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# Taxation of cross-border mergers and acquisitions

**Poland**

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# 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 later to adjust to European Union (EU) law, as required by Poland's accession to the EU on 1 May 2004.

Poland has fully incorporated the EU Parent-Subsidiary Directive [90/435/EC], Merger Directive [90/434/EC], and Interest and Royalties Directive [2003/49/EC], and the EU-Swiss Savings Agreement.

## Recent developments

Recent developments in the Polish tax law have affected the tax environment and could have an impact on mergers and acquisitions (M&A).

As of 1 January 2015, new rules on the taxation of passive income arising in controlled foreign companies conducting no genuine business activity (CFC) were introduced. The key objective was to tax interest, dividend, capital income or gains derived by foreign subsidiaries of Polish taxpayers that are seated in a country with a significantly lower corporate income tax (CIT) rate or in a country with which Poland has not concluded an agreement containing an exchange of information clause.

As of 1 January 2014, Polish joint stock partnerships (SKA) are treated as CIT taxable entities. As a consequence of ending the tax transparency of SKAs, income arising for such entities is taxed initially at the level of the partnership and subsequently at the level of the partners. This treatment mirrors the taxation of income for limited liability companies (sp. z o.o.) and joint stock companies (SA).

As of 31 December 2015, the anti-abuse clause is applicable to dividend payments and other profit distributions made by a subsidiary to a parent company. As a result of the new regulation, the scope of application of the EU Parent-Subsidiary Directive will be limited in the case of artificial arrangements (i.e. carried out without justifiable business or economic reasons) and where the main driving force for concluding the transaction is to obtain a tax advantage (i.e. tax exemption).

In January 2016, the Polish government published an initial draft amendment to the tax ordinance including the general anti-avoidance clause. Based on the current wording, the new clause would allow the tax authorities to ignore the implications of a taxpayer's legal structures if they are deemed to be artificial, that is, if their only purpose is to avoid taxation and the same business goal could have reasonably been achieved in a different way if a tax motive were not present. The provision's entry into force and final wording are still uncertain.

As of 1 February 2016, a new asset tax for financial institutions was introduced (banking tax). It applies to local institutions and branches of foreign institutions engaged in banking, insurance, reassurance, credit or loan business. The monthly tax due is calculated based on 0.0366 percent rate applicable to surplus of the assets over the statutory thresholds, depending on the taxpayer's business category.

In January 2016, the Polish government published an initial draft bill proposing to implement new retail trade tax. The provision's entry into force and final wording are still uncertain.

## 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 for the acquisition, as the chosen form could depend on many circumstances and the different objectives of the entity concerned.

### 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 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 is the base for tax-depreciation purposes. Individual depreciation rates (higher than the standard rate) can normally be applied to secondhand assets.

### Tax attributes

Tax losses are not transferred on an asset acquisition; 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. Any losses of the selling company can be used to offset any profit (subject to the normal restrictions).

**Value added tax**

Valued added tax (VAT) arises on the sale of goods (e.g. stock and equipment) and certain intangibles. Currently, the standard VAT rate is 23 percent.

Generally, the sale of buildings, constructions and their parts is VAT-exempt (except where the sale is performed in principle before the period of 2 years from the first occupation expires). However, in most cases, the taxpayer can waive the exemption where certain conditions are met. Supplies of buildings, constructions or their parts are also exempt from VAT if the supplier had no right to deduct input VAT on acquisition of the building or construction and certain other conditions are met.

**Transfer taxes**

Where the sale is VAT-exempt, it is usually exempt from transfer tax on civil law activities (PCC), except for land and buildings. The purchase of real estate is subject to 2 percent PCC even if VAT-exempt.

A sale of assets outside the scope of VAT is subject to PCC of 1 or 2 percent, payable by the purchaser. There is no separate PCC land tax in Poland.

**Purchase of a business or organized part of a business**

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 sale price taxed at normal corporate rates. For an individual, such profit is taxed in the same way as normal business income.

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, permission of the competition authorities and/or the European Commission is required. The acquirer generally is the legal successor for most purposes, but administrative decisions and permits generally do not automatically transfer.

The purchase of a business or an organized part of a business is generally advantageous where 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.

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 5 years. Where the assets are regarded as secondhand (more than 6 months old for movable property or 5 years old 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**

Where a whole business or an organized part of a business is sold, the transaction should be outside the scope of VAT. Instead, it is subject to PCC of 2 percent on movable property and real estate and 1 percent on rights. The purchaser is liable for the PCC 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 were previously 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. Therefore, the purchaser normally requires 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). Tax losses 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 5 years. Only 50 percent of a tax loss from each of the previous periods can be used in any 1 tax year.

