cases, however, permission of the competition authorities and/or the European Commission will be required. The acquirer is generally the legal successor for most purposes, but administrative decisions and permits would not generally automatically transfer.

The purchase of a business or an organized part of a business is generally advantageous when the disposing company has tax losses to offset against any potential taxable gain arising on the transaction, and the acquiring company can benefit from tax-depreciable goodwill or a step-up in the tax-depreciable basis of assets.

The purchaser can depreciate the assets purchased based on their market value if goodwill arises. If no goodwill arises, the depreciation base of fixed assets and intangibles is the difference between the purchase price and current assets less liabilities. Goodwill, if created, can be depreciated for tax purposes over a minimum of five years. If the assets are regarded as second-hand (more than six-months old for movable property or five years for buildings) individual depreciation rates (higher than standard rates) can be applied. Difficulties can arise if liabilities are included, especially in connection with the deductibility of interest on assumed debt.

VAT and Transfer Taxes

If the whole business or an organized part of a business is sold, the transaction should be outside the scope of VAT. It will, instead, be subject to transfer tax (stamp duty) of 2 percent on movable property and real estate, and 1-percent on rights. The purchaser is liable for the transfer tax payment.

Responsibility for Tax Liabilities

The purchaser of a business or an organized part of a business is jointly and severally liable with the seller for the tax liabilities relating to the acquired business activity that arose prior to the purchase, up to the amount of the purchase price (unless, despite acting with appropriate care, the purchaser was not able to identify such tax liabilities). The seller or the purchaser (with the seller's consent) can seek a certificate from the tax authorities confirming the seller's outstanding tax liabilities. In this case, the purchaser would not be responsible for any liabilities not included on the certificate (which is valid for 30 days).

Purchase of Shares

The purchase of a target company's shares does not result in an increase in the base cost of that company's underlying assets.

Any gain arising on the sale of shares is subject to CIT in the usual way. Any associated costs of acquisition that have previously been disallowed are also deductible. Gains on the sale of shares by an individual are subject to 19-percent income tax.

Tax Indemnities and Warranties

In a share acquisition, the purchaser is taking over the target company together with all related liabilities. The purchaser will, therefore, normally require more extensive indemnities and warranties than in the case of an asset acquisition.

Tax Losses

Tax losses normally stay with a company (there is no change of ownership rule in Poland). They can be lost if the company is merged or split, unless the loss-making company remains in existence.

Tax losses can be carried forward for up to five years. Only 50 percent of a loss can be used in any one tax year.

Transfer Taxes

Generally, a sale of shares is subject to transfer tax (stamp duty) of 1-percent. The basis for the calculation of the tax is the market value of shares (in practice, the sale price). The purchaser is liable for the transfer tax. Generally, transfer tax applies regardless of the nationality of the buyer and the seller if the transaction includes shares in a Polish company (some tax optimization may be considered).

Purchase of Partnership Interest

Partnerships are regarded as fiscally transparent for income tax purposes, with the profits and losses being allocated directly to the partners. There is no minimum capital requirement, except in the case of limited joint stock partnerships. On the sale of the business of a partnership, each partner is regarded as selling his/her allocable share of the partnership assets. The sale proceeds are taxable together with the value of any liabilities assumed by the buyer, but the net tax value of the assets being sold is deductible. Any profit is subject to tax at the normal rates.

It is likely that the sale of an interest in a partnership would be subject to PCC (transfer tax on civil law

activities) of 1-percent in Poland, calculated on the market value of the partnership share.

If one of the partners disposes of his/her rights and liabilities in the partnership, there are no clear regulations indicating how the taxable income from the sale of rights and obligations should be calculated.

Partnerships are taxpayers as far as other taxes, such as VAT and PCC, are concerned.

Choice of Acquisition Vehicle

There are several potential acquisition vehicles available to a foreign purchaser and tax factors will often influence the choice. There is a 0.5-percent capital duty on capital contribution to a Polish company (share premium is not subject to capital duty in Poland).

Local Holding Company

A Polish holding company may be considered *inter alia* for debt push-down structures, where the purchaser wishes to offset the interest on debt financing against the target's taxable profits (see Funding).

