



Polska Izba Nieruchomości Komercyjnych

Key tax topics at the turn of the year and what to await in 2025?

TAX FLASH / DECEMBER 2024

Anna Pleskowicz, Partner
Tax Advisory Services, Crido

Tomasz Koterbski, Senior Manager, Attorney-at-law
Tax Advisory Services, Crido

CRIDO

General Interpretations of the Minister of Finance Regarding Withholding Tax (WHT) on Dividends, Interest, and Royalties

In the second half of November, long-awaited general interpretations were issued, in which the Minister of Finance explained certain aspects of interpreting one of the conditions for WHT exemption on dividend payments – i.e., the recipient not benefiting from tax exemption on its entire income, regardless of its source (general interpretation of the Minister of Finance dated November 15, 2024, ref. DD9.8202.1.2024) and a similar condition for interest and royalties (general interpretation of the Minister of Finance dated November 20, 2024, ref. DD9.8202.2.2024).

Regarding dividends, the Ministry of Finance adopted a taxpayer-friendly approach and indicated that **the exemption is possible even when the recipient benefits from an objective exemption directly in relation to the received dividend**, based on provisions transposing EU law (Parent Subsidiary Directive). The mere circumstance that (i) dividend is transferred further in such a way that it is not taxed within the EU or EEA, or (ii) the taxpayer is not actually obligated to pay tax, for example due to incurring tax losses or earning only exempt income, does not mean that the taxpayer benefits from a tax exemption on its entire income (which may, however, be examined on the basis of anti-abuse clauses).

Regarding interest and royalties, the Ministry of Finance indicated that WHT exemption will apply when the recipient: (i) does not benefit in its country of residence from income tax exemption either on its entire income or interest / royalties income specifically, or (ii) does not benefit from special income tax rules for income from received payments (interest/royalties).

In both cases, however, the Ministry of Finance reserved the possibility of assessing the individual taxpayer's situation and the issue of non-payment of income tax on the basis of the provisions of Article 22c of the CIT Act, i.e., a provision allowing for denial of WHT exemption – despite meeting all conditions – if, among other things, using the WHT exemption would be contrary to the purpose of the exemption provisions.

The Ministry of Finance's approach aimed at clarifying the understanding of WHT exemption conditions and their uniform application which deserves full approval. The interpretation direction proposed by the Ministry of Finance should generally be assessed positively. One issue that cannot be accepted though, looking at the literal wording of the provision, is that to meet the condition of not benefiting from income tax exemption on all income, one cannot benefit from both subjective and objective exemptions. Currently, we must observe whether – and how – the newly published General Interpretations will affect the practice and interpretation of tax authorities regarding WHT exemption provisions.

Independently, Ministry of Finance is also conducting works aimed at clarifying the concept of beneficial owner and the concept of the look-through approach (i.e., the possibility of applying exemptions and reduced WHT rates by beneficial owners who are not direct payment recipients). According to announcements, the work is to be finished with an amendment to tax explanations issued last year – for now, we are still waiting for the results of this work.

Controversies in tax depreciation of commercial real estate

The year 2024 was marked by disputes between taxpayers and tax authorities regarding the depreciation of commercial real estate. In 2022, the legislator introduced a regulation that limits the amount of tax depreciation to the amount of balance sheet depreciation of a building that constitutes a fixed asset for accounting purposes. The tax authorities consistently claim that the amount of depreciation is always dependent on the amount of balance sheet depreciation – regardless of how the building is treated for accounting purposes and whether it constitutes a fixed asset or investment (which is not covered by the provision).

On the other hand, majority of administrative courts indicate that when a building is not recognized as a fixed asset for accounting purposes, tax depreciation restrictions do not apply at all (e.g., judgements of WSA in Gdańsk from December 3, I SA/Gd 681/24, WSA in Warsaw from September 10, III SA/Wa 1528/24). Over 20 positive judgements have been issued at the administrative court level so far, although courts are not fully consistent on this issue, and there have also been several different judgements (cf. e.g., the Ruling of WSA in Warsaw from April 4, 2023, III SA/Wa 2425/22). In light of the controversies, we must wait for the Supreme Administrative Court's ruling.

Imprecise provisions and discrepancies in interpretation practice (including case law) introduce uncertainty among taxpayers regarding the application of tax law - the right to depreciation and introduce great uncertainty regarding the amount of tax burdens. Some investors decide to enter into disputes with tax authorities, some decide to change their

accounting policy (different presentation of buildings), and some refrain from including depreciation in tax costs altogether, hoping that the costs can be recognized as a tax cost at the time of building disposal.

