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THE RIGHT FOCUS

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ENERGY PASSPORT: NEW OBLIGATIONS (AND COSTS) WHEN SELLING OR RENTING PROPERTY

MALWINA JAGIEŁŁO

WERONIKA DUDA

As early as the end of April 2023, amended regulations on the energy performance of buildings will come into force, requiring owners of apartments or buildings to obtain a so-called energy passport.

The energy passport (or energy performance certificate) will become essential for a property owner to have when selling or leasing an apartment or building. In light of the prevailing energy crisis, these changes could significantly increase public awareness of energy consumption and costs, and generate savings for consumers during the use of buildings.

Energy performance certificate

The amendment to the Energy Performance of Buildings Act and the Building Law implements the provisions of the directives of the European Parliament and of the Council on the energy performance of buildings and energy efficiency in the Polish legal framework.

An energy performance certificate is a document specifying the energy needed to meet the energy demand associated with the use of a building or part thereof.
The obligation to have a certificate has been in place in Poland for some time now, but until now it only applied to buildings constructed after 2009.

Once the amendment comes into force, an energy certificate will be required for all buildings and will be obligatory for the purposes of dealing with the property.

This means that the owner will have to produce an energy passport:

- When selling a building/apartment on the basis of a sales agreement,
- When selling a building/apartment on the basis of an agreement for the sale of a co-operative member's ownership right to the apartment, and
- When entering into a lease agreement for a building/apartment.

In the case of a sales agreement, the certificate should be handed over to the purchaser at the time of drawing up the notarial deed and the notary will be obliged to record this in the notarial deed.

The amendment also specifies that if the property for sale or lease is a building, the energy performance certificate to be provided should concern that building. In the case of a part of a building (e.g. an apartment), the certificate should concern that specific part (the apartment) and not the whole building.

For newly constructed buildings, it will be mandatory to attach a copy of the energy performance certificate, in paper or electronic form, to the notification of the completion of construction or the application for an occupancy permit.
When entering into a lease agreement, the landlord will be obliged to provide the tenant with a copy of the certificate at the time of signing.

Energy passport for existing leases

It is worth noting that according to the ministry responsible for amending the relevant laws, the above obligation will apply only to newly concluded lease agreements.

As regards agreements in force on the date the new act enters into force, the lessor will not be obliged to hand over the certificate to the current lessee.

Moreover, the act does not refer to any other agreements (e.g. leasehold, Polish: umowa dzierżawy) and it explicitly refers to lease agreements (Polish: umowa najmu). According to the principle of lawmaker rationality, the omission of leasehold agreements from the amended provisions should not be interpreted broadly. It can therefore be assumed that in the absence of any reference to leasehold agreements, these agreements will be excluded from the regulation on building certification.

Obtaining an energy performance certificate

Energy performance certificates can only be prepared by an individual entered on the list of persons authorised to prepare such certificates, which is available in the Energy Performance of Buildings Central Register kept by the Ministry of Development and Technology. The information contained in the certificate will also go into the Energy Performance of Buildings Central Register, which is and will be publicly available. The time for producing a passport is generally quite short – around 2 to 3 days, while the passport itself will be valid for 10 years from the date of its issuance.

Penalties for non-compliance

The problem with the existing legislation was the lack of effective mechanisms to ensure the transfer of energy performance certificates when selling or leasing buildings or parts of buildings.

The current amendment resolves this issue and provides for a fine for entities obliged to submit a certificate and failing to do so.

The new law does not regulate the fine amounts, but it may be presumed that, as such cases will be examined on the basis of the Petty Offences Procedure Code, the fine may reach PLN 5,000.

In addition, the notary drawing up a sales agreement will be required to record the fact of handing over the certificate in the notarial deed and, if the certificate is not provided, will instruct the seller on the fine.

Energy passport – objectives of the amendment

The proposed changes should be welcomed. The legislator has indicated that the main objective of the amendment is to protect the interests of prospective purchasers or tenants by ensuring that the technical condition of the building and its energy needs can be determined.