Foreign Parent Company

The foreign purchaser may choose to make the acquisition itself, perhaps to shelter its own taxable profits with the financing costs. Non-residents are not subject to tax in Poland on gains on the disposal of shares in a Polish company (unless so-called real estate clause (if any) from the respective double tax treaty (DTT) is applicable). Any transactions concerning real estate companies must be carefully analyzed.

Non-Resident Intermediate Holding Company

If the foreign country taxes capital gains and dividends received from overseas, an intermediate holding company resident in another territory may be used to defer this tax and perhaps take advantage of a more favorable tax treaty with Poland.

Local Branch

Acquisitions via a Polish branch are very unusual in the Polish market (there are not many branches in Poland).

Joint Ventures

Joint ventures can be either corporate (with the joint venture partners holding shares in a Polish company) or unincorporated (such as a partnership). Partnerships are generally considered to provide greater flexibility from a tax viewpoint. For example, where it is seen that the joint venture will make initial losses, the partners should be able to use their shares of those losses against the profits of their existing Polish trades.

In practice, there may be non-tax reasons that lead a purchaser to prefer a corporate joint venture. In particular, a corporate body may enable the joint venture partners to limit their liability to the venture (assuming that lenders do not insist on receiving guarantees from the partners).

Choice of Acquisition Funding

A purchaser will need to decide whether an acquisition will be funded with debt or equity. The main concern will often be to ensure that the interest on any funding can be offset against the profits of the target to reduce the effective Polish tax rate.

Debt

The principal advantage of debt is the potential tax-deductibility of interest (see *Deductibility of Interest*), as the payment of a dividend does not give rise to a tax deduction. Another potential advantage of debt is, in principle, the deductibility of expenses such as guarantee fees or bank fees in computing trading profits for tax purposes and flexibility of the return. Generally, the costs of a share issue, by contrast, should not be tax deductible. The standpoints of the tax authorities concerning the tax deductibility of the above mentioned costs should be carefully observed.

If it is decided to use debt, a further decision must be made as to which company should borrow and how the acquisition should be structured. In order to minimize the cost of debt there must be sufficient taxable profits against which interest payments can be offset.

Typically, a Polish company is used as the acquisition vehicle, funding the purchase with debt either from a related party or directly from a bank. Subsequently both companies could be merged. However, this should be carefully structured and an analysis of the post-acquisition debt push down is crucial.

Transfer tax (stamp duty) is levied on loans (from non-shareholders) at a rate of 2 percent but can be avoided if properly structured. Loans from banks or financial institutions are stamp duty exempt. Shareholder loans granted to corporates are stamp duty exempt (while loans granted by partners to the partnerships are generally subject to 0.5-percent stamp duty).

Cash injections to increase the share capital and additional payments to a company's equity are subject to stamp duty at 0.5-percent (except for share premium).

Deductibility of Interest

Interest incurred for the purpose of earning revenue is normally deductible when it is either paid or capitalized (i.e., rolled into the principal). The exception to this rule is when the loan is used to purchase fixed assets. In this case, interest up to the time the assets are brought into use should be capitalized as part of the acquisition cost of the assets.

Interest on a loan to buy shares is currently considered to be tax deductible, based on various official interpretations issued by the Polish Ministry of Finance. It is generally advisable to confirm this with a ruling. To absorb the interest deduction it is necessary for the acquisition vehicle to generate taxable profits.

When a Polish company is used as the acquisition vehicle or when considering the financing of the Polish target, Poland's thin-capitalization rules should be taken into account.

The Polish thin-capitalization rules limit the tax deductibility of interest paid on loans granted by qualified lenders. Under the Polish tax regulations the thin-capitalization rules apply to loans:

- from one shareholder holding at least 25 percent of voting rights or shareholders holding jointly at least 25 percent of voting rights of the borrowing company; and/or
- from a company which has the same shareholder as the borrower, if the shareholder owns at least 25 percent of the voting rights of both the lending and borrowing companies (a sister company).

Generally, it should be noted that the thin-capitalization restrictions apply to paid or capitalized interest from the above loans if, on the date of its payment or capitalization, the total indebtedness to the above qualifying shareholders or holders of at least 25 percent of voting rights of the parent entity, exceeds three times the qualifying share capital of the Polish company. In principle, the interest paid or capitalized from the part of the loan exceeding this debt to equity ratio will not be deductible.