The most significant changes in property tax in 20 Years

On January 1, 2025, new definitions of building and structure will enter into force in the Act on Local Taxes and Fees. Current definitions refer to construction law. These concepts have in practice caused doubts over the years about how they should be understood and, consequently, what should be subject to taxation. Last year, Polish Constitutional Tribunal ruled that the definition of structure was unconstitutional, as a result of which it will cease to apply at the end of 2024 and should be replaced with new provisions.

The change in definitions of key concepts, particularly structures, which is to include not only objects listed in the provisions but also, for example, building devices or building parts of technical devices, will require taxpayers to review their assets and assess which of them and according to what rules will be subject to property tax.

Some objects that were previously reported for taxation may potentially cease to be taxable (e.g., certain types of squares), and finally, some previously unreported objects may be included in taxation.

Global Minimum Tax (Pillar 2)

The new global minimum tax (also referred to as GloBE or Pillar 2) is a new international initiative aimed at limiting tax competition between countries (originally adopted at the OECD level, then as an EU directive). In Poland, provisions related to the global minimum tax will enter into force from January 1, 2025. GloBE introduces a minimum effective CIT rate of 15% and will apply to groups whose income is taxed below the threshold CIT rate in a given jurisdiction. If this occurs, the group will be required to pay a top-up tax to the country where the group's headquarters is located, unless a so-called domestic top-up tax is paid in the low-taxed jurisdiction. Only large capital groups will be subject to GloBE (more than EUR 750 million in consolidated revenues).

Review of the court rulings from 2024 concerning the real estate market

1. WHT Exemption for “société par actions simplifiée”

Warsaw Administrative Court Ruling of January 11, 2024, III SA/Wa 2311/23

According to the Court, WHT exemption cannot be applied to a company operating in a legal form not listed in the appendix to the CIT Act, which implements Directive 2003/49/EC. WHT exemption provisions must be interpreted strictly, and the lack of specific indication of a company form does not authorize expansion of the exemption scope, including based on other EU Directives.

2. Reduction of depreciation rates possible also retroactively

Supreme Administrative Court Ruling of January 25, 2024, II FSK 545/21 Supreme Administrative Court Ruling of February 16, 2024, II FSK 708/21 Kraków Administrative Court Ruling of October 9, 2024

A taxpayer is entitled to reduce depreciation rates of fixed assets for past periods and submit appropriate tax return corrections. The CIT Act provisions do not contain a prohibition on retrospective change of depreciation rates, but only require that the change be effective from the first month of a given tax year. Such correction constitutes a technical change in cost settlement over time, not affecting the total value of depreciation write-offs.

3. CIT exemption for investment fund on sale of real estate

Supreme Administrative Court Ruling of February 14, 2024, II FSK 669/21

Supreme Administrative Court Ruling of June 27, 2024

Income obtained by an investment fund from the sale of real estate benefits from CIT exemption. Only income from rental, lease, and similar agreements is excluded from the exemption.

4. VAT exemption waiver and real estate pre-emption right

Wrocław Administrative Court Ruling of February 22, 2024, I SA/Wr 713/23

A declaration of will to waive VAT exemption before completing a real estate sale transaction is effective, even if there is a change in the entity purchasing the real estate.

5. Merger by acquisition and withholding tax exemption

Supreme Administrative Court Ruling of April 9, 2024, II FSK 1060/21

Due to tax succession principles, merger by acquisition does not affect the two-year share holding period necessary for applying the WHT exemption on interest.

6. Controversies around the ban on residential building depreciation

In practice, there are extremely different approaches regarding the depreciation of investments in third-party assets if these assets are residential premises or buildings for which the CIT Act explicitly excludes the possibility of depreciation for tax purposes:

No depreciation for owners and tenants of residential properties

Poznań Administrative Court Ruling of April 11, 2024, ref. I SA/Po 39/24

The ban on depreciation of residential buildings, residential premises constituting separate real estate, cooperative ownership right to residential premises, and the right to a single-family house in a housing cooperative applies to both property owners and tenants who depreciate investments in third-party fixed assets.