The amendments also aim to build public awareness, and increase the drive towards designing buildings with the highest possible performance and using technical solutions and better quality materials to save energy and heat. This should translate into significant savings in energy consumption, reduced building operating costs and savings for consumers themselves.

Making public the information contained in the list of energy performance certificates is intended to enable any person concerned to verify the authenticity of their certificate.
This will also make it possible for notaries to verify the energy performance certificates provided during transactions involving the transfer of rights to a building or premises.

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DUAL LISTING AS A WAY TO MANAGE DOWNTURN IMPACT WHILST EFFECTIVELY RAISING FUNDS

PAWEŁ MARDAS

Why is it worth Polish companies seeking capital in foreign markets?

For Polish companies, a dual listing brings prestige, money and opportunities for international growth. It is a chance to build global brands and achieve the best competitive position, but also to enhance liquidity and raise money for bold investments and necessary acquisitions.

For many companies today, it may be the only way to survive the coming crisis. And it's a path on which it is good to have a trusted advisor and an experienced guide, as well as a seasoned player whose contacts, relationships and know-how will guarantee the success of the entire venture.

Polish companies forced into growth

Polish businesses are redefining themselves. And they are doing so in the context of both the threats and opportunities presented by global, dynamically changing markets. Aware that growth is the only way to escape the effects of the downturn, they are aggressively seeking new areas of investment and funding. Seeking and successfully raising funds on foreign stock exchanges is one of the most attractive directions and a good strategy for building a competitive edge. Take the London Stock Exchange, for example.

The London Stock Exchange – a natural destination for Polish companies

The London Stock Exchange (LSE) is one of the oldest stock exchanges and one of the largest in the world in terms of turnover.

A listing on the LSE raises company profile, becoming more attractive to investors and capital providers, allowing companies to grow faster and more smoothly. The fact that the LSE ensures much greater transparency of information than the Warsaw Stock Exchange (WSE) is of great importance and has a significant impact on the image of a London-listed company.

This means meeting a number of notification obligations and maintaining high standards of transparency. Investors can be confident that LSE-listed companies meet these higher standards, giving them an edge over companies listed on other markets.

A London listing can be interesting not only for those Polish companies that are already home-listed (through dual listing), but also for those which have not gone public yet and are planning to make an IPO and are considering listing on a foreign exchange. This is because an IPO on the WSE is not always a good solution, especially if the Polish trading floor does not offer the expected valuation and the possibility of raising capital in the domestic market.

Today's LSE as a chance for cheaper money with a mature market valuation

It is worth noting that the current combined capitalisation of companies listed on the LSE is around GBP 3.7 trillion, which is many times higher than that of WSE-listed companies.
Unfortunately, the WSE cannot always meet the capital needs of its companies, or at least meets them to a far lesser extent than the LSE.

Other benefits of an IPO or a dual listing on the LSE include:

- access to much larger pool of foreign capital and potential investors;
- easier raising of capital through further issues;
- much greater liquidity of shares than of those listed on the WSE due to the significantly higher turnover on the LSE, ensuring much higher valuations of LSE-listed shares;
- raising a company profile in international markets and increasing brand recognition worldwide;
- investor and market confidence – LSE-listed companies enjoy enhanced credibility among foreign business partners, investors, banks and financing institutions, which strengthens their negotiation position;
- better possibilities of comparing the valuation of a Polish company to that of foreign peers listed on the LSE – not all sectors are popular or even present on the WSE, so investors often lack the knowledge or tools to properly value a given company.