Equity is defined as basic share capital, excluding capital that arises from a debt-equity conversion or the contribution of an intangible asset that cannot be depreciated. Qualifying debt is generally considered to include all amounts due whether or not these are interest bearing (such as loans, bonds, deposits, and securities). The ratio is calculated separately on the date of the payment of each interest charge.

Withholding Tax on Debt and Methods to Reduce or Eliminate

Interest, royalties, and certain payments for services (including advisory, advertising and accounting services, and guarantee fees) paid to a foreign entity are subject to 20 percent WHT under domestic legislation. This is reduced or eliminated under most DTTs to which Poland is a party. To qualify for the reduced rate the payer must have a certificate of the beneficiary's tax residence.

Poland was granted a derogation period of eight years to 1 July 2013 to implement the EU Interest and Royalties Directive fully. From 1 July 2009, interest and royalties paid to qualifying EU-resident companies or EU permanent establishments (PEs) have been subject to 5-percent WHT. From 1 July 2013, qualifying interest and royalties will be tax-exempt. Similar provisions apply to Switzerland.

Checklist for Debt Funding

- The use of bank debt may avoid thin capitalization and transfer pricing problems, and should obviate the requirement to withhold tax from interest payments (detail analysis of respective double tax treaty should be executed in this respect). Still, the certificate of tax residence is required.
- Withholding tax of 20 percent will apply on interest payments to non-Polish entities unless a lower rate applies under the relevant DTT or EU Directive.
- Complex analysis of a post-acquisition debt push down.
- Potential foreign exchange implications.
- Transfer tax implications on funds providing.

Equity

A purchaser may use equity to fund its acquisition, possibly by issuing shares to the seller in satisfaction of the consideration. Further, the purchaser may wish to capitalize the target post-acquisition.

Any establishment (or increase) of the share capital in the Polish company would be subject to 0.5-percent transfer tax (stamp duty) in Poland (share premium is not subject to stamp duty). Dividend payments from a Polish company may be exempt from withholding tax if the respective conditions from the EU Parent-Subsidiary Directive are met. Dividends are not deductible for Polish tax purposes.

The use of equity, although offering less flexibility should the parent subsequently wish to recover the

funds it has injected, may be more appropriate than debt in certain circumstances, such as:

- Where the target is loss-making, it may not be possible to offset the cost of interest.
- Where the company is thinly capitalized, it would be disadvantageous to increase borrowings without also obtaining an injection of fresh equity. A tax-efficient structure normally requires an appropriate mix of debt and equity so that debt-to-equity and interest cover are adequate for Polish tax purposes.
- Where the funding company would prefer not to recognize taxable revenue arising from interest.

Generally dividends paid by a Polish company are subject to 19-percent WHT. This is reduced under most DTTs to which Poland is a party. To qualify for the reduced rate, the payer should have a certificate of tax residence for its shareholder.

Domestic dividends and dividends paid to an EU/EEA-resident company (or its PE) when the shareholder owns at least 10 percent of the payer are exempt from Polish WHT, provided that the shares have been owned for more than two years. Dividends can qualify conditionally even if the holding period has not been met. This treatment also applies to dividends paid to a Swiss shareholder (the required shareholding threshold is 25 percent), and to the European Cooperative Societies (Societas Cooperativa Europaea – SCE).

In principle, foreign dividends received by a Polish company are subject to normal CIT, unless a DTT stipulates otherwise. The Polish company receiving the dividend can offset the WHT against its mainstream corporate tax liability.

Dividends paid by an EU/EEA subsidiary to its Polish parent company are exempt from income tax in Poland if the two years holding period has been met. Additionally, the foreign company should be taxable on its worldwide income in an EU/EEA Member State. The participation requirement for a Polish parent company is a shareholding of at least 10 percent. Appropriate certificates of residence must be obtained.

This treatment also applies to dividends paid from a Swiss subsidiary to its Polish parent company. In this case the required shareholding threshold is to 25 percent. These parent-subsubsidiary provisions also apply to the Societas Cooperativa Europeas (SCE).

