The Inward Investment and International Taxation Review

Fifth Edition

Editor
Tim Sanders

Law Business Research

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For further information please email
Nick.Barette@lbresearch.com

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Gideon Roberton

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SENIOR ACCOUNT MANAGERS
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EDITOR'S PREFACE

Cross-border corporate structures and transactions are under ever closer scrutiny. While a global economy requires the free movement of capital, goods and services and legitimate cross-border financing and business acquisitions, governments are increasingly concerned by the potential this activity creates for artificial erosion of their tax base and are taking action to protect it. In response to this trend, the current edition has a chapter dedicated to 'BEPS': the OECD Action Plan on Base Erosion and Profit Sharing.

Recent, tangible examples of governments acting to protect their tax base include Notice 2014-52 issued by the US Treasury on 22 September, in response to US corporates relocating their headquarters to non-US jurisdictions. The Notice describes regulations that the US government intends to issue to curtail tax benefits of US corporate inversions where the transaction closes on or after the issue date of the Notice, with no grandfathering for signed but yet to be completed transactions. The Notice also indicated that the US Treasury is reviewing its tax treaty policy and the extent to which it is appropriate for inverted groups to obtain treaty benefits. A further example is the UK government's plan to publish a consultation document on new measures to prevent multinational companies exploiting differences between countries' tax rules through the use of 'hybrid mismatch' arrangements, the focus of action 2 of the OECD's BEPS action plan on international corporate tax avoidance. In the UK Autumn Statement draft legislation was put forward to introduce a new UK tax called diverted profit tax at 25 per cent on profits deemed to have been diverted from the UK (1) through entities, including UK corporate taxpayers, or by means of transactions that deliver effective tax mismatch outcomes without sufficient underlying economic substance or (2) as a result of planning designed to avoid trading in the UK through a UK permanent establishment. These are not isolated examples.

The concern is that legitimate cross-border commercial activity will become caught up in attempts to curtail what governments regard to be artificial and unacceptable activity. At the extremes the distinction between what is genuine commercial activity and artificial manipulation is clear but there is a middle ground where legitimate commercial transactions and activity also generate tax benefits and how this area will be caught up

in the drive to tackle perceived cross-border abuse is an area to watch. Whatever the obstacles, companies will continue to trade in the global economy, across borders and as governments increasingly target such activity there will be a pressing need for the adviser to consider the potential impact these initiatives could have on their clients' tax affairs.

The aim of this book is to provide a starting point for readers, and to assist businesses and advisers, each chapter providing topical and current insights from leading experts on the tax issues and opportunities in their respective jurisdictions with a chapter on the overarching potential impact of BEPS. While specific tax advice is always essential, it is also necessary to have a broad understanding of the nature of the potential issues and advantages that lie ahead; this book provides a guide to these.

I should like to thank the contributors to this book for their time and efforts, and above all for their expertise. I would also like to thank the publisher and the team for their support and patience. I hope that you find the work useful, and any comments or suggestions for improvement that can be incorporated into any future editions will be gratefully received.

The views expressed in this book are those of the authors and not of their firms, the editor or the publishers. Every endeavour has been made to ensure that what you read is the latest intelligence.

Tim Sanders
Skadden, Arps, Slate, Meagher & Flom LLP
London
January 2015

Chapter 31

POLAND

Jarosław Bieroński[1]

I INTRODUCTION

Since Poland joined the European Union on 1 May 2004, Polish domestic law has been harmonised with EU legislation and the case law of the Court of Justice of the European Union, and all EU tax directives have been implemented.[2]

In addition, foreign and local income is protected in Poland against double taxation through an extensive network of 91 double taxation treaties (DTTs) that are based on the OECD Model Convention. Whenever such a treaty does not exempt income from taxation, or in the absence of a treaty, the tax credit system applies, including the full tax credit for underlying tax applicable to Polish companies receiving foreign (inbound) dividends from countries outside the EU. As a result, in many such cases, no corporate tax would apply in Poland, since the Polish Corporate Income Tax Law (CITL) sets a tax rate of 19 per cent, which is lower than tax rates in many countries.

Income derived from economic activities conducted in the Polish territory within special economic zones (SEZs) (i.e., areas designated for the purposes of running businesses on preferential terms) is tax-exempt. Furthermore, large and small investments that are crucial to the Polish economy may also find support through a number of government

1 Jarosław Bieroński is a partner at Sołtysiński Kawecki & Szlęzak.

2 Including Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States, and to the transfer of the registered office of a European company (SE) or European cooperative society (SCE) between Member States; Council Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States; and Council Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States.

and other state aid programmes aimed at fostering investment or the creation of new workplaces. Flexible thin capitalisation rules also encourage investors to finance local businesses with the use of debt, including intra-group loans.

II COMMON FORMS OF BUSINESS ORGANISATION AND THEIR TAX TREATMENT

In Poland, business activity may be pursued by any person acting either as a sole entrepreneur or a capital (corporate) company or partnership, as envisaged in the Polish Commercial Companies Code. Foreign entrepreneurs with their registered office in the EU, EFTA or EEA may perform their business activity in Poland in compliance with the rules and principles set forth for Polish entrepreneurs. In turn, foreign entrepreneurs with their registered office in other countries may perform their business activity in Poland through a limited partnership, a partnership issuing shares, a limited liability company or a joint-stock company only. Foreign entrepreneurs may also perform their business activity in Poland through a local branch.

i Corporate

Corporate companies (i.e., limited liability companies and joint-stock companies) obtain legal personality upon court registration. The limited liability company is most frequently used for doing business in Poland. It may be established for any legitimate purpose by one or more persons, except when the company's sole shareholder is another limited liability company with one shareholder only. Shares of a limited company may not be traded on a stock exchange or on a public market. In turn, a joint-stock company features more advanced corporate instruments, such as convertible bonds, authorised but not issued capital, founders' certificates and non-voting shares. Its operations and management are subject to more stringent requirements than the operations of a limited liability company. In addition, the value of all in-kind contributions to the share capital of a joint-stock company is subject to a mandatory verification by court experts. The registered share certificates may be issued prior to the full coverage of shares by shareholders. Bearer shares may be listed on stock exchanges and traded on a public market. The form of a joint-stock company is mandatory for the conduct of certain types of activities (e.g., banking or insurance). Joint-stock companies floated on the Warsaw Stock Exchange must comply with additional informational obligations envisaged by pertinent laws and stock regulations.

Corporate companies (even prior to their court registration) and other organisational units, with or without legal personality (with the exception of partnerships other than limited partnerships issuing shares), are taxpayers liable to corporate income tax (CIT). Corporate taxpayers that have their registered office or place of management in Poland are liable to CIT on their worldwide income. If a corporate taxpayer does not have its registered office or place of management in Poland, the tax is levied only on the income derived in Poland, unless an applicable DTT provides otherwise.

Capital companies may also establish a 'tax group' (tax unit) – a group of two or more capital companies treated as a single CIT payer – which must first satisfy numerous conditions.

Due to attractive tax treatment, foreign and local investors also use Poland-based close-ended investment funds and qualified foreign-regulated mutual investment funds from the EU and the EEA (they must be managed by a company operating under a permit granted by the competent financial sector supervision authority of the country of the fund's seat), and regulated investment companies from the EU and the EEA operating upon a simple notice of initiation of investment activities. Although Polish investment funds may not conduct operational business activities, they may invest in real property, in shares issued by local companies and limited partnerships issuing shares, and in other securities. Such local and foreign funds and regulated investment companies are entirely exempt from Polish CIT on any local and foreign income. However, pursuant to local administrative courts, a Cyprus-based regular capital company managed by directors or managers being natural persons may not qualify as a tax-exempt regulated investment fund, since Polish tax rules require that a tax-exempt foreign investment fund be managed by a permitted third-party management company and should be supervised by a competent financial sector supervision authority.