Dual listing with an M&A transaction in the background

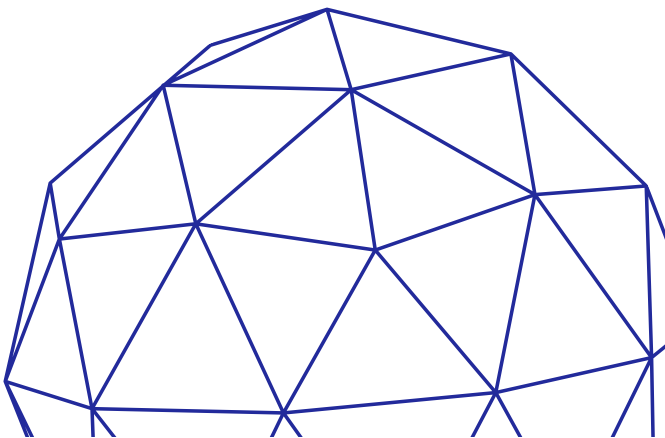
A possible dual listing scenario involves the acquisition of a company listed on a foreign stock exchange by a company listed on a domestic stock exchange (e.g. the WSE). The acquisition takes the form of a merger of both companies. The owners of the merging companies may have an interest in maintaining a listing on both exchanges, which would increase their ability to raise capital.

In such a case, the execution of an M&A transaction (acquisition of one company by another) requires additional work in terms of preparing and executing the dual listing.

Landmark transaction on the Polish market

We authored and partnered the first ever dual listing of a Polish company – WorkService SA. And we are sure that subsequent dual listings have drawn to some extent on our experience.

We offer full legal support and unique know-how to companies interested in a debut on the LSE at every stage of the process, including identifying the most attractive stock exchange listing market, determining the optimal corporate structure for a company entering a foreign stock exchange, drawing up legal documentation, providing assistance in communicating with the stock exchange and the market regulator, as well as a number of other aspects on which the success of such a significant venture depends.



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NON-EXISTENT COMPANY RESOLUTIONS

KAROL POŁOSAK

The adoption of a resolution by the general meeting of a limited liability company with respect to a matter not placed on the agenda is a condition for the resolution to be considered non-existent.

In order to protect shareholders against defective resolutions being used in transactions, the Commercial Companies Code provides, in principle, for a closed list of legal instruments.

A distinction is made between defects justifying an action to invalidate a resolution that is inconsistent with law and defects justifying an action to repeal a resolution that is inconsistent with the articles of association or good practice and is detrimental to company interests or is intended to harm a shareholder.
In certain cases, however, shareholders resolutions may be considered non-existent pursuant to Article 189 of the Code of Civil Procedure.

What are non-existent resolutions?

Non-existent resolutions are resolutions that have no legal effect. In legal terms, they are considered not to exist and to never have existed.
In its decision of 25 August 2016, case file V CSK 694/16, the Supreme Court characterises non-existent resolutions as follows:

"Non-existent resolutions differ from resolutions that are inconsistent with law, with the former being characterised by a drastic, extreme degree of defectiveness that justifies considering them as non-existent, i.e. producing no legal effects ab initio."

What are the conditions for a resolution to be declared non-existent?

In its judgment of 12 December 2008, Case No. II CNP 82/08, the Supreme Court sets out the following conditions for resolutions to be considered non-existent:

- "a resolution is considered non-existent if it is adopted by persons who are not actually shareholders.
- a shareholders resolution is considered non-existent if a general meeting is self-convened by a group of shareholders without complying with the required procedure (...).
- a resolution is considered non-existent if the quorum required for its adoption is not present, if the resolution does not receive the required majority of votes, if the voting results are falsified, if the resolution is recorded without a vote **or if it is adopted with respect to any matter that is not on the agenda** (...).
- in accordance with the general rules on non-existent legal acts, a shareholders resolution is considered non-existent if physical coercion is used against shareholders, the resolution is adopted not in earnest, or if the content of the resolution is incomprehensible and its meaning cannot be determined by interpretation."

Below, we take a closer look at the reasons why a resolution on an item not placed on the agenda is considered non-existent.

Absence of a given matter on the agenda of a general meeting

According to Article 238 § 2 of the Commercial Companies Code, an invitation to a general meeting must state the date, time, place and detailed agenda of the meeting.

Although this provision allows for a concise formulatio n of the agenda and does not require the wording of the proposed resolutions to be indicated, it does not allow for the agenda of a general meeting to be so vague and imprecise as to mislead shareholders.