Investments in third-party fixed assets are not subject to depreciation restrictions

Rzeszów Administrative Court Ruling of April 23, 2024, I SA/Rz 88/24

Investments in third-party fixed assets being apartments or residential buildings are not subject to depreciation restrictions that apply to the apartments and residential buildings themselves. The provision speaking of the depreciation ban should be interpreted narrowly.

7. VAT base for real estate contribution in kind

CJEU Ruling of May 8, 2024, C-241/23

The VAT base for real estate contribution to a company in exchange for shares is determined based on the issue value of these shares if the parties agreed that the payment for the contribution would be the issue value. In practice, this value will correspond to the market value of the contributed real estate, not the nominal value of shares (which may differ from the issue value).

8. Initial value of real estate and first occupation

Supreme Administrative Court Ruling of May 16, 2024, I FSK 1646/19

The initial value referred to in the definition of first occupancy in the VAT Act is the value determined at the time of real estate acquisition. The provisions do not provide for its later update. The reference to the CIT Act in the definition of first occupancy only concerns distinguishing improvement from renovation, not value updating.

9. Interpretation of a floor definition for property tax purposes

Supreme Administrative Court Ruling of April 25, 2024, III FSK 230/22

The lack of statutory definition of a “floor” requires reference to linguistic meaning and definitions functioning in general circulation and jurisprudence. A story is defined as the surface between horizontal partitions (ceilings) permanently connected to the building. Permanent connection to the building is crucial when assessing whether a given surface constitutes a floor.

10. Taxation of student dormitories with minimal tax on commercial real estate

Supreme Administrative Court Ruling of April 17, 2024, II FSK 905/21

Providing places in a student dormitory to students, doctoral students, and interns takes place within the framework of an internal institutional relationship connecting such persons with the university, which does not meet the criteria of a rental or lease agreement. The lack of equality between parties and the university authorities' competencies to unilaterally shape the content of this relationship exclude recognizing it as similar to rental or lease agreements or other agreements of a similar nature. As a result, university dormitories made available based on such agreements are not subject to minimal tax on commercial real estate.

11. Correction period for renovation works in light of the VAT Directive

CJEU Ruling of September 12, 2024, C-243/23

The Advocate General in his opinion indicated that renovation works carried out for the purpose of renovating or rebuilding a building do not constitute “real estate acquired as investment goods” and therefore the extended fifteen-year VAT correction period does not apply to them.

12. Adaptation works in rental premises not subject to VAT reverse charge mechanism

Supreme Administrative Court Ruling of May 24, 2024, I FSK 1437/20

A company that rents premises and acquires adaptation works from contractors does not provide construction services in this way. Adaptation services are part of the rental service, not a separate construction service, and therefore are not subject to the VAT reverse charge mechanism.

13. Advances for future real estate sales subject to VAT

Supreme Administrative Court Ruling of June 20, 2024, I FSK 1199/20

Advances paid for future real estate sales are subject to VAT. The fact that the transaction may not take place does not affect the tax obligation. Filing a declaration of waiver of VAT exemption for real estate delivery on the day of advance payment results in taxation of that advance. The Court emphasized that the declaration concerns waiving the exemption for a specific delivery, not the advance. Since the delivery will be subject to VAT, the advance paid for this delivery is also subject to taxation.

14. VAT taxation of assignment of rights and obligations from development agreement

Supreme Administrative Court Ruling of June 24, 2024, I FSK 1661/20

The ruling of seven Supreme Administrative Court judges states that the assignment of rights and obligations from a developer agreement for consideration, in a situation where the assignor does not have the right to dispose of the premises as an owner, constitutes a service provision taxed at 23% VAT. In its justification, the Supreme Administrative Court indicated that the essence of the analyzed transaction is the sale of property rights, not the delivery of premises.

Warsaw Administrative Court Ruling of July 23, 2024, III SA/Wa 408/24

If the taxpayer has keys to the premises at the time of assigning the developer agreement, it should be assumed that they control such premises as an owner. As a result, for VAT purposes, the assignment of such a developer agreement transfers the right to control the premises as an owner to the assignee. This means it will constitute a delivery of goods taxed at 8% VAT.

15. No possibility of making depreciation write-offs from collective residential buildings

Gdańsk Administrative Court Ruling of May 21, 2024, I SA/Gd 116/24

Collective residential buildings should be treated as residential buildings. As a result, such buildings cannot be subject to tax depreciation due to depreciation restrictions imposed from January 1, 2022. The court's position is consistent with the case law of other administrative courts.