On the other hand, the Court of Justice of the European Union and Polish administrative courts have issued encouraging judgments stating that narrowing the tax exemption to income of regulated investment funds only from Poland and other EU or EEA Member States violated Article 56 of the Treaty on the Functioning of the European Union (TFEU). According to Article 56, taxpayers from third countries should be treated equally to taxpayers from the EU, and therefore income of investment funds from countries outside the EU or EEA should also be exempted from CIT pursuant to Article 56 of the TFEU, which may be applied by foreign funds directly.

Since 2014, CIT has been imposed at a rate of 19 per cent on profits of limited partnerships issuing shares (general and limited partnerships remain tax-transparent for income taxation). Such partnerships fall under the standard corporate tax rules, including thin capitalisation rules, and should depreciate fixed and intangible assets by continuing to apply the rates and methods they adopted prior to 2014. The new tax law, however, sets out interim rules that, subject to certain conditions, exempt 'old' profits from the 'new' CIT and dividend withholding tax, allowing the deduction of 'old' losses by general partners and the continued use of the old tax-transparency regime until 2015 if the 'old' tax year ends in 2015.

ii Non-corporate

Local and foreign investors may conduct business activities through a partnership, which, in general, may have one of the following forms: civil law partnership, general partnership, professional partnership, limited partnership or limited partnership issuing shares (limited-stock partnership). General and limited partnerships are most commonly used. Limited partnerships issuing shares have also been popular, as they are used by close-ended investment funds for carrying out income tax-exempt business activities. In turn, civil law partnerships are established for small businesses only. All types of partnerships other than limited partnerships issuing shares are income tax-transparent. Therefore, partners are liable to income tax on profits derived through their partnership proportionally to their interests in the partnership's profits. Creation and liquidation of partnerships are subject to special tax rules, and income from withdrawal of a partner

from a partnership or from liquidation of a partnership is tax-exempt under those rules. However, according to a recent court ruling, payments received by a partner in a partnership without the withdrawal of the partner from the partnership will not be tax-exempt if such payment represents the income of the partnership that was not taxed when derived by the partnership.

In general, partnerships may be taxpayers for purposes of other Polish taxes, including VAT, excise tax, customs duty, tax on civil law transactions or real estate tax (local taxes).

III DIRECT TAXATION OF BUSINESSES

i Tax on profits

Determination of taxable profit

CIT is payable at a rate of 19 per cent on all income derived from whichever source of income, subject to certain exemptions. Taxable income is defined by tax rules as an excess of all items of the taxable income over costs of such income in a given tax year. The taxable income is not equal to an accounting profit. In addition, it may include income from gratuitous services and imputed income. For example, according to interpretative guidelines issued by the Minister of Finance, a surety or guarantee issued by a shareholder without remuneration to secure a payment of debts of its corporate company constitutes taxable income of such company. In principle, income from business activities is taxable on an accrual basis. Expenses incurred in order to derive taxable income are deductible unless they are listed in Article 16 of the CITL, which enumerates non-deductible costs. Non-deductible costs include expenses for the acquisition of land or perpetual usufruct of land, which may not be depreciated, but may be deducted upon sale of such assets, purchase costs of shares and securities until the day of their sale or redemption, certain expenses for promotion, compensations and contractual damages, any donations, expenses (above certain limits) for the use of cars, costs incurred for tax-exempt income or depreciation write-offs pertaining to know-how contributed in-kind to the stated capital of the company, and other costs. According to the general tax interpretative guidelines of the Minister of Finance, however, deductions of payments for the rental of passenger cars used in business activities are not subject to statutory limitations in terms of expenses incurred during the use of such cars (e.g., the cost of fuel); such rental payments are therefore fully deductible. Another general tax interpretative guideline of the Minister of Finance states that the costs of food, beverages, lunches and other meals offered to customers and potential customers are not subject to the statutory limitations regarding expenses for the promotion and representation of a taxpayer; therefore, such costs are fully deductible.

In addition, the tax rules encouraging the settlement of bad debts require debtors to increase the taxable basis by the amount of costs deducted but not paid on time within 30 days of the day they became payable.

According to case law, company share capital increase is tax-exempt; therefore, costs associated with such increase are non-deductible. However, the costs should be solely narrowed to expenses that are directly connected with such an increase (e.g., notarial or court fees), and not to costs connected with the general functioning of a

company or its business activity generating taxable income (e.g., advisory fees), which should be deductible.

Generally, fixed assets (buildings, constructions, machinery and equipment, and vehicles) owned by a taxpayer, acquired or constructed may be depreciated if their projected service life exceeds one year, they are completed and fit for use when they are placed in service, and if they are used for business activities by the taxpayer or a third party on the basis of a rental, lease or similar agreement with the taxpayer.

The following may also be depreciated, regardless of their projected useful life: leasehold improvements placed in service; buildings and constructions developed on land owned by a third party; and buildings, constructions and other assets constituting a separate freehold used by a taxpayer for business activities on the basis of a financial lease agreement.

Taxpayers may also depreciate certain intangible assets such as computer software, copyrights, licences and goodwill.

Interest on loans received to finance acquisitions or to develop depreciable fixed or intangible assets accrued by a borrower before the assets are placed in service is subject to depreciation rather than full deduction. Generally, rates of deductible depreciation write-offs are prescribed by local tax regulations. However, taxpayers may set depreciation rates within certain limits for fixed assets used or improved, and for intangible assets. The minimum depreciation periods for intangible assets are 24 months for licences for computer software, copyrights, films, radio and television programmes; 12 months for R&D costs; and 60 months for goodwill and other intangible assets.

Once established, the depreciation rates for intangible assets may not be changed. Goodwill may be depreciated only in cases of acquisition of an enterprise or its organised part, namely where it is purchased on the basis of a sale agreement; or where the enterprise or its organised part is subject to a financial lease arrangement and is depreciated by the lessee pursuant to applicable rules, or where the enterprise or its organised part is contributed in-kind to a local company under the Privatisation Law.

After a statutory merger or demerger, acquiring companies should continue the depreciation of fixed and intangible assets of the target company on the basis of the same depreciation value, rates and methods. This also applies in cases of the contribution in-kind of an enterprise or its organised part to a company. Depreciation of fixed and intangible assets contributed to partnerships is subject to special tax rules.

Capital and income

There is no capital gains tax in Poland. Capital gains from a disposal of shares and other securities, real property and other forms of capital represent ordinary income subject to CIT. In principle, capital expenses may be offset against capital gains upon the sale of such assets.

Losses

Where costs of revenues exceed total taxable revenues, including aggregated revenues from interests in one or more partnerships, in a given tax year, the difference will represent a tax loss. Such loss may be carried forward against income derived in the next five consecutive tax years. However, in any of those five years, the loss from the given year may be deducted in part not exceeding 50 per cent of that loss. It is not possible to

carry losses back, offsetting them against prior year income. Tax losses are linked with the legal entity that incurred them. Therefore, in cases of mergers, acquisitions (including purchases of an enterprise) and divisions, an acquiring entity may not carry forward tax losses incurred by a target business prior to such a transaction. Conversely, the acquiring entity may carry forward its tax losses incurred prior to the transaction.

Capital losses may be carried forward under the same rules applicable to ordinary losses.

Rates

As previously mentioned, CIT is chargeable at a rate of 19 per cent. In addition, outbound dividends are subject to local withholding tax at a rate of 19 per cent, and outbound royalty and interest payments are subject to local withholding tax at a rate of 20 per cent, unless a pertinent DTT sets out a lower rate. There is no proposed legislation aimed at a change in the CIT rates after 2014.

Administration

The fiscal year is the same as the calendar year, unless a taxpayer selects another period of 12 consecutive months and notifies the tax office by 30 January of a given year.