According to the above Supreme Court case law, the omission of an item from the agenda when it is subsequently put to a vote may result in the resolution being considered non-existent.
Interestingly, the Court of Appeal in Warsaw came to a different conclusion when deciding one of our own cases.

In its judgement of 8 September 2022, Case No. VII AGa 875/21, **the Court of Appeal stated that if the shareholders' meeting of a limited liability company adopts a resolution that was not on the agenda of the meeting, the resolution may not be considered non-existent**.

In particular, the Court of Appeal in Warsaw used the following arguments:

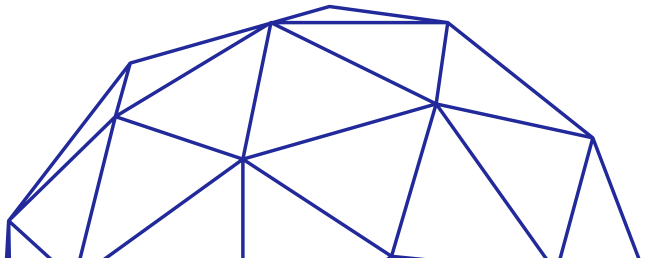
"Pursuant to Article 250(4) in fine of the Commercial Companies Code, those entitled to bring an action for repealing a shareholders' resolution include shareholders who did not attend the shareholders' meeting, in the event the resolution concerns a matter not included in the agenda. Similarly, in accordance with Article 252 of the Commercial Companies Code, such shareholders have the right to bring an action for declaring invalid a resolution contrary to statutory law. These provisions, although concerning the issue of locus standi to bring an action for the repeal or declaration of invalidity of a resolution, may not be disregarded when examining the sanction for the adoption of a resolution on a matter not on the agenda.

There is no systemic justification for the view that a resolution may be declared non-existent. Indeed, this would mean that if a shareholder was not present at a shareholders' meeting at which a resolution on a matter not on the agenda was adopted, the shareholder would be entitled to bring an action for the repeal of that resolution or for declaring it invalid (in accordance with Articles 250(4) and 252 § 1 of the Commercial Companies Code), while if the shareholder was present at the meeting at which the resolution on the matter not on the agenda was adopted, they may effectively seek such resolution to be declared non-existent. Such a differentiation of sanctions, depending on whether or not the shareholder attended the shareholders' meeting at which the resolution on a matter not on the agenda was passed, has no systemic justification.

In the hypothetical situation where, in its invitations to the shareholders' meeting, the management board intentionally fails to communicate a particular issue to be voted on at the shareholders' meeting – the sanction varies depending on whether or not a shareholder was actually misled about the agenda of the meeting. If the shareholder is misled by the wording of the invitation and, relying on such wording, does not attend the shareholders' meeting (assuming that no matters of interest to them will be discussed at the meeting), and subsequently a resolution is adopted at the meeting in respect of a matter not on the agenda, the shareholder will be entitled to claim that the resolution be repealed (Article 250(4) of the Commercial Companies Code) or – if the resolution is contrary to statutory law – declared invalid (Article 252 § of the Commercial Companies Code).

By contrast, if a shareholder, having received an invitation with an agenda not corresponding to the actual agenda, does attend the meeting at which a resolution is adopted on a matter not on the agenda, the resolution will be non-existent. Thus, paradoxically, if the shareholder is 'successfully' misled by the wording of the invitation (i.e., trusting the invitation, they do not attend the meeting), they will be entitled to a weaker sanction (an action for the repeal of the resolution, which may be brought within specific time limits), than they would be if they attended the meeting (not having trusted the invitation)."

This example shows that, although the concept of non-existent resolutions is generally accepted in doctrine and case law, the actual list of conditions for considering a resolution non-existent remains an open question in some cases.



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A WAVE OF NFT-RELATED TRADEMARK APPLICATIONS

TOMASZ SZAMBELAN

We have followed the trend in trademark applications for NFT-related protection and the conclusions are clear: what started as a trickle has become a flood, with tycoons from virtually every industry jumping on the bandwagon. And their applications often relate to pioneering types of marks

NFT-related trademark applications – the numbers are soaring

The beginning of the year is a good time to take a look at some full-year statistics on filings with the European Union Intellectual Property Office (EUIPO).