For 75 percent shareholdings in non-EU/EEA/Swiss tax-residents, a credit can also be claimed for underlying tax

paid on the profits from which the dividend is paid. This only applies when the subsidiary is resident in a country with which Poland has concluded a DTT and the Polish entity has held the shares for at least two years. The total foreign tax credits cannot exceed the Polish tax payable on the dividend income.

Hybrids

The Polish tax system tends to be very form-driven and will generally classify hybrid instruments by their legal form. However, the tax authorities can re-characterize the transaction based on the substance over form principle.

Discounted Securities

Any discount on the issue of securities is recognized as a deduction for tax purposes when the security is redeemed. This is only treated as income for the purchaser on redemption.

Deferred Settlement

Any deferred settlement must be analyzed in detail based on case by case basis as its tax treatment in Poland would depend on the wording of the agreements and circumstances of the transaction.

Other Considerations

Based on the CIT law in principle any method of settling liabilities (such as by offset of mutual receivables/liabilities between the parties) should be treated as a payment and result in the recognition of foreign exchange differences for tax purposes (provided other conditions are met).

Concerns of the Seller

Sale of Assets

Capital gains are subject to tax at the normal Polish CIT rate. In principle, the sale of assets is subject to VAT. Should any transfer tax (stamp duty) be due, the buyer is liable for stamp duty payment.

A capital gain obtained by an individual seller is subject to tax at normal progressive tax rates. If, however, the individual is subject to flat-rate tax on business activities, the gain will be taxed at 19 percent.

Sale of Shares

Based on Polish income tax provisions a gain on the sale of shares of a Polish company is subject to CIT in the hands of the seller, however non-residents should not be subject to income tax in Poland (unless so-called real estate clause (if any) from the respective DTT is applicable) under most Polish DTT. Any transactions

concerning real estate companies should be carefully analyzed.

If the shares were acquired in exchange for a contribution in-kind to an enterprise or an organized part of enterprise, a gain may be deferred until the shares are sold. A redemption of shares, or a share buy-back, is treated as a dividend unless the shares were acquired in exchange for the contribution in-kind of a business after 31 December 2002, in which case gain is treated in the same manner as a gain on a sale of shares.

Gains on the sale of shares obtained by an individual are subject to 19-percent tax.

Non-Tax Considerations

In principle, most investments in Poland do not require advance approval for non-strategic sectors. On an acquisition the most common approval required is that of the Office for the Protection of Competition and Consumers, often referred to as the Antimonopoly Office. Effective 1 May 2004, the EU competition rules apply.

If the Polish target company owns land the buyer must obtain advance permission from the Ministry of the Interior to acquire more than 50 percent of the shares. From 1 May 2004, this requirement ceased to apply to EU/EFTA purchasers, as long as the land was not agricultural or forest.

Company Law and Accounting

Based on Polish Commercial Companies Code the main forms of reorganizations are mergers and de-mergers of the companies. However, the popular form of reorganization is also in-kind contribution of business or organized part of the business.

Merger

Two types of mergers are possible in Poland: a takeover by an existing company and the merger of two companies into a new company. From a legal perspective, the merger is the most complete method of integration, because the acquiring company is the legal successor to all rights and obligations of the acquired company. Merger also generally ensures that administration decisions, concessions, and permits are automatically transferred to the acquiring company. This is the general position, but other legal issues may be involved, and each case should be analyzed separately.

Most mergers between Polish companies will be tax-free for the merging companies and their shareholders if no cash is distributed, and/or if, prior to the merger, the

acquiring entity has either no shareholding or at least 10 percent of the shares in the entity being acquired.

Hidden tax values, such as goodwill or increases in the value of assets, are not affected by a merger. Existing prior years' tax losses are eliminated unless the loss company survives. Generally a merger may be beneficial if the business being transferred is profitable, because unrealized gains are not taxed on the merger, and if the company is taken over has no significant tax losses (which would be lost on a merger).