Polish taxpayers are obligated to pay corporate tax advances on a monthly basis, without, however, an obligation to file monthly CIT returns with the tax office. They may also decide to pay monthly tax advances in a simplified form, in an amount of one-twelfth of the tax due as disclosed in the annual CIT return filed during the preceding tax year. All taxpayers are only obliged to file one annual CIT return within three months from the end of each tax year, and to pay the difference between the tax due and the sum of tax advances paid from the beginning of the tax year.

The taxation system is uniform across Poland (outside small differences in local taxes only). Foreign and local companies and individuals pay the same taxes. The Polish tax system is administered by:

a heads of tax offices, who supervise the collection of taxes in their territories, audit taxpayers and issue individual administrative decisions;

b heads of tax control offices, who perform taxation and procedural checks on fiscal settlements;

c heads of tax chambers, who supervise the heads of tax offices: they are empowered to review administrative decisions of tax offices and tax control offices. Certain heads of tax chambers have also been authorised to issue private tax rulings on behalf of the Minister of Finance;

d the Minister of Finance, who is responsible for budgetary policy and supervises the entire taxation system. He or she, *ex officio* or upon the request of taxpayers and other entities, issues general guidelines applicable to tax rules that in his or her opinion require uniform interpretation; issues private tax rulings in taxation cases upon the request of taxpayers and withholding tax agents; and examines tax cases that require that final tax decisions be declared null and void, or that tax proceedings already closed be exceptionally resumed; and

e local self-government authorities, which are responsible for the collection of local taxes.

Taxpayers may, within 14 days, appeal against a tax decision or a private tax ruling of the local tax authority. Afterwards, a complaint against the tax decision or a private tax ruling may be submitted, within 30 days, to the district administrative court, and subsequently to the Supreme Administrative Court of Poland (NSA).

Tax grouping

Tax advantages of a few single companies may become apparent in the case of creation of a 'tax group', which may compensate losses of some of its members with profits of the remaining members. The tax group may be formed by corporations that meet the following conditions:

a they are limited liability or joint-stock companies incorporated in Poland;

b the average share capital of the member companies is not less than 1 million zlotys;

c in principle, a parent company directly holds 95 per cent of the shares of the subsidiary companies;

d the subsidiary companies do not hold shares in other subsidiary companies being members of the tax group; and

e before joining the tax group, the companies do not have any tax arrears towards the State Treasury budget.

Once the tax group is formed, the following additional requirements must be met: members of the tax group may not be exempted from CIT; the ratio of taxable income of the tax group to its total revenue in each tax year must be at least 3 per cent; and members of the tax group need to price transactions with related entities from outside the group at arm's-lengthaccording to Polish transfer pricing rules.

Violation of any of these conditions results in the dissolution of the tax group. The group is also dissolved at the end of a period for it was established.

The parent company and the subsidiaries that establish the tax group need to do so for at least three years under an agreement in the form of a notarial deed to be registered with the tax office.

Each member of the tax group should calculate its profits or losses separately in accordance with the ordinary rules. The taxable income of the tax group is defined as an excess of total taxable profits of members of the group over losses of the other members during the tax year. However, tax losses or profits from years before or after the life of the tax group may not be offset against the income or losses of the tax group. The tax group is a taxpayer liable to CIT at the regular rate of 19 per cent, which should be withheld by a designated member of the group, but for which tax all the members of the tax group may be held liable jointly and severally. If the total losses of the members exceed their total profits, such difference represents a tax loss of the tax group. However, in practice, such a situation violates the 3 per cent profitability requirement for the tax group, and triggers the end of the tax group as of the date the group files its annual tax return for its given tax year.

Due to the required 3 per cent profit-to-revenue ratio, the benefits of creating the tax group are generally seen as rather strict when compared with the potential 'fruits' of the creation of such a group.

ii Other relevant taxes

Other taxes in Poland are:

a tax on goods and services (VAT);
b excise tax;
c stamp duty;
d tax on civil law transactions;
e real estate tax and other local taxes;
f tonnage tax;
g gambling tax;
h donation and inheritance tax (which, however, does not apply to legal persons); and
i tax on mines.

When joining the EU in 2004, Poland harmonised Polish VAT with the EU VAT legislation, including Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax. Pursuant to Article 5, Section 1 of the Polish VAT Law, in principle, supply of goods (*inter alia*, intra-Community acquisitions and supplies of goods) and provision of services against consideration in the territory of Poland are subject to Polish VAT at a rate of 23 per cent. Gratuitous services and supplies of goods without remuneration may be also taxable. For some goods and services, VAT rates have been reduced to zero,[3] 8,[4] 7,[5] 5[6] and 4 per cent.[7] Certain services, including education, medical services, insurance, granting and management of loans, dealing in securities and certain other services, are subject to a VAT exemption, and the service provider may not deduct input VAT in such cases.

Pursuant to the above-mentioned EU Directive, Poland has exercised the option that any transfer of an enterprise or organised part of an enterprise is outside the scope of Polish VAT. In addition, input VAT on purchases, importation, manufacturing and use (rent, lease) of passenger cars, and VAT on the purchase of engine fuel, maintenance and other services related to such cars, may be deducted provided such passenger car is used solely for business activities. If a passenger car is used for both business and private purposes, 50 per cent of the input VAT may be deducted. Taxpayers using passenger cars for business activities only should maintain VAT records that include details about the driver, his or her itinerary and the mileage.

3 For example, export and intra-Community supplies of goods, sea and air transportation, international transportation and related services.

4 For example, some groceries, fertilisers, health-care products; sport, recreation and culture events; some services in agriculture and forestry; and construction services related to development of public residential buildings and apartments.

5 For example, farming activities.

6 For example, printed books and specialist journals, some groceries, ready-made meals.

7 For example, taxi or cab transportation.

In principle, only suppliers (importers) of goods and services are taxpayers obliged to pay VAT on their supplies; however, a VAT payer who purchases certain goods[8] may be jointly and severally liable with a supplier of such goods for the payment of VAT chargeable on that supply if the value of goods supplied between those parties exceeds 50,000 zlotys in a given month, and the purchaser knows or should reasonably know that the supplier is not going to pay VAT on that supply. The purchaser will not be held liable if the supplier provided the tax authorities with the required security for the payment of VAT (e.g., cash deposit, bank guarantee or insurance policy).

The VAT Law, as amended from 1 January 2010, states that services provided by Polish suppliers to foreign service recipients are not subject to Polish VAT, and are subject to VAT in the country where the recipient of services has its seat or fixed establishment, provided that the recipient is registered for VAT in that country.

Excise tax was introduced in 1993 together with VAT. The new Excise Tax Act is harmonised with the respective EU regulations. The tax is charged on certain supplies of goods, including intra-Community acquisitions and supplies of goods in Poland.

Excise tax is imposed on certain transactions performed by the taxable entity, such as transactions involving:

a import, intra-Community acquisition and first domestic sale of passenger cars that are not registered in Poland; and

b import, intra-Community acquisition, production or transfer to a tax warehouse, domestic supplies and use of certain engine fuels and gas, heating fats, oils and gas, coal products, other energy products, electric energy, and alcohol and tobacco products listed in Attachment 1 to the Excise Tax Law, including the use of goods exempted from excise tax because of their intended use if they are used contrary to their intended use.

Excise tax is calculated either as a percentage of the value of taxable goods (or their customs duty value) or as a flat fee per the quantity basis (fee per unit).

Stamp duty is payable in nominal amounts on certain acts and documents, including:

a official applications;

b official acts;

c certificates;

d permits; and

e certain documents (e.g., powers of attorney presented in administrative and court proceedings).

Stamp duty rates are determined in relevant schedules to the Stamp Duty Act and paid in stamp duty signs, in cash or by a bank transfer, depending on the amount.