As the EUIPO allows you to obtain the broadest protection with just one application and a relatively low fee, we think these figures give a very good picture of the current status.

For the sake of completeness, we have focused our analysis on applications from 2020 to 2022. As is well known, we saw a real boom in NFT content over the past year. The extent of this popularity will be particularly apparent when we note that there were no NFT-related filings in 2020.

On the other hand, it is safe to say that the coming years will see an avalanche of applications, and this is already evident from the initial statistics from this year.

NFT trademarks – 2021 statistics

221 applications were filed in 2021, of which 195 have been granted registration to date. Of the total number of applications, 141 applications were for protection for word marks and 77 – for word-figurative marks.

Most of the applications were filed by technology companies, mainly game developers, but other companies are also on the register.

Among those seeking protection for their NFT-related goods and services was Buccellati Holding Italia, an Italian jewellery and watch company with more than 100 years of trade.

Burberry, Maserati and David Beckham – who applied for NFT trademark protection in 2022

There were 1,867 applications for NFT-related trademark protection in 2022. 814 marks were registered, 615 applications were published and 112 were opposed.

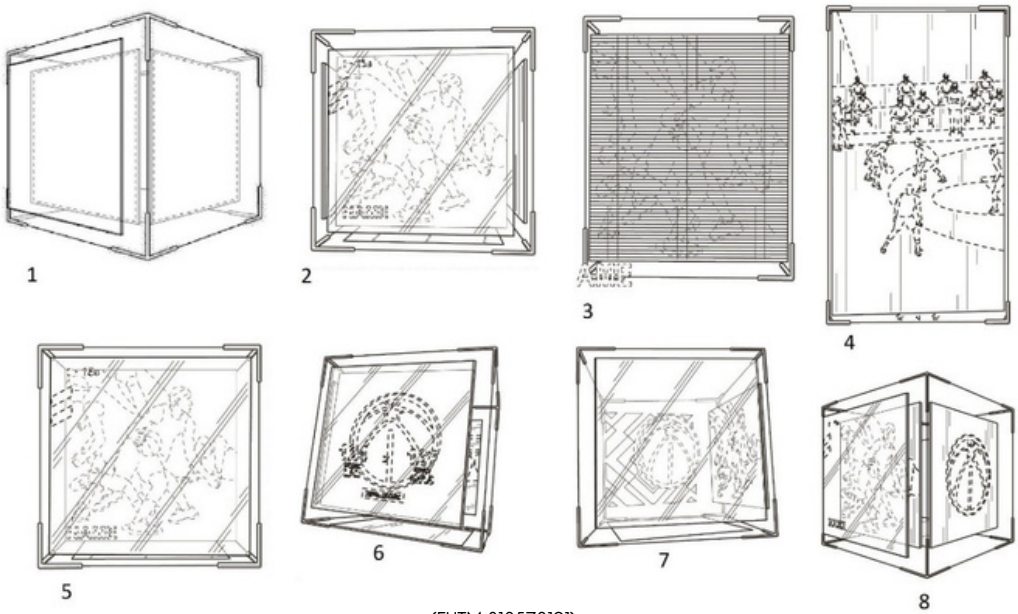
There were 1,066 applications for protection for word marks, 789 – for word-figurative marks, and 7 – for three-dimensional marks. One application was for a motion and sound mark.

Applicants included major fashion houses such as Bulgari, Burberry, Valentino and Yves Saint Laurent.

One of the most interesting applications was for the word mark DAVID BECKHAM (EUTM 018688632), filed by DB Ventures which manages Beckham's post-football activities.

A real gem, on the other hand, was the application for word-figurative marks representing the Little Prince character, registered for the Society for the Work and Memory of Antoine de Saint-Exupéry.

In summary, the number of trademark applications for NFT-related protection has increased more than eightfold compared to the previous year.