From 1 May 2004, mergers between Polish companies and entities resident in EU Member States are treated in the same manner as domestic mergers, because Poland has fully adopted the EU Tax Merger Directive. Poland has also implemented the EU Legal Merger Directive, which means that under the commercial law cross-border mergers, can not only take place if a European Company is being created but also the domestic corporation (and limited joint stock partnerships) can be merged cross-border with the EU-based company described in the Directive (however, the limited joint stock partnerships cannot be acquiring entity). So far there is not much practice in the market in this respect.

If the acquiring company has a shareholding of less than 10 percent of shares of the company being acquired, the value of the net assets acquired in excess of the acquisition costs of this shareholding is treated as a dividend. The other shareholders of the entity being taken over are treated as realizing a gain equal to the difference between the acquisition cost of those shares and the nominal value of new shares, but taxation is deferred until the new shares are disposed of.

If it can be shown that the merger was not carried out for bona fide commercial reasons and that there was intent to avoid tax, the transaction would no longer be tax-free.

When a merger is accounted for using the acquisition method, the books should be closed on the date of the merger and the tax year ends. There is no such obligation when the merger is accounted for using the pooling of interest method. In this case the merged entity can file a single year-end return.

A merger is outside the scope of VAT and, in principle, there are no negative VAT consequences of a merger.

From 1 January 2009, the merger between a Polish corporation and a Societas Europaea (European Company) is not subject to stamp duty. In general, any

increase in share capital as a result of the merger (which has not been previously taxed in the merging entities, unless, in the case of corporation, such lack of taxation of contributions was allowed by the domestic law of the EU country of one of the merging companies), is subject to stamp duty at 0.5-percent.

Due to complex legal procedures, the process can last between six to eight months, although a merger of a parent and a 100-percent owned subsidiary usually only takes from four to six months. The time-frames for cross-border mergers could vary, depending on the local jurisdictions and the direction (inbound or outbound) of the merger.

De-Merger

A company may be divided into two or more companies. A division of a joint-stock company is not possible, unless the initial capital has been fully paid up. Partnerships cannot be divided. A company in liquidation that has started distributing its assets to shareholders or a company in bankruptcy cannot be divided.

A division may be effected through:

- transfers of all the assets of the company being divided to other companies in exchange for shares in the acquiring company, which are taken up by the shareholders of the divided company (division by takeover);
- formation of new companies to which all the assets of the divided company are transferred in exchange for shares in the new companies (division by formation of new companies);
- transfers of all the assets of the divided company to an existing company and a newly-formed company or companies (division by takeover and formation of a new company); and
- transfers of some of the assets of the divided company to an existing company or a newly formed company (division by separation).

No CIT obligation usually arises for the de-merged entity or its shareholders as long as an organized part of the business is transferred to the receiving entity and, in the case of a division by separation, an organized part of the business remains in the company being de-merged and an organized part of the business is transferred to the receiving entity. This does not apply if the main purpose of the de-merger is to evade or avoid tax. In addition, the de-merger will not be tax free if the acquiring entity

has less than 10-percent of the shares of the company being de-merged, and/or the cash is distributed.

If the transaction is not tax-free, the following income tax implications arise:

- Shareholders of the company (companies) being divided: the difference between the value of the shares received and the acquisition costs of the original shares is treated as a dividend.
- De-merged company: the difference between the market value of the assets being transferred and the tax written-down value is taxable/tax deductible.
- The entity receiving part of the de-merged business: the difference between the value of assets received and the nominal value of the shares issued to the shareholders of the de-merged company is treated as taxable income/tax deductible.

Generally, a de-merger should not be subject to VAT. Any increase in share capital would be subject to stamp duty at the rate of 0.5 percent. Whether or not the increase of the share capital covered by assets that have been previously taxed in the de-merging entity would be subject to 0.5-percent stamp duty should be separately analyzed case, by case.

Contribution In-Kind

The contribution in-kind of a business or an organized part of a business in exchange for shares is not subject to corporate tax at the moment of contribution. A contribution of assets (including shares) is regarded as a taxable disposal. The contributor is regarded as having received proceeds equal to the nominal value of the shares issued (subject to the transfer pricing provisions). In the case of companies, any gain will be added to mainstream income subject to corporate tax at normal rates. In the case of individuals a profit from a contribution of assets other than a business or organized part of a business in exchange for shares is subject to 19-percent tax. The contribution of shares carrying an absolute majority of voting rights in companies by a Polish company to another EU/EEA-resident company is not, however, subject to tax.