**Transfer taxes**

Generally, a sale of shares is subject to PCC 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 PCC. Generally, PCC 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 (except joint stock partnerships, as of 2014) are regarded as fiscally transparent for income tax purposes, with the profits and losses being allocated directly to the partners. On the sale of the business of a partnership, each partner is regarded as selling their 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.

The sale of an interest in a partnership is subject to PCC of 1 percent in Poland, calculated on the market value of the partnership share.

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

## Choice of acquisition vehicle

Several potential acquisition vehicles are available to a foreign purchaser, and tax factors often influence the choice. There is a 0.5 percent capital duty/PCC 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 for debt pushdown structures (among other things), where the purchaser wishes to offset the interest on debt financing against the target's taxable profits. (See this report's section on 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 a so-called 'real estate clause' in a relevant tax treaty applies). All transactions concerning real estate companies should be carefully analyzed.

### Non-resident intermediate holding company

Where 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 unusual in the Polish market. It is more common to conduct the business activity of a foreign entity through a branch.

### Joint venture

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

In practice, non-tax reasons may 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 needs to decide whether an acquisition will be funded with debt or equity. The main concern is often 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 this 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, are not tax-deductible.

However, according to a recent interpretation of the administrative courts, this relates only to the direct costs (e.g. court fees). Still, the interpretation of the tax authorities concerning the tax-deductibility of these costs should be carefully observed on a case-by-case basis.

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 can be merged. However, this arrangement should be carefully structured and an analysis of the post-acquisition debt pushdown is crucial.

PCC 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 PCC-exempt. Shareholder loans granted to corporates are PCC-exempt. Loans granted by partners to partnerships generally are subject to 0.5 percent PCC.

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

### Deductibility of interest

Interest incurred for the purpose of earning revenue is normally deductible when paid. However, according to Polish CIT provisions (and confirmed in various interpretations and court verdicts), the capitalization is a form of payment. 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 when incurred. 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 directly or indirectly at least 25 percent of voting rights or shareholders directly or indirectly holding jointly at least 25 percent of voting rights of the borrowing company

— from a company that has the same shareholder as the borrower, where the shareholder owns at least 25 percent of the voting rights of both the lending and borrowing companies (a sister company).

Generally, the thin capitalization restrictions apply to paid or capitalized interest from such loans where, on the date of its payment or capitalization, the total indebtedness to the above qualifying direct or indirect shareholders or direct or indirect holders of at least 25 percent of voting rights of the parent entity equals 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 is not tax-deductible.

'Equity' is defined as basic share capital, supplementary capital, reserves excluding revaluation reserve and capital arising 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 the debt is interest-bearing (e.g. loans, bonds, deposits and securities), as well as commercial liabilities and currency transactions, etc.

**Withholding tax on debt and methods to reduce or eliminate it**

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 Polish tax treaties. To qualify for the reduced rate, the payer must have a certificate of the beneficiary's tax residence.

Under current law, if the certificate confirming the tax residence of the payment's recipient does not include the period of its validity, then it should be considered as valid only for 12 calendar months following its date of issuance (as the data included in the certificate must be up-to-date). Where the recipient's seat changes during the 12-month period, a new certificate should be obtained immediately.

This practice applies only where the respective tax treaty includes an exchange of information clause.

The EU Interest and Royalties Directive is fully in force in Poland. Consequently, interest and royalties paid to EU-resident companies or EU permanent establishments (PE) can be exempt from WHT in Poland. In order to apply the exemption, the Polish company paying interest/royalties should possess appropriate documentation consisting of the beneficiary's certificate of residence and a written statement that the beneficiary's revenues are not CIT-exempt (irrespective of their source). 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. (Detailed analysis of the relevant tax treaties should be executed.) A certificate of tax residence and, where the exemption claim is based on the EU directives, a respective shareholder statement is required.

— WHT of 20 percent applies to interest payments to non-Polish entities unless a lower rate applies under the relevant tax treaty or EU directive.

— Complex analysis of a post-acquisition debt pushdown may be required.

— Potential foreign exchange implications.

— PCC implications on providing funds.

**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 is subject to 0.5 percent PCC in Poland (a share premium is not subject to PCC). Dividend payments from a Polish company may be exempt from WHT if the conditions of the EU Parent-Subsidiary Directive are met. Dividends are not deductible for Polish tax purposes.

Although equity offers less flexibility should the parent subsequently wish to recover the funds it has injected, the use of equity may be more appropriate than debt in certain circumstances, such as:

— where the target is loss-making, in which case it may not be possible to offset the cost of interest

— where the company is thinly capitalized, in which case it would be disadvantageous to increase borrowings without also injecting 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 prefers not to recognize taxable revenue arising from interest.

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

In principle, foreign dividends received by a Polish company are subject to normal CIT, unless a tax treaty stipulates otherwise. The Polish company receiving the dividend can offset the WHT

against its mainstream corporate tax liability where the treaty includes the respective provisions.