(EUTM 018578191)

The automotive industry also decided to protect its marks for NFT-related goods and services. Applications were filed by representatives of Maserati, Volkswagen and Hyundai, among others.

Other internationally recognizable applicants were Heinz, Red Bull, eBay, Tommy Hilfiger, Johnson & Johnson and Puma.

There were also representatives from the world of sport including the world's biggest football clubs and the organisers of league competitions such as the English Premier League.

This demonstrates not only the popularity of NFT content and the dynamic development of this new technology sector, but also the growing awareness among right holders of the need to protect their rights. The extent of this growth is illustrated in the graph below.

Moreover, the results for January 2023 show a continuation of this upward trend in further new applications. It is therefore fair to say that the coming years will see a flood rather than a wave of applications and registrations.

POLISH DEAL 3.0 / CIT AND PIT

AGATA DZIWISZ

JAKUB DITTMER

With the beginning of 2023, let's take a brief look at the major tax solutions that came into effect from 1st January

Changes in taxation with Estonian CIT (flat-rate company income tax payable at the time of profit distribution)

- Employment regulations have been modified. According to the amendment, the minimum employment requirement is deemed to be met even in cases where taxable persons employ persons who are exempt from PIT (e.g. persons under 26 years of age) or social security contributions (e.g. students).
- The deadline has also been clarified over taxable persons to submit a notification of opting for Estonian CIT (ZAW-RD), if the change is made during the tax year.
- It has further been clarified that a tax liability under a so-called preliminary adjustment is also fully extinguished after at least one full flat-rate taxation period, i.e. four tax years.
- According to the amendment, expenditures related to the use of passenger cars (including depreciation write-offs) are deemed to be non-business expenses if the car is not used exclusively for business but also for private purposes.
- The changes apply to the CIT Act only.

Changes in withholding tax (WHT) declarations

- The deadline for tax remitters to file initial declarations on the exercise of due diligence in verifying the conditions for the application of preferential taxation rules in the collection of WHT (under the pay and refund procedure) has been extended until the end of the second month following the month in which the threshold of PLN 2,000,000 is exceeded.
- The changes apply to both the CIT Act and the PIT Act.

Changes and deferral of the minimum income tax regime

- Taxable persons have been exempted from minimum tax between 1 January 2022 and 31 December 2023.
- The profitability ratio, below which taxable persons are required to account for minimum tax, has been increased from 1% to 2%, and the method for calculating the minimum tax has been modified by excluding the following:
  - payments under leasing contracts that are included in tax costs;
  - revenue and deductible costs directly related to such revenue from the sale of receivables to a financial institution engaged in factoring activities;

- annual increases in electricity, heat and mains gas purchase costs;
- excise duty (including trade in excisable goods), retail sales tax, gambling and lottery tax, fuel and emission charges;
- 20% of the costs of salaries, social security contributions and contributions to employee capital plans.

- The method of determining the tax base has been modified, with the tax base being the sum of: 1.5% (instead of the previous 4%) of operating revenue (i.e. other than capital gains), excess passive costs, i.e. debt financing costs incurred for related parties, and excess intangible service costs.

- The possibility of opting for an alternative method of determining the tax base has been introduced, whereby the tax base is 3% of revenue, other than capital gains, earned by taxable persons during the tax year, provided that the choice of the method is declared in the tax return for the tax year in respect of which the choice has been made.

- A number of additional exemptions from minimum income tax have been added, including for the following groups:
  - taxable persons deriving the majority of their revenue, other than capital gains, from the provision of health care services;
  - taxable persons deriving the majority of their revenue from transactions where the price or the method of determining the price is laid down by statute or other regulatory act;
  - CIT taxable persons whose annual revenue does not exceed EUR 2,000,000 (i.e. small taxable persons);
  - utility companies;
  - taxable persons whose profitability in one of the last three tax years was at least 2%;
  - taxable persons that have gone into bankruptcy or liquidation or those undergoing reorganisation;
  - parties to cooperation agreements;
  - financial institutions engaged in factoring activities;
  - mining companies in receipt of state aid.