Generally, taxpayers receiving an in-kind contribution of a business/organized part of a business should use, for tax depreciation purposes, the initial value of the fixed assets in the books of transferring party (the continuity principle). Special care should be taken if liabilities are included. Contributed goodwill, know-how, and assets

allocated to reserve capital cannot be depreciated for tax purposes.

The in-kind contribution of a business or an organized part of business is not subject to VAT. A contribution of assets or rights is subject to VAT if the supply of such goods would be subject to VAT. An increase in share capital is subject to stamp duty at the rate of 0.5 percent (share premium is not subject to stamp duty), unless subject to VAT, but it is advisable to seek a ruling on this point. However, based on the recent proposed changes to the stamp duty provisions, generally the increase in share capital would be subject to stamp duty even if being subject to VAT. On the other hand the proposed changes to the stamp duty provisions provide a rule that the in-kind contribution of a business or an organized part of the business would not be subject to stamp duty (currently the exception covers branches).

Group Relief/Consolidation

Generally, each company is taxed on a stand-alone basis, but a fiscal group can be created for corporate tax purposes. This consists of a Polish parent and its 95 percent Polish subsidiaries with an average qualified share capital per company of PLN 1 million. The subsidiary companies cannot own shares in other companies that are members of the group.

An agreement must be signed by the members to form a fiscal group for at least three years. This should take the form of a notarized deed. The agreement is then registered with the tax office. A fiscal group is regarded as one taxpayer, and transactions between the members are disregarded for transfer pricing purposes. Losses arising before the group is formed cannot be offset against the profits of the group.

A number of conditions need to be met, the most significant of which operationally is the requirement that the taxable income of the group for tax purposes must be equal to at least 3-percent of gross taxable revenue.

Transfer Pricing

The arm's-length principle generally applies to transactions between related companies. The OECD Transfer Pricing Guidelines are followed in applying domestic transfer pricing legislation. The provisions apply to transactions between related parties in circumstances where the taxpayer does not carry out transactions on an arm's-length basis. In these cases, the tax authorities have the right to adjust the level of declared income.

Special transfer pricing documentation is required to be delivered to the tax authorities within seven days upon

the request (lack of the documentation leads to 50-percent taxation on any upward adjustment).

Foreign Investments of a Local Target Company

There are no CFC provisions in Poland, therefore, foreign investments in Polish companies are not affected or limited from this perspective.

Comparison of Asset and Share Purchases

Advantages of Asset Purchases

- The acquirer may depreciate the assets acquired at market value, including goodwill.
- It is possible to acquire only part of the business.
- The tax liabilities assumed by the acquirer (for which he/she is jointly and severally liable with the seller) can be eliminated or limited if a special certificate is obtained from the tax authorities (in the case of the acquisition of a business or organized part of a business; no such liability in case of single assets purchase).
- If the purchase is funded by debt, the interest can be offset against the profits of the acquired business.
- Profitable operations can be absorbed by loss-making companies within the acquirer's group (or vice-versa), consequently reducing the effective tax rate.
- If the purchase is subject to VAT, the input VAT could be deducted.
- When business/organized part of the business is purchased goodwill is subject to tax depreciation.

Disadvantages of Asset Purchases

- Possible need to renegotiate supplier agreements and employment contracts.
- Pre-acquisition losses and other tax attributes of the target company are not transferred with the business. They remain with the target company or are lost.
- A higher capital outlay is usually involved.
- Higher capital taxes (usually) or a cash-flow disadvantage if the transaction is subject to VAT.
- Possible VAT claw-backs (if the transaction is VAT-exempt).

- May be unattractive to the vendor, thereby increasing the price.
- Usually involves more formalities, because each individual component needs to be transferred.
- Structure of transaction must be carefully examined; re-classification may trigger adverse tax consequences.

Advantages of Share Purchases

- Lower capital outlay (purchase net assets only).
- Likely to be more attractive to vendor, so price is likely to be lower (if properly structured, the capital gain tax on vendor's side).
- Tax losses and other attributes of the target company can be used post-acquisition.
- May gain benefit of existing supply and technology contracts.
- Lower capital taxes payable (usually).
- Not subject to VAT.
- Simplicity and speed.
- The purchased company is not subject to taxation on the transaction.

