

Poland to tax Dutch real estate holdings

At the end of 2020 Poland has introduced significant changes to taxation of real estate companies, including changes to Double Tax Treaty with the Netherlands. How and when these changes will affect the current holding structures? Are any other European jurisdictions affected? What is the amount of tax to be considered? For the answers, please read further.

WHAT?

Protocol to Dutch – Polish Double Tax Treaty

Based on the recently signed Protocol, capital gains from alienation of shares in companies, whose value during the 365 days preceding the alienation was derived in more than 75% directly or indirectly from immovable property located in Poland, will be taxed in Poland. The exception to this rule covers recognized pension funds.

Real Estate Clause in Polish domestic law

At the same time, amendments to real estate clause in Polish domestic law have also been introduced. They cover the following points:

- clause applies also to any rights similar to shares / profits participation in entities holding Polish real estate properties;
- determination whether at least 50% of the assets market value constitute real estate properties in any moment of 12-month period preceding the sale of shares / rights.

Combination of these two points means that Poland uses the right to tax the capital gain from sale of shares derived directly or indirectly from immovable property located in Poland.

Real Estate Company – definition in the Polish domestic tax law

On top of that, capital gain tax collection has changed with respect to so called Real Estate Companies. Entities, in which at least 50% of the balance sheet value of assets was covered value of real estate located in the territory of the Republic of Poland or rights to such real estate, exceeding PLN 10 million, whose primary source of income, constituting at least 60% of total income, will be income derived from real estate or rights to real estate, including their sale, are called Real Estate Companies (RECo) and subject to further reporting and tax obligations.

Capital gain tax on sale of RECo with a Polish tax remitter

The tax on the sale of shares in a RECo will be paid by such a company itself acting as a tax remitter – and not by its shareholders (vendors), as it has been so far. System is applicable when a seller is a Polish non-resident (has its seat or management board or is an individual residing outside Poland).

WHEN?

Polish – Dutch Double Tax Treaty

Protocol foresees that the new DTT regulation will come into force on the last day of a third month following the month when the later ratifying notification is received, however effective from a tax year on or after the first day of January in the calendar year following entry into force. So, the earliest possible time when the protocol will become effective is **1 January 2022**.

Domestic amendments

Domestic regulations have been introduced as of 1 January 2021.

HOW?

19% basic CIT rate in Poland

Capital gain tax on alienation of shares is levied in Poland at the rate of 19%, in line with Polish rules on calculating the capital gain (which may be different from the rules of country of the vendor). Poland has no

participation exemption regime allowing to apply CIT exemption for capital gain on sale of shares after certain holding period.

WILL OTHER EUROPEAN JURISDICTIONS BE AFFECTED?

Czech Republic

There is no real estate clause in DTT between Poland and the Czech Republic. Thus, income from sale of shares in a Polish subsidiary by Czech parent company is subject to tax in the Czech Republic and not in Poland.

As a matter of Czech income taxation, such income can eventually profit from participation exemption: Income from sale of shares in companies are exempt from Corporate Income Tax under certain conditions in the Czech Republic.

No plans to change / renegotiate DTT between Poland and the Czech Republic are known as of now.

Hungary

There is no real estate clause in DTT between Poland and Hungary. Thus, income from sale of shares in a Polish subsidiary by Hungarian parent company is subject to tax in Hungary and not in Poland. Under Hungary's current participation exemption rules, capital gains on the sale of shares are exempt from Corporate Income Tax under certain conditions.

No known plans to change or renegotiate Hungary-Poland DTT.

HOW CAN WE HELP?

Dutch perspective

Considering the possibilities in the Dutch tax law, there are ways to have an effective carve out of the Dutch entity. Possibilities have to be reviewed on a case by case approach. Our Baker Tilly member firm in the Netherlands can work with the TPA team to give you an integrated advise.

Wondering about future steps?

If in your group structure there are:

- Dutch holding companies,
 - Dutch shareholders / partners of Polish RECos
 - plans for share deal exits,
 - plans for acquisition of Polish based immovables,
 - plans for European structuring,
- we would be pleased to guide you through them with our international tax team involved.

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