Tax on civil law transactions is a capital (transfer) tax levied on certain civil law transactions and certain legal acts and their amendments, in particular, on the sale and

8 In principle, steel pipes for fuel and gas pipelines, fuels (except for fuels purchased at petrol stations) and gold (including gold sand and gold self-products).

exchange of goods and property rights agreements, loan agreements, on setting up a mortgage, establishing a corporate company or partnership, and increasing the company's share capital, additional shareholder payments or loans. The tax is due if related goods are situated or property rights are exercised in Poland, or their purchaser has its residence in Poland, and the transaction itself takes place in Poland. With few exceptions, this tax is not payable if the transaction is subject to VAT, even though VAT-exempt.

Civil law transactions tax rates are either fixed or *ad valorem*. The rates include:

a 2 per cent of the market value of the subject of the transaction on the sale or exchange of real estate, perpetual usufruct right or moveable goods;

b 1 per cent of the market value of the subject of the transaction on the sale or exchange of other property rights, including shares in companies;

c 0.5 per cent of the par value of the share capital on the establishment of a corporation or partnership or an increase in a share capital; and

d 2 per cent of the principal amount of loans.

A number of tax exemptions apply, including a tax exemption on loans extended by a direct shareholder to its company and by non-residents of Poland conducting business activities that encompass the extending of loans. In addition, an exchange of majority shares in one company for new shares issued by another company is tax-exempt if all companies in such a transaction are located in one or more EU Member States. The tax exemption also applies to an in-kind contribution of an enterprise or its organised part to the stated capital of a local capital company as well as to mergers or transformations of such local capital companies.

Local taxes include:

a real estate tax;

b transportation tax (imposed only on lorries and trucks);

c marketplace tax;

d agricultural tax;

e forestry tax;

f dog owner tax; and

g sanatorium tax.

Local self-governments are entitled to establish rates for certain taxes within the limits set by law. The most important local tax is the real estate tax, which is paid annually (in monthly instalments) by an owner or possessor of real property and constructions and their parts, including devices and equipment facilities, connected with business activities. For real properties used for business, the maximum tax rates in 2015 are 23.13 zlotys per square metre for buildings connected with business and 0.90 zlotys per square metre of land. In addition to defined exemptions, local self-government bodies, at their discretion, may establish further tax exemptions and their conditions with a view to attracting investors and businesses to invest in certain regions of Poland.

Tonnage tax is imposed on navigation enterprises rendering international sea ship services in transportation of goods and passengers, sea tugboat and sea tow services, sea lifeboat and rescue services, deepening of the sea bottom, as well as certain other services connected with the foregoing, such as sale of goods and services on ships, currencies exchange, management of passenger and cargo terminals, loading, unloading

and reloading of cargo, and ship chartering. Tonnage tax is chargeable to the extent that the navigation enterprise uses ships with a tonnage gross (GT) capacity exceeding 100GT, and provided that it has selected to be the taxpayer of this tax, instead of CIT, for at least five years. The tax is chargeable at a rate of 19 per cent on total lump-sum income calculated as an aggregated product of the total net capacity (as determined in the international measurement certificate) of each ship used for the taxable services, and rates decreasing from €0.50 to €0.10 for each 100 tonnes of net capacity of each ship per day. In addition, such ship owners pay tax at a rate of 15 per cent of gross proceeds from the sale of ships if such proceeds are not reinvested into the purchase, reconstruction or modernisation of ships within three years. They are exempted from CIT.

Gambling tax is imposed on businesses organising gambling activities (casino roulette, card games and gambling, bingo games, various lotteries, mutual bids, slot machines, etc.), except for promotion lotteries and poker tournaments; it is also imposed on individual participants in poker tournaments. Tax rates differ with respect to each gambling activity and game, and vary from 2.5 to 50 per cent of proceeds from given activities.

The inheritance and donation tax is levied on natural persons only, and depends on the tax bracket, which in turn depends on the degree of relationship between a donor and a donated party. The first two brackets pertain to relatives, the third to other persons. The tax rates for the first bracket are 3 to 7 per cent; for the second, 7 to 12 per cent; and for the third, 12 to 20 per cent. There also apply tax exemptions regarding certain assets and regarding inheritance or donations of all assets between certain family members.

The tax on mines, implemented in 2012, is imposed on copper and silver mining. For copper, the tax rate amounts to 0.033 x average copper price + (0.001 x average copper price) 2.5, and applies to each tonne of copper mined by a taxpayer or included in copper concentrate produced by the taxpayer. For silver, the tax rate amounts to 0.125 x average silver price + (0.001 x average silver price) 4, and applies to each kilogramme of silver mined by a taxpayer or included in silver concentrate produced by the taxpayer. If the average prices of copper or silver drop below the statutory determined thresholds, higher tax rates will apply, with a minimum tax rate of 5 per cent of the average price of copper or silver. The tax should be declared and paid to the proper customs chamber for each month within 25 days of the following month.

IV TAX RESIDENCE AND FISCAL DOMICILE

i Corporate residence

Companies, other legal persons, limited partnerships issuing shares and organisational units without legal personality (e.g., tax units), except for other partnerships, are taxpayers liable to CIT. Taxpayers having their seat or place of management in Poland are tax residents liable to CIT on their worldwide income. Other taxpayers are non-residents liable only to tax on income derived in Poland unless an applicable DTT states differently. An entity incorporated outside Poland may become a Polish tax resident if its place of management is relocated to the territory of Poland. Conversely, a locally incorporated entity may cease to be a Polish tax resident if its place of management is relocated from Poland to another jurisdiction. In order to determine under Polish rules where an entity has its place

of management, one must look at where the entity is actually managed (namely, where decisions regarding the entity's matters are actually taken). It is a question of facts rather than law. Any legal deeds or other formal indicators of a place where the entity is managed and where decisions are made (e.g., relevant rules in articles of association or management agreements executed with the entity) may be considered by the tax authorities, but they are neither final nor prevailing in determining the place of management. In practice, however, there exists no tax or court ruling in which local tax authorities would claim that a given entity became or ceased to be the Polish tax resident due to relocation of the place of its actual management. Nevertheless, the place of actual management may be effectively moved for tax purposes. In many cases, such movement could not be challenged by the tax authorities of the exit jurisdiction, since many DTTs executed by Poland state that in cases of disputes regarding where a corporate taxpayer is tax resident, it must be considered a tax resident of the contracting state in which it has a place of management.

A company incorporated in any EU Member State, including European companies (SEs), may also become Polish tax residents, and a company incorporated in Poland may relocate to another EU Member State by way of a statutory merger between such companies. SEs and the European cooperative societies (SCEs) may also move their corporate seat between EU Member States. Another Polish company would have to open a liquidation procedure if it decides to move its seat to another country.

In Poland, no corporate immigration or emigration taxes are levied on entities that become or cease to be Polish tax residents.

ii Branch or permanent establishment (PE)

A foreign entrepreneur has its fiscal presence in Poland and is liable to Polish income tax if it derives income locally through its PE in Poland within the meaning of local definitions or a pertinent DTT. A PE is defined as a fixed place where the business activity of the foreign entrepreneur is conducted, in part or in whole, in Poland. A PE is created, in particular, if the foreign entrepreneur has a place of management, a branch office or a workshop in Poland.

PEs frequently take the form of a local branch office. A locally registered partnership of one or more of its non-resident partners may also constitute their PE. A PE may also be created without such formal presence in Poland, in particular where a foreign entrepreneur seconds to Poland an employee authorised to conclude agreements in Poland on behalf of the foreign entrepreneur, and such individual customarily exercises such authorisation.

In practice, activities of a foreign entrepreneur will create a PE if they are conducted in Poland permanently. Therefore, such establishment does not exist if activities generating local income are performed outside Poland on a permanent basis rather than in Poland. However, neither Polish domestic regulations nor DTTs define the permanency of such local activities; thus, activities conducted for a few months (e.g., six months) may create a PE. For example, pursuant to a court judgment, cross-border advisory and other services of a Japanese company aimed at implementation in Poland of a licence granted to a Polish company constitute a local PE within the meaning of the Poland–Japan DTT.