- The changes apply to the CIT Act only.

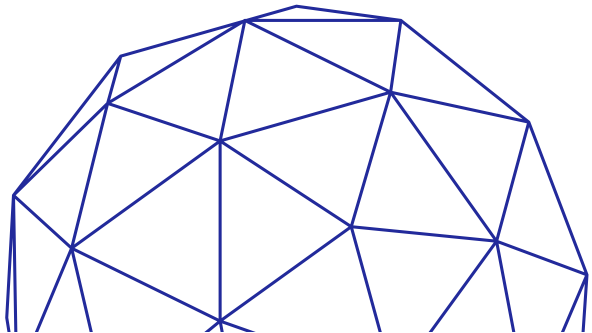
Changes in the regulations on controlled foreign companies (CFCs)

- The definition of the term "subsidiary" has been expanded.
- The prerequisite of a CFC's high profitability, calculated as the ratio of revenue to the value of assets, in relation to held assets in the event of their potential disposal during the year, has been clarified.
- The applicability of reliefs under the CIT Act has been excluded.
- The changes apply to both the CIT Act and the PIT Act.

New conditions for Polish holding companies to apply preferential taxation rules

- The condition of not applying tax exemptions under Articles 20(3) and 22(4) of the CIT Act has been deleted from the definition of a holding company.
- The definition of a subsidiary no longer includes the condition of:
  - not holding more than 5% of shares in other companies;
  - not holding all rights and obligations in a company that is not a legal person;
  - not applying the exemption under Article 17(1) (34) or (34a) of the CIT Act, i.e. within a special economic zone or the Polish Investment Zone.

- The income tax exemption of 95% of dividends received by holding companies has been replaced by the full CIT exemption.
- The changes apply to the CIT Act only.



Repealing the "hidden dividend" regulations

The "hidden dividend" regulations, intended to counteract corporate profit transfers, have been repealed following numerous interpretative doubts.

Changes in profit shifting taxation

- A number of changes in the calculation of profit shifting tax have been made, with in particular tax deductible costs only being now subject to the tax, and several conditions for related entities have also been clarified:
  - a related entity for which costs are incurred must not have its registered office or place of management in the Republic of Poland;
  - the condition of preferential taxation in a state of establishment, management, registration or location of a related entity has been simplified by replacing the condition of actual tax payment by a related entity in an amount that is at least 25% lower than the basic CIT rate applicable in Poland (which was 14.25%) with the condition that a related entity is subject to tax at a rate lower than 14.25% (with the algorithm for calculating the rate being specified);
  - the condition of 50% of revenue coming from passive receivables has been clarified;
  - related entities must transfer at least 10% of revenue obtained from Polish companies.
- The condition of preferential taxation in a state of establishment, management, registration or location of a related entity has been simplified.
- The burden of proof for the substantiation of costs lies with taxable persons.
- The changes apply to the CIT Act only.

New rules for the submission of applications and statements by taxable persons to tax remitters and tax remitters' obligations

- The possibility of settling the annual exempt amount with several employers.
- A new PIT-2 form, being a comprehensive statement by a taxable person for the purposes of calculating monthly advances for personal income tax.
- The possibility for taxable persons to opt out of applying increased monthly employee deductible costs.
- Clarified rules for collection of advance payments from tax remitters.
- The changes apply to the PIT Act only.

Special rules for changing the form of taxation for 2022

- The new deadline for filing PIT-28 and PIT-28S returns will be unified and will be 30 April 2023.
- Entrepreneurs who, prior to 1 July 2022, applied a flat tax or registered revenue tax (flat-rate tax on registered revenue without deductible costs, Polish: ryczałt od przychodów ewidencjonowanych), were entitled to opt for taxation based on tax brackets for the entire 2022. In the case of retrospective taxation of revenue for 2022 based on tax brackets, this choice will not apply to subsequent years.
- The changes concern the PIT Act and the Registered Revenue Tax Act (Polish: ustawa o zryczałtowanym podatku dochodowym od niektórych przychodów osiąganych przez osoby fizyczne).

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