16. VAT taxation of division and separation of ongoing developer project

Warsaw Administrative Court Ruling of June 19, 2024, III SA/Wa 849/24

The separated project (ongoing construction of an office and service building with underground garage, internal roads, and technical infrastructure) constitutes an organized part of the enterprise according to the VAT Act. This means that this transaction is not subject to VAT, as the transferred assets maintain full capacity to continue business activity.

17. Land with structures as undeveloped land for VAT purposes

Supreme Administrative Court Ruling of August 23, 2024, I FSK 1670/20

The circumstance that there are structures on the land in the form of building objects does not always mean the whole property should be treated as developed land within the meaning of the VAT Act. In each case, one should primarily consider the economic purpose of the transaction and whether the objects that are located on the land have leading significance for determining the character of this land as developed land. If the parties' intention is not to transfer ownership of the buildings and they have no significance for the buyer, then for VAT purposes the land should be considered undeveloped.

18. Settlement of arrangement works costs (fit-outs) in rented premises

Supreme Administrative Court Ruling of September 3, 2024, II FSK 1486/21

Expenses incurred for arrangement works (fit-outs) in rented premises constitute indirect tax-deductible costs. The Supreme Administrative Court confirmed that these costs should be settled proportionally to the length of the given lease agreement period when two conditions are met: the lease agreement exceeds the tax year and it is not possible to assign costs to individual settlement periods. In such a situation, fit-out costs will not be deducted one-time at the date of their incurrence.

19. Rental of residential premises and real estate tax rate

Supreme Administrative Court Resolution of October 21, 2024, III FPS 2/24

Residential buildings intended for rental as part of business activity are subject to preferential real estate tax rates - the same as for residential buildings, if they actually serve to meet tenants' housing needs. Higher tax rates apply to properties used for short-term rentals, temporary accommodation, or deliberately kept vacant ("ghost units").

20. Verification of beneficial owner status for dividend payment

Supreme Administrative Court Ruling of October 9, 2024, II FSK 78/22

The Supreme Administrative Court ruled that the tax remitter is not required to verify the recipient's status as the beneficial owner when applying withholding tax exemption on dividends. However, when applying for a refund of already collected tax, the tax remitter must submit all required documents, including the taxpayer's declaration of being the beneficial owner of the dividend.

21. Preferential VAT taxation for student dormitory construction

Supreme Administrative Court Ruling of October 10, 2024, I FSK 802/24

Construction of a student dormitory is subject to a preferential 8% VAT rate as a building covered by social housing program. Rooms in a student dormitory serve students' housing needs and constitute a place of permanent residence, unlike hotels or recreational facilities. The fact that residence is linked to the period of study does not deprive it of its permanent residence nature.

22. Allocation of share purchase costs to different sources of income

Supreme Administrative Court Ruling of October 22, 2024, II FSK 140/22

Expenses related to acquiring shares in other companies can be proportionally allocated between capital gains revenue and operating revenue if they are related to generating income from both sources.

23. Building in poor technical condition as object related to business activity for real estate tax purposes

Supreme Administrative Court Ruling of October 11, 2024, III FSK 88/23

The mere possibility of potential future use of a building in business activity after renovation is sufficient to classify it as property related to business activity and apply a higher real estate tax rate. The current technical condition of the building and lack of entry in the fixed assets register are irrelevant for this classification if the property may serve the taxpayer's business activities in the future.

24. Method of determining real estate company status

Warsaw Administrative Court Ruling of October 16, 2024, III SA/Wa 1771/24

The Administrative Court confirmed the tax authority's position that when determining real estate company status, one should consider the actual balance sheet value of properties owned directly and indirectly (through subsidiaries), not the value of shares held in real estate companies.





Polska Izba Nieruchomości Komercyjnych

The Polish Chamber of Commercial Real Estate

Since 2016, the Polish Chamber of Commercial Real Estate has brought together representatives from all sectors and services of the commercial real estate market in one organization, enabling them to have a real impact on the surrounding economic, political, and social environment. The PINK Association is both their representative and a platform for exchanging experiences, knowledge, and cooperation. By collaborating with other organizations, it promotes best practices in the commercial real estate market. The Association includes developers, investors, asset managers, property managers, design companies, construction consultants, real estate market advisors, as well as legal, tax, and financial advisory firms.

Publications of the PINK Association are available on the website:
<https://stowarzyszeniepink.org.pl/en/>