Disadvantages of Share Purchases

- Liable for any claims or previous liabilities of the entity, including tax liabilities.
- No deduction for the purchase price.
- More difficult to finance tax-efficiently.
- Lack of effective tax consolidation means that post-acquisition integration with the acquirer's existing Polish operations can be complex.
- No step-up on assets possible.
- 1-percent PCC payable by the purchaser on the acquisition.
- No recognition of tax deductible goodwill.

Withholding Tax Rate Chart

The rate information and footnotes contained in this table are from the 2009 IBFD/KPMG Global Corporate Tax Handbook.

Country	Dividends		Interest ¹ (%)	Royalties (%)
	Individuals, Companies (%)	Qualifying Companies ² (%)		
Albania	10	5	10	5
Armenia	10	10	5	10
Australia	15	15	10	10
Austria	15	5 ³	0/5 ⁴	5
Azerbaijan	10	10	10	10
Bangladesh	15	10 ³	10	10
Belarus	15	10 ⁵	10	0
Belgium	15	5 ⁶	0/5 ⁷	5
Bosnia and Herzegovina ⁸	15	5	10	10
Bulgaria	10	10	10	5
Canada	15	15	15	0/10 ⁹
Chile	15	5 ¹⁰	5/15 ¹¹	5/10 ¹²
China (People's Rep.)	10	10	10	7/10 ¹³
Croatia	15	5	10	10
Cyprus	10	10	10	5
Czech Republic	10	5 ¹⁰	10	5
Denmark	15	0/5 ¹⁴	0/5 ¹⁵	5
Egypt	12	12	12	12
Estonia	15	5	10	10
Finland ³¹	15	5	0 ³¹	10 ³¹
France	15	5 ³	0	0/10 ¹⁶
Georgia	10	10	8	8
Germany	15	5 ³	0/5 ⁴	5
Greece	- ¹⁷	- ¹⁷	10	10
Hungary	10	10	10	10
Iceland	15	5	10	10
India	15	15	15	22.5 ³³
Indonesia	15	10 ¹⁰	10	15
Iran	7	7	10	10
Ireland	15	0	0/10 ⁴	0/10 ¹⁸
Israel	10	5 ¹⁹	5	5/10 ¹³
Italy	10	10	10	10
Japan	10	10	10	0/10 ¹⁶
Jordan	10	10	10	10
Kazakhstan	15	10 ¹⁰	10	10
Korea (Rep.)	10	5 ³	10	10
Kuwait	5	0 ²⁰	0/5 ²⁰	15
Kyrgyzstan	10	10	10	10
Latvia	15	5	10	10
Lebanon	5	5	5	5
Lithuania	15	5	10	10
Luxembourg	15	5	0/10 ²¹	10
Macedonia	15	5	10	10
Malaysia	0	0	15	15/ ²²
Malta	15	5 ¹⁰	10	10
Mexico	15	5	0/5/15 ²³	10
Moldova	15	5	10	10
Mongolia	10	10	10	5
Montenegro ²⁴	15	5	10	10
Morocco	15	7	10	10
Netherlands	15	5 ³	0/5 ²⁵	5
New Zealand	15	15	10	10
Norway ³²	15 ³²	5 ³²	0 ³²	0/10 ¹⁶³²

Country	Dividends		Interest ¹ (%)	Royalties (%)
	Individuals, Companies (%)	Qualifying Companies ² (%)		
Pakistan	¹⁷	15 ²⁶	¹⁷	15/20 ²⁷
Philippines	15	10	10	15
Portugal	15	10 ²⁸	10	10
Qatar	5	5	0/5 ⁴	5
Romania	15	5	10	10
Russia	10	10	10	10
Serbia ²⁴	15	5	10	10
Singapore	10	10 ³⁴	10	10
Slovak Republic	10	5 ¹⁰	10	5
Slovenia	15	5	10	10
South Africa	15	5	10	10
Spain	15	5	0	0/10 ⁹
Sri Lanka	15	15	0	0/10 ¹⁶
Sweden	15	5	0	5
Switzerland	15	5	10	0
Syria	10	10	10	18
Tajikistan	15	5	10	10
Thailand	¹⁷	20	10	5/15 ⁹
Tunisia	10	5	12	12
Turkey	15	10	10	10
Ukraine	15	5	10	10
United Arab Emirates	5	5 ³⁵	5	5
United Kingdom	10	0 ²⁹	0/5 ⁴	5
United States	15	5 ³	0	10
Uzbekistan	15	5 ¹⁰	10	10
Vietnam	15	10	10	10/15 ³⁰
Zimbabwe	15	10	10	10