Owing to the protection of DTTs executed by Poland, the PE condition may not be enough to tax local income of the foreign entrepreneur. With few exceptions, most

DTTs require that tax authorities prove a nexus between the local business activities of the PE and any items of income derived by the entrepreneur in Poland. In the absence of such nexus, no item of local income may be taxed. However, a few treaties, such as the DTT between Poland and Italy, set forth the presumption that one must assume that such nexus exists between the PE and all items of income (if any) derived by that taxpayer in Poland, unless the taxpayer proves the absence of such nexus with a given item of local income.

In addition, DTTs executed by Poland provide which local permanent activities and places may not be considered to be a PE. Although such activities and places differ to some extent, Polish tax treaties are based on the OECD Model Convention, and therefore such definitions are similar in all treaties. In general, a fixed place of business in Poland does not constitute a PE if it constitutes a construction site or installation for a certain period (usually lasting not more than 12 to 18 months), or if the fixed place is designated solely for the storage or delivery of products, or the purchase of goods or gathering of information (or for the combination of some or all of these). In the absence of a DTT, most such activities would constitute a PE, and any income generated by the taxpayer from such activities would have to be taxed in Poland.

V TAX INCENTIVES, SPECIAL REGIMES AND RELIEF THAT MAY ENCOURAGE INWARD INVESTMENT

According to Article 17, Section 1, Item 34 of the CITL, income derived from economic activities conducted in the Polish territory within an SEZ is tax-exempt. The main purpose of SEZs is to encourage investors to invest in these territories to accelerate the economic development of such regions. In return, an investor is permitted to deduct a specific percentage (depending on pertinent regulations, up to 50 per cent) of its qualified investment outlays and costs incurred in the SEZ (eligible expenditures) from the amount of income tax. The investor must obtain a prior permit from the Minister of Economy to pursue a business activity in an SEZ. The investor may benefit from the CIT exemption on the ground of costs borne for a new (initial) investment, or on the ground of costs borne for the creation of workplaces for new employees. The CIT exemption may be cancelled as a result of withdrawal of the permit if the investor ceases to perform a business activity in the SEZ as defined in the permit, or flagrantly violates conditions specified in the permit or fails to redress infringements thereof within the deadline set by the Minister. The SEZ regulation provides a list of activities that are banned in SEZs and that may not be covered by the permit and, consequently, by the tax exemption, including:

a administration and supporting services (such as those related to office administration services – e.g., preparation and copying of documents, post services such as e-mails and answering telephones), except for call centre services, which are explicitly authorised to be performed in SEZs;

b professional, science and technical services (e.g., legal and tax advisory, management advisory, head office, advertising and translation services);

c financial, insurance and real estate transactions; certain licence services related to books, brochures, maps, magazines, computer games, software, etc.;

d military services;

e film, video and TV production;
f waste management services;
g construction services; and
h certain other services that are also banned in SEZs.

In addition, costs of investments (not only in SEZs) not successfully closed can be fully deducted by a taxpayer on the date of the sale or liquidation of investments. The disposal of investments should be documented with an invoice or a bill, and the liquidation of investments should be documented with a memorandum (protocol) of liquidation.

In Poland, any foreign income items may also be income tax-exempt under a pertinent DTT. If the tax treaty is silent as to the exemption, or in absence of a treaty, foreign income tax may be credited against Polish tax on the same item of income (see Section VI.iv, *infra*).

i Holding company regimes

Inbound and outbound dividends, capital gains, and other local or foreign income derived by local holding corporations or their non-resident shareholders, are subject to income taxation at a rate of 19 per cent and, in certain cases, tax exemptions or tax credits. The basic characteristics of a local special holding company tax regime are as follows:

Dividends exemption	Yes
Minimum holding In votes or in capital	10% (25% for Switzerland) Capital*
Minimum holding period for dividends	Two years†
Capital gains tax exemption	No
Capital loss deduction	Yes
Deduction of expenses (e.g., interest)	Yes
Debt-to-equity ratio	1:1
Capital infusion tax	0.5%‡
Withholding tax to parent under domestic law To EU, EEA and Switzerland parent To US parent	19%/0%§ 0% 15%/5%
Foreign income tax credit	Yes, if foreign income is not tax-exempt locally under a tax treaty
Foreign income tax credit for underlying tax	Yes, for CIT of foreign subsidiaries from outside the EU, EEA and Switzerland
Cross-border consolidation	Yes, under certain circumstances
Controlled foreign companies legislation	No

* This exemption applies to dividend payments between domestic companies, EU, EEA or Switzerland-based companies. The direct shareholder's interest in the share capital should amount to 10 per cent. In respect of dividends paid by Swiss companies, interest in the share capital must amount to at least 25 per cent.
† The tax exemption applies even if the two-year minimum holding period is met after the payment of dividends.
‡ Exemptions available for an in-kind contribution of an enterprise or its organised part or shares in an EU capital company to the share capital of a local capital company in exchange for its new shares, and for mergers and transformations of capital companies.
§ No dividend withholding tax if the requirements for the tax exemption referred to in the first footnote to this table are satisfied.

ii IP regimes

According to Article 18b of the CITL, Polish taxpayers are entitled to deduct expenditures incurred for acquisitions of new technologies unless they carry on activities in an SEZ in the tax year or in the preceding year. New technologies are defined as technological knowledge in the form of intangible assets (in particular R&D results) that enable the manufacture of new or improved goods or services, and that have not been applied worldwide for a period longer than the past five years, which should be confirmed by the opinion of a scientific unit. Deductions of such expenditures may not exceed 50 per cent of the expenditures.

iii State aid

On 5 July 2011, the Council of Ministers adopted the Scheme Concerning Support for Investments of Material Significance to the Polish Economy for the period 2011 to 2020 (Scheme), which was subsequently amended on 22 July 2014. The purpose of the Scheme is to increase innovation and competitiveness in the economy through cash grants awarded to Polish and foreign companies. The cash grants under the Scheme may be awarded until 2015 for a maximum of five years, and the Scheme will end in 2020. The Scheme's overall budget is 672.4 million zlotys. Under the Scheme, funds may be granted to support high-value investments or the creation of new workplaces to entrepreneurs planning investment in priority sectors such as aviation, the car industry, electronic equipment manufacturing (e.g., computers, home appliances, TV, radio and telecommunication devices, etc.), biotechnology, R&D or 'modern' services, including IT processing and advanced IT processing management, knowledge management, IT consulting, engineering centres and also certain business processes.[9]

To qualify for support for the creation of new jobs, the investor should make at least one of the following investments:

a a new manufacturing investment in priority sectors offering at least 250 new jobs with a minimum investment of 40 million zlotys; or

b significant new manufacturing investments offering at least 500 new jobs with a minimum investment of 500 million zlotys, or offering at least 200 new jobs with a minimum investment of 750 million zlotys (significant investments);

c a new investment in the 'modern' services sector offering at least 250 new jobs with a minimum investment of 1.5 million zlotys; or

d new R&D investments creating at least 35 jobs for employees with higher education degrees with a minimum investment of 1 million zlotys.

To qualify for support for new investment, the investor should carry out at least one of the following investments:

a new investments in priority sectors offering at least 50 new jobs for employees with a minimum investment of 160 million zlotys;

b significant investments; or

9 For example, HR management, accounting and tax services, risk management, hedging, netting and certain other services.

c new R&D investments creating at least 35 jobs for employees with higher education degrees with a minimum investment of 10 million zlotys.