For 75 percent shareholdings in non-EU, non-European Economic Area (EEA) and non-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 tax treaty and the Polish entity has held the shares for at least 2 years. The total foreign tax credits cannot exceed the Polish tax payable on the dividend income. However, this applies only where the relevant treaty includes an exchange of information clause.

Domestic dividends and dividends paid to an EU/EEA-resident company (or its PE), where the shareholder owns at least 10 percent of the payer, are exempt from Polish WHT, provided the shares have been owned for more than 2 years. In order to apply the exemption, the Polish company paying the dividend should possess appropriate documentation consisting of the beneficiary's certificate of residence and a written statement that the beneficiary's revenues are not CIT-exempt (regardless of their source). Dividends can qualify conditionally even where the holding period has not been met. This treatment also applies to dividends paid to Swiss shareholders (the required shareholding threshold is 25 percent) and European cooperative societies *(societas cooperativa Europaea* — SCE).

Dividends paid by an EU/EEA subsidiary to its Polish parent company are exempt from income tax in Poland where the 2-year holding period is met and the subsidiary is 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.

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-subsidiary provisions also apply to SCEs.

### Hybrids

The Polish tax system tends to be very form-driven and generally classifies hybrid instruments by their legal form. However, the tax authorities can re-characterize the transaction based on the substance-over-form principle. Still, the planned anti-abuse regulations may change the current approach.

### 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 on a case-by-case basis as its tax treatment in Poland depends 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 (e.g. 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. The buyer is liable for any PCC payment. A capital gain obtained by an individual seller is subject to tax at normal progressive tax rates. However, where the individual is subject to flat-rate tax on business activities, the gain is taxed at 19 percent.

### Sale of shares

Based on Polish income tax provisions, the seller is subject to CIT on a gain on the sale of shares of a Polish company. However, non-residents should not be subject to income tax in Poland under most Polish tax treaties (unless a so-called 'real estate' clause in the treaty applies).

Where the shares are 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 compulsory redemption of shares is treated as a dividend. A share buyback 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 anti-monopoly office. The EU competition rules apply.

Where 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. As of 1 May 2004, this requirement does not apply to EU/European free trade area purchasers, as long as the land was not agricultural or forest (this type of land is covered by a 12-year derogation period). In January 2016, the Polish government published an initial draft bill amending the rules for purchases of agricultural real estate from the government.

### Company law and accounting

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

**Merger**

Two types of mergers are possible in Poland: a takeover by an existing company and a 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. A 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. The interpretations of tax law issued by the Ministry of Finance to the company being subsequently merged into another entity (the acquiring entity) do not protect the latter after the merger.

Most mergers between Polish companies are tax-free for the merging companies and their shareholders, provided that no cash is distributed and/or that, before the merger, the acquiring entity owned either no shares or more than 10 percent of the shares of the acquired company.

Where 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 is no longer tax-free.

Mergers do not affect hidden tax values, such as goodwill or increases in the value of assets. Existing prior-year tax losses are eliminated unless the loss company survives. Generally, a merger may be beneficial where the business being transferred is profitable because unrealized gains are not taxed on the merger. A merger may also be beneficial where the company taken over has no significant tax losses (which would be lost on a merger).

Poland has fully adopted the EU Tax Merger Directive, so mergers between Polish companies and entities resident in EU member states are treated in the same manner as domestic mergers.

Thus, under the commercial law, cross-border mergers can take place where a European company is being created. Also, domestic corporations (and limited joint stock partnerships) can be merged cross-border with the EU-based company described in the directive (although a limited joint stock partnership cannot be the acquiring entity).

Where 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.

Where 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 where the merger is accounted for using the pooling of interest method. In this case, the merged entity can file a single year-end return.

Mergers are outside the scope of VAT and, in principle, create no negative VAT consequences.

A merger of a Polish corporation and an SCE is not subject to PCC. Generally, any increase in share capital as a result of the merger is subject to PCC at 0.5 percent (provided the increase was not previously taxed in the merging entities, unless, in the case of a corporation, such non-taxation of contributions was allowed by the domestic law of the EU country of one of the merging companies).

Due to complex legal procedures, the process can take 6 to 8 months, although a merger of a parent and a 100 percent owned subsidiary or a merger of sister companies usually takes 4 to 6 months.

KPMG in Poland notes that the timeframes for cross-border mergers vary, depending on the local jurisdictions and the direction (inbound or outbound) of the merger. During recent years, cross-border mergers became more popular in Poland.

**Demerger**

A company may be divided into two or more companies.