Notes

- Many treaties provide for a 0-percent rate for certain types of interest, such as interest paid to the state, local authorities, the central bank, export credit institutions, or in relation to sales on credit. Such exemptions are not considered in this column.
- Unless otherwise indicated, the rates in this column apply if the holding is at least 25 percent of the Polish company's capital or voting power, as the case may be.
- Minimum holding of 10 percent is required.
- The lower rate applies to interest on bank loans.
- Minimum holding of 30 percent is required.
- The rate applies if the Belgian company holds directly at least 25 percent of capital in the Polish company or at least 10 percent of the capital in the Polish company and has invested in it at least EUR 500,000.
- The lower rate applies to interest from any kind of loans granted by banking enterprises, not being loans represented by bearer securities.
- The treaty concluded between Poland and the former Socialist Federal Republic of Yugoslavia.
- The lower rate applies to copyright royalties, excluding films.
- Minimum holding of 20 percent is required.
- The treaty rate is 15 percent for all types of interest. However, by virtue of a most-favored-nation clause of the protocol, the rate is reduced to 5 percent in respect of interest paid to a bank or insurance company or derived from bonds or securities that are regularly and substantially traded on a recognized securities market. (The rate on such interest is currently 5 percent under the Chile-Spain treaty.)
- The lower rate applies to equipment rentals. The general treaty rate is 15 percent. However, by virtue of a most-favored-nation clause of the protocol, the rate is reduced to 10 percent. (The general rate on royalties is currently 10% under the Chile-Spain treaty.)
- The lower rate applies to equipment rentals.
- For the zero rate a minimum holding of 25 percent for at least one year is required. The 5-percent rate applies to payments to pension funds.
- The lower rate applies to interest paid by public bodies.
- The lower rate applies to copyright royalties (sometimes including films – the treaty should be checked in all cases).
- The domestic rate applies; there is no reduction under the treaty.
- The lower rate applies to fees for technical services.
- Minimum holding of 15 percent is required.
- The zero rate applies if a beneficial owner is the government of the other state, or a company in which at least 25 percent of the capital is owned by the government.
- The zero rate applies to interest on bank deposits and bank loans.
- The domestic rate applies to film royalties.
- The zero rate applies to interest paid by public bodies. The 5-percent rate applies to interest paid to a bank or insurance company or derived from bonds or securities that are regularly and substantially traded on a recognized securities market.
- The treaty concluded between Poland and the former Serbia and Montenegro.
- The lower rate applies to interest on bank loans and interest paid by public bodies.
- A holding of one third of the capital is required.
- The lower rate applies to know-how.
- Minimum holding of 25 percent is required for an uninterrupted period of two years.
- Minimum holding of 10 percent is required for an uninterrupted period of two years.
- The lower rate applies to royalties paid for a patent, design, or model, plan, secret formula or process or for know-how.
- The new treaty with Finland will probably start to be in force from January 2011 which would provide 5-percent withholding tax on interest and royalties payments.
- The new treaty with Norway will probably start to be in force from January 2011 which would provide 5-percent withholding tax on interest and royalties payments. Based on the proposed wording the 0-percent withholding tax would apply for dividends payments (in this case minimum holding of 10 percent is required for an uninterrupted period of two years), otherwise the 15-percent withholding tax would apply on dividend payments.
- Because the rate under the domestic law in Poland is 20 percent, the treaty rate of 22.5 percent does not apply.
- The 0-percent rate applies to certain dividends paid to government units or companies.
- The 0-percent rate applies if the owner of the dividends is the government or government institution.

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