Cash grants for significant investments may be awarded for periods exceeding five years, but only until 2020. No cash grants may be awarded for any investments in areas where the unemployment rate is below 75 per cent of Poland's average unemployment rate, except for investments in R&D, 'modern' services, significant investments or, in certain eastern parts of Poland, investments in 'priority sectors'. In principle, it is not possible to combine cash grants awarded under the Scheme in an amount higher than 3 million zlotys with other regional cash grants originating from the state budget, CIT exemptions available in SEZs or EU grants, except for cases of cash grants for significant investments or in the R&D sector, or where the value of an investment in other priority sectors exceeds 350 million zlotys or if an investor creates 500 new jobs in the modern services sector. Any deviation from this rule requires the consent of the Polish Council of Ministers.

Investors whose investments meet the above criteria may apply on a standard form to the Polish Information and Foreign Investment Agency (PAIiIZ). The application is assessed by PAIiIZ and the Ministry of Economy. The decision of whether to award cash grants under the Scheme is discretional; however, the Scheme defines the criteria for assessing the investment parameters for the purposes of calculating available support.

Poland-based companies, either within or outside SEZs, may under certain conditions benefit from horizontal state aid instruments for legitimate purposes (mainly employment and training). State aid for employment is, as a rule, designed to reimburse companies for part of the costs of employment or training of selected categories of persons (namely, employees, unemployed persons delegated by local labour offices, and disabled and disadvantaged persons).

Incentives are granted in Poland in compliance with the EU state aid rules. The maximum regional aid intensity available for investors varies from 15 per cent (in Warsaw) to 50 per cent (mostly in the eastern part of Poland).

iv General

The following all make Poland a very attractive jurisdiction for business development, acquisition and operation:

a domestic tax legislation harmonised with EU tax law;
b the low 19 per cent CIT rate;
c the income tax exemption offered for activities conducted in SEZs;
d the real estate tax exemption offered by local self-government bodies in many areas of Poland;
e broad state aid programmes for new investments;
f the advantageous tax treatment of IP technologies and unsuccessful investments;
g Poland's attractive geographical location in central and eastern Europe; and
h the government's attempts to soften the adverse impact of the economic depression of other countries on Poland's economy in order to maintain economic growth.

In addition, the extensive network of DTTs and the attractive foreign tax credit system, including the foreign full tax credit for dividend withholding tax and underlying tax,

allow for the effective elimination or sufficient reduction of the total international and local tax burdens on income derived by Poland-based holding companies and on foreign income derived by Polish companies.

VI WITHHOLDING AND TAXATION OF NON-LOCAL SOURCE INCOME STREAMS

i Withholding outward-bound payments (domestic law)

A 19 per cent rate of withholding tax applies to outbound dividends and other income from participation in corporate profits, and withholding tax at a rate of 20 per cent applies to outbound interest and royalties. Other income from participation in corporate profits includes income from share capital reductions, company liquidations, redemptions of corporate shares (except for their voluntary redemption via a transfer of shares to a company, qualified as taxable capital gains), and other income from shares (e.g., bonus shares or shareholders' income from companies mergers and divisions) or other equity titles in legal persons. Payments of profits by limited partnerships issuing shares (which are taxpayers since 2014) to general partners and shareholders of such partnerships are also subject to dividend withholding tax at a rate of 19 per cent.

Domestic compliance rules for the settlement of local withholding tax on cross-border interest and dividend outbound payments from securities registered on an *imnibus* account maintained for foreign investors also apply.

ii Domestic law exclusions or exemptions from withholding on outward-bound payments

Poland has implemented into domestic tax laws Council Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, which sets forth, *inter alia*, the 'participation exemption'. Accordingly, payments of outbound dividends and other income from participation in corporate profits of a Polish corporation are exempt from local dividend withholding taxation provided that:

a the recipient of the payment is a company that is a tax resident of any EU Member State, Switzerland or EEA Member State, provided the recipient is not entirely tax-exempt as regards its worldwide income, and has a legal form indicated in an attachment to the above Directive or is such company's PE also located in one of the above-mentioned states;

b the recipient of dividends holds at least 10 (in the case of Switzerland, 25) per cent of shares in the Polish corporate subsidiary for an uninterrupted period of two years, even if this minimum holding period expires after the dividends were paid; and

c prior to the payment of dividends or other corporate profits, a tax certificate is delivered by the recipient of the income to the Polish subsidiary, such certificate must be issued by the former's pertinent foreign tax authority to confirm that the recipient is a tax resident of an EU Member State or another state referred to above.

Pursuant to a judgment of the local court, the dividend withholding tax exemption may still apply, although the minimum two-year holding period elapses after a merger of a parent company from an EU Member State with its general tax successor (being another EU company referred to in the above Directive).

In limited partnerships issuing shares, the above dividend withholding tax exemption applies only to profits paid to shareholders. In turn, general partners (and not shareholders) may credit the CIT of the partnership (according to their participation in the partnership's profits) against withholding tax on profits distributed to them within the next five consecutive years.

Poland has also implemented Council Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States. In particular, payments of outbound interest and royalties are exempt from withholding taxation. The withholding tax exemption as from July 2013 applies to outbound interest and royalties as long as:

a the recipient and payer of interest or royalties are associated companies where one company holds directly at least 25 per cent of shares of the other company, or another company holds directly at least 25 per cent of shares of both the payer and the recipient of interest or royalties, or the payer or recipient (or both) is a PE of any of such associated companies;

b the above minimum 25 per cent holding of shares lasts for an uninterrupted period of two years, even if this minimum holding period ends after the payment of interest or royalties;

c the recipient of interest or royalties is a tax resident of any EU or EEA Member State or Switzerland, provided the recipient is not entirely tax-exempt as regards its worldwide income, or it is such tax resident's PE located in another EU or EEA Member State or Switzerland; and

d prior to the payment, the recipient of income delivers its tax residence certificate issued by its pertinent foreign tax authority to confirm that the recipient is a tax resident in the EU Member State or Switzerland, or is such tax resident's PE that is also located in another EU Member State or Switzerland.

The existing withholding tax exemptions of outbound dividends, interest and royalties, paid mainly to recipients from the EU, the EEA and Switzerland referred to in Section VI.ii, *supra*, are limited to situations where Poland may claim the exchange of information from tax authorities of the country of the foreign recipient of income pursuant to a pertinent DTT.

iii DTTs

Local interest and royalty withholding taxation at a rate of 20 per cent, and dividend withholding taxation at a rate of 19 per cent, may be reduced to 10 or 5 per cent, or even eliminated, in compliance with a relevant DTT. A foreign recipient of such payment should deliver a tax certificate from its respective tax authorities to confirm that it is a tax resident of the other contracting state under the meaning of the tax treaty. According to new legislation, such certificate is valid for one year only unless it indicates another

period, and the same recipient of income should deliver a new tax certificate for each tax year in which it receives a payment falling under local withholding taxation.

In turn, most of the 91 DTTs executed by Poland provide that Polish income taxation of inbound dividends, interest and royalties may be reduced through foreign tax credits on such income (not higher, however, than the Polish tax due on the same item of income). In addition, the Poland-Luxembourg DTT, which exceptionally provided for the tax exemption of foreign inbound dividends, whereby a Luxembourg company's dividends that are subject to Luxembourg dividend withholding taxation are Polish tax-exempt, changed as from 2013. Now, the Luxembourg dividend withholding tax may only be credited against the Polish dividend withholding tax.

iv Taxation on receipt

Dividends, interest and royalties are taxed on a cash basis. Dividends paid between local corporate companies, or by a foreign corporate company tax resident in any EU or EEA Member State or Switzerland, are exempted from Polish income taxation if the Polish recipient of dividends holds at least 10 (25, in the case of a Swiss subsidiary company) per cent of shares in a subsidiary distributing dividends for an uninterrupted period of two years, even if this minimum holding period expires after the payment of dividends. Any inbound dividends, interest, royalties and other item of foreign income may also be exempt from Polish income taxation if a pertinent DTT provides for such an exemption. Whenever a tax treaty provides otherwise, or in the absence of a treaty, foreign income tax may be credited against Polish tax. Such credit, however, may not exceed the Polish income tax on the same income.

Polish companies receiving foreign (inbound) dividends in Poland may credit against Polish CIT foreign dividend withholding tax, as well as foreign corporate tax paid by a foreign corporation on its profits out of which such dividends were paid out (full tax credit for underlying tax). The foreign underlying tax may also be credited against Polish tax on other foreign income, not only dividends. As a result, in many cases there would be no corporate tax in Poland, since the 19 per cent Polish tax rate is lower than tax rates in many countries. The Polish tax credit for the underlying tax, however, applies only with respect to foreign tax of a foreign subsidiary being a tax resident in countries other than the EU, EEA Member States and Switzerland, having a DTT with Poland, and provided that the Polish corporation holds at least 75 per cent of shares in the foreign company distributing dividends for an uninterrupted period of two years, even if this minimum holding period expires after the payment of dividends. The scope of the foreign tax credit referred to above, including the tax credit for foreign dividend withholding tax and underlying tax, is also granted in the case of Polish taxation of foreign income derived through a Poland-based PE of a company from the EU or EEA Member State, pursuant to a pertinent DTT.

The existing tax credit on foreign inbound income referred to here is limited to situations where Poland may claim the exchange of information from tax authorities of the country of the source of foreign income pursuant to a pertinent DTT.

VII TAXATION OF FUNDING STRUCTURES

In practice, local companies are usually financed with a mix of equity contributions (both in cash and in kind) and typical loans from shareholders or third parties, or through bonds issued to shareholders or third parties. Sometimes, companies also obtain 'additional shareholder cash contributions', which in principle are required to be paid to cover accounting losses of the company, but may also be used to finance operations of the company in other situations, and may be returned to shareholders to the extent that they are not required to cover company losses.

i Thin capitalisation

The CITL provides for restrictions with respect to interest paid by the Polish subsidiary on borrowings (loans) extended by qualified related lenders. Such interest is not tax-deductible to the extent that the loans from qualified lenders exceed the borrower's (Polish subsidiary) equity. Qualified lenders are:

a a shareholder or shareholders directly or indirectly holding at least 25 per cent of the voting stock in the share capital of the borrower; or

b sister companies, where the same shareholder directly or indirectly holds at least 25 per cent of the voting stock in the share capital in each of those companies.

Interest on part of such a loan or loans exceeding the 1:1 debt-to-equity ratio is not deductible, but for local withholding taxation it should still be qualified as interest rather than dividends. The debt-to-equity ratio should be calculated on the last day of the month preceding the month of interest payment. A definition of the loan covers not only typical loan agreements regulated in the Polish Civil Code, but also any agreement for payment of the amount that will subsequently have to be returned, including debt securities, irregular deposits and deposits (except for derivatives).

Recent case law confirms that interest is not deductible under thin capitalisation rules if paid to a qualified lender under a loan extended by the same or other qualified lender; however, transfer of such a loan by the qualified lender to a third party (or vice versa) before payment of interest does not restrict interest deductions. Accordingly, due to the narrow scope of qualified lenders, the impact of the thin capitalisation rules on the financing of local companies with inter-company loans is very limited.

Taxpayers may select not to apply the above thin capitalisation rules on condition of notifying the tax office. Subsequently, for at least a three-year period, they will have to apply an alternative interest deduction regime, according to which interest paid on any loan (whether from a related or non-related party) may not be deducted to the extent a sum of interest payments exceeds the statutorily determined percentage of the value of borrower's asset (reduced, however, by depreciable intangible assets). The new rules set the percentage of the assets limiting interest deductions as the reference interest rate announced by the National Bank of Poland (which is currently 2 per cent) increased by 1.25 per cent. A surplus of interest over such limitation may be deducted over the next five consecutive tax years with other deductible interest to the extent of the aforesaid limitation.

ii Deduction of finance costs

Interest, discounts and other financial costs are deductible when they are actually paid or capitalised – that is, added to a principal amount of debt without payment. Interest that is not at arm's-lengthmay be challenged by the local tax authorities. Interest and other costs of financing acquisitions of shares and other securities may also be deducted, including situations of pushing debt down, where interest on the parent company's debts used to finance a purchase of shares in a subsidiary where companies subsequently are merged is deducted, after the merger, from taxable profits generated by the merged subsidiary's business.

Interest and other costs of financing acquisitions of depreciable fixed and intangible assets accrued until the day of placing a fixed asset into service are subject to depreciation write-offs. Such costs of financing acquisitions of depreciable fixed assets accrued after that day may be deducted according to general rules.

iii Restrictions on payments

Tax rules do not prevent dividend payments, which are not restricted by corporate law provided that they are not paid from the company's net assets required to fully cover the par value of the share capital. Dividends may amount to the aggregated company's profits from the last accounting year and retained earnings from previous years. Dividend payments must, however, be decreased by losses, the equivalent of treasury shares and write-offs from the company's profits to reserve and supplemental capitals, as required by the articles of association or law.

If dividends are formally declared by a company, but not actually paid to shareholders, such dividends, as shareholders' funds deposited gratuitously with the company, may be a source of imputed income equal to interest on a hypothetical banking loan that otherwise would be taken by the company from a bank.

iv Return of capital

The equity capital may be repaid to the company's shareholders as a result of capital reduction or redemption of (almost) all or some of the shares in the company. In both cases it is tax-neutral for shareholders up to the amount of the share purchase costs; only a surplus is taxable. Whenever new shares are issued with a share premium in exchange for an in-kind contribution, their purchase costs may not exceed the shares' par value. However, a share premium of shares acquired in exchange for a cash contribution increases the share purchase costs. In any case, losses from the capital reduction or redemption of shares are not deductible.

VIII ACQUISITION STRUCTURES, RESTRUCTURING AND EXIT CHARGES

i Acquisition

Most frequently, non-local companies acquire local businesses by virtue of acquisition of existing or new shares in a local corporation operating a business. In the former case, a purchase of shares is subject to capital tax (tax on civil law transactions) at a rate of

1 per cent. In the latter case, such tax is payable at a rate of 0.5 per cent by the local corporation. In addition, acquisition of new shares issued by the company in exchange for a cash contribution to the local corporation is frequently used to eliminate tax on capital gains that arises for sellers in cases of purchases of existing shares. In particular, sellers may reduce the share capital or redeem their existing shares in the corporation for a consideration to be paid by the corporation out of cash contributed for the new shares by the investor, instead of selling the existing shares to the non-local purchaser directly. In such case, the consideration for the sellers qualifies as dividend-like income that may be tax-exempt if the seller holds 10 per cent of shares in the corporation for an uninterrupted period of two years ending even after the redemption of old shares. Since 2011, the tax legislation has limited this solution to a reduction of the share capital and certain types of redemption of corporate shares; the transfer of shares to the company for the purposes of their redemption is excluded from this solution.

Acquisitions of shares in local corporations are frequently financed with inter-company or third-party loans, and often such acquisitions are followed by a merger (also cross-border) between the acquiring and target companies. According to existing tax rulings, after the merger, interest on such loans may be deducted from the taxable profits of the target company's business.

Foreign investors use also local limited partnerships issuing shares to acquire or operate local businesses, since income from shares in such partnership may still not be taxable under the 'old' tax-transparency regime (even up to the end of October 2015) if, in 2013, such partnership elected to have a tax year different from the calendar year. Due to attractive tax treatment, foreign and local investors also use Poland-based close-ended investment funds, qualified foreign-regulated mutual investment funds, and regulated investment companies from the EU and the EEA to acquire shares in local businesses. Although such funds or regulated companies may not conduct operational business activities directly, they may invest in real property, in shares issued by local and foreign companies and limited partnerships issuing shares, and in other securities. They are entirely exempt from Polish CIT on any local and foreign income. Therefore, if they invest in shares issued by a local or foreign partnership that is tax-transparent in Poland, no CIT is levied on profits derived through the partnership in proportion to interest held by such a fund in the partnership.

However, in 2014, Polish limited partnerships issuing shares ceased to be tax-transparent (with certain exceptions applicable until the end of October 2015), and become CIT taxpayers pursuant to new tax rules. Therefore, investment funds transfer investments from Polish limited partnerships issuing shares to other Polish partnerships in which they hold interest through other tax-transparent entities, including foreign partnerships (e.g., Luxembourg tax-transparent special limited partnerships or Dutch limited partnerships). Consequently, due to the tax-transparency of Polish and foreign partnerships, profits of such Polish partnerships remain within the Polish income tax exemption of Polish and foreign investment funds.

ii Reorganisation

Poland has implemented Council Directive 133/2009/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers

of assets and exchanges of shares concerning companies of different Member States, and to the transfer of the registered office of an SE or SCE between Member States as regards both cross-border and domestic mergers, demergers and other corporate reorganisations determined in the Directive. Accordingly, pursuant to the CITL, a merger of companies from Poland or other EU Member States is tax-exempt for both the merging companies and their shareholders, except for up-stream mergers when the acquiring company holds less than 10 per cent of voting rights in the target company. The same exemptions apply to a company demerger, provided, however, that all assets and liabilities of the demerged company are divided into two or more parts, each representing a separate organised part of enterprise. Otherwise, a demerger will be taxed as a sale of assets by the demerged company and a sale of shares by its shareholders.

The above tax exemptions apply assuming that the merger or demerger is pursued for justified business (non-tax) reasons, and where tax avoidance is not the main or one of the main merger drivers. Pursuant to the tax authorities, only statutory mergers of capital companies are tax-exempt; therefore, in the event of the merging of a local tax-transparent partnership into a capital company, shares acquired in exchange for the business of the merging partnership by a partner in such a partnership constitute taxable income of such partner.

If a company contributes in-kind a majority of shares in a company to another company in exchange for shares of the latter company, whether as a domestic or cross-border exchange, such an exchange of shares will be exempt from CIT (19 per cent) and capital tax (0.5 per cent) if all such companies are tax resident in Poland or other EU Member States. In addition, in-kind contributions of an organised part of an enterprise is exempt from corporate and capital taxes.

From 2011, an enterprise conducted by a natural person may also be transformed into a corporation in a tax-exempt manner. According to the tax authorities, the transformation of a corporate (capital) company into a local partnership is subject to CIT at a rate of 19 per cent on the retained profits of such company. However, the transformation of a local partnership into a corporate (capital) company is not subject to CIT.

However, the general tax succession applicable to the tax rights and obligations of the acquired company in cases of statutory company mergers and demergers does not cover protection arising from a tax ruling. According to a recent court judgment, nonetheless, a general tax successor may benefit from a tax ruling issued to an acquired company if the acquired company complied with such ruling before the merger.

iii Exit

A non-local investor may exit from a Polish corporate company by selling shares in such a company. Most DTTs executed by Poland exempt capital gains from such sale from Polish income tax, except for some treaties allowing for taxation if the company holds mainly real properties. Alternatively, the investor may redeem the shares for consideration that in certain cases may be considered dividend income that is tax-exempt or taxed at a lower treaty rate according to rules referred to in Section VI.i–iii, *supra*.

Such an investor may also exit from Poland by relocating a Polish company, including an SE, to another EU Member State by way of a statutory merger with a

company in such other EU Member State. The SE may also move its corporate seat between the EU Member States. Another Polish company would have to open a liquidation procedure if it decided to move its seat to another country.

In Poland, no emigration taxes are levied on entities that cease to be Polish tax residents.

Income from liquidation of a partnership is tax-exempt under local rules. Therefore, investors holding interests in a local partnership may liquidate it in order to exit from the partnership's business in a tax-neutral way. Poland-based close-ended investment funds, qualified foreign-regulated mutual investment funds, and regulated investment companies from the EU and the EEA may exit from their local investments through mere sales of shares in local companies and other securities, since they are entirely exempt from Polish CIT on any local and foreign income, including capital gains from sales of such shares and other securities.

IX ANTI-AVOIDANCE AND OTHER RELEVANT LEGISLATION

i General anti-avoidance

Anti-avoidance rules are very limited in Poland. Article 199a of the Polish Tax Ordinance sets forth the 'substance-over-form' principle. Under this regulation, the tax authorities may ignore tax effects of a given transaction if it is a cover for another transaction (legal act). In such case, the tax effects should be drawn from the hidden transaction. Whenever the intentions of transacting parties cast doubt, the tax authorities should refer to a civil court to judge the existence or non-existence of such a transaction. In principle, Article 199a may apply when a given transaction is executed or performed in an extraordinary manner to achieve tax benefits that would not normally be available if such a transaction were performed in a typical manner.[10]

Taxpayers entering into transactions triggering payments, directly or indirectly, to entities located in jurisdictions known for applying harmful tax practices must prepare transfer pricing documentation explaining such transactions if an aggregated amount of payments exceeds €20,000 per year.

The Ministry of Finance believes that existing anti-avoidance rules are not efficient, and proposes draft legislation setting out a new general anti-avoidance clause due to come into force from 2016.

ii Controlled foreign corporations (CFCs)

Polish CFC rules apply both to corporate and personal income taxpayers shifting profits (i.e., in the form of royalties, dividends and other passive income) to a foreign company or PE located in jurisdictions with a lower income tax rate. In particular, a Polish parent company must incorporate income generated by its CFC (or its foreign PE) into its corporate tax base for a given year and tax it according to the Polish corporate income (personal income) tax law. A foreign subsidiary is deemed a CFC when:

10 As confirmed by the verdict of the NSA of 18 November 2009 No. I FSK 1133/08.

a it is located in a tax jurisdiction applying harmful tax practices as listed by the Polish Ministry of Finance;
b it is located in a tax jurisdiction with which Poland has not concluded a DTT; or
c if the conditions referred to below are met jointly:
- a Polish parent company holds, directly or indirectly, at least 25 per cent of shares (voting rights) in the foreign company;
- at least 50 per cent of the foreign subsidiary's income constitutes dividends, capital gains, royalties, income from derivatives, or interest or other passive income; and
- such passive income is either exempt or excluded from taxation or subject to a tax rate that is not higher than three-quarters of the Polish tax rate (given that the Polish CIT rate is currently fixed at 19 per cent, the foreign tax rate should equal 14.25 per cent or less).

A foreign subsidiary is not a CFC if its yearly income does not exceed €250,000 or it has a business substance that includes the existence of an establishment performing a business activity (in particular, maintaining premises or qualified staff), and a correlation exists between the CFC's activity and its technical and personal resources; and the transactions of a CFC are based on economic reality, are driven by business reasons and do not stand in opposition to the general business interests of the CFC, and the CFC performs its key economic functions self-sufficiently, using its own resources.

iii Transfer pricing

Transactions between related parties must be priced at arm's length. Parties are related, *inter alia*, where one party holds, directly or indirectly, at least 5 per cent of shares in the share capital of the other party, or the same persons are in the governing bodies of those entities. If, as a result of such relations between parties, they agree conditions differing from those that would have been agreed by independent entities, and as a result a taxpayer does not show any income or shows income lower than would have been expected should those linkages not exist, taxable income or related costs may be reassessed, and the tax settlement of that entity may be challenged by the tax authorities. In such a situation, the tax authorities determine income on the basis of market prices of similar goods or services, or according to one of the following methods:
a the comparable uncontrolled price method;
b the resale price method;
c the reasonable margin (cost plus) method; and
d the transaction profit method.

Note that taxpayers conducting transactions (including the execution of partnership deeds, joint-venture or similar agreements with related entities), and if such transactions trigger payments to