A division of a joint stock company is not possible unless the initial capital is 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 by:

— transferring 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)

— forming 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)

— transferring 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)

— transferring 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 demerged 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 demerged and an organized part of the business is transferred to the receiving entity. This does not apply where the main purpose of the demerger is to evade or avoid tax. In addition, the demerger is not tax-free if the acquiring entity has less than 10 percent of the shares of the company being demerged 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.

— *Demerged company:* The difference between the market value of the assets being transferred and the tax written-down value is taxable or tax-deductible.

— *The entity receiving part of the demerged business:* The difference between the value of assets received and the nominal value of the shares issued to the shareholders of the demerged company is treated as taxable income or tax-deductible.

Generally, a demerger should not be subject to VAT. Any increase in share capital is subject to PCC at the rate of 0.5 percent. Whether the increase of the share capital covered by assets that were previously taxed in the demerging entity is subject to 0.5 percent PCC should be 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). For companies, any gain is added to mainstream income and subject to corporate tax at normal rates. For 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 subject to tax.

Generally, taxpayers receiving an in kind contribution of a business or 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, knowhow 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 PCC at the rate of 0.5 percent (a share premium is not subject to PCC). On the other hand, the in kind contribution of a business or an organized part of the business to a capital company is currently not subject to PCC.

**Group relief/consolidation**

Generally, each company is taxed on a stand-alone basis. A fiscal group can be created for corporate tax purposes, consisting of a Polish parent and its 95 percent Polish subsidiaries with an average qualified share capital per company of 1 million Polish zloty (PLN). 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 3 years. This should take the form of a notarized deed, which 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 group's profits.

A number of conditions need to be met. Operationally, the most significant requirement is 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 Organisation for Economic Co-operation and Development's (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 must be delivered to the tax authorities within 7 days of their request (lack of the documentation leads to 50 percent taxation on any upward adjustment).

As of 1 January 2017, significant changes to the rules governing the relationships between related parties will be introduced. In particular, the amendments will impose new transfer pricing reporting obligations and new criteria for preparation and extent of transfer pricing documentation. The changes will also increase the threshold for determining the existence of capital relations to 25 percent.

Taxpayers whose revenues or expenses in the year preceding the tax year exceed 10 million euros (EUR) will be obligated to prepare a comparable analysis (benchmarking study), and those exceeding EUR20 million will also have to prepare a master file. Further reporting requirements will be imposed on domestic tax payers whose consolidated revenue exceeds the equivalent of EUR750 million — they will be required to prepare and submit to the tax authorities a report on the amount of income and tax paid and the places of business activity of its subsidiaries and foreign establishments.

A taxpayer may conclude an advance pricing arrangement (APA) with the Minister of Finance to confirm the appropriateness of the taxpayer's transfer pricing policy. The purpose of an APA is to agree in advance the arm's length nature of the terms of the transactions between related parties. APAs also cover the attribution of profit to PEs. Once an APA is concluded, the local tax authorities will not be able to question the arm's length nature of the covered transactions. At the end of December 2014, the Minister of Finance had received only 11 APA applications.

**Foreign investments of a local target company**

Poland recently introduced CFC provisions — see the recent developments section for details.

## Comparison of asset and share purchases

**Advantages of asset purchases**

— The acquirer may depreciate the assets acquired at market value. If goodwill arises (it is possible to acquire only part of the business) on assets under an asset deal, the price constitutes the depreciation base.

— The tax liabilities assumed by the acquirer (for which they are jointly and severally liable with the seller) can be eliminated or limited if a special certificate is obtained from the tax authorities (where a business or organized part of a business is acquired; no such liability arises on purchases of single assets).

— If the purchase is funded by debt, the interest can be offset against the profits of the acquired business.

— Loss-making companies within the acquirer's group can absorb profitable operations (or vice versa), reducing the effective tax rate.

— If the purchase is subject to VAT, the input VAT can be deducted.

— Where a business or 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.

— Higher capital outlay is usually involved.

— Higher capital taxes if ongoing business is purchased (usually) or a cash flow disadvantage if the transaction is subject to VAT.

— Possible VAT clawbacks (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**

— Likely more attractive to vendor, so the price is likely lower (if properly structured, no capital gains tax arises for the vendor).

— Tax losses and other attributes of the target company can be used post-acquisition.

— May gain the benefit of existing supply and technology contracts.

— Lower capital taxes payable (usually).

— Not subject to VAT, so enjoys simplicity and speed.

— 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 immediate 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 is possible.

— 1 percent PCC payable by the purchaser on the acquisition but no recognition of tax-deductible goodwill.

## KPMG in Poland

**Honorata Green**
KPMG Tax M.Michna sp.k.
ul. Inflancka 4A
00-189 Warsaw
Poland

**T:** +48 22 528 1153

**E:** honoratagreen@kpmg.pl

**kpmg.com**

**kpmg.com/tax**

**kpmg.com/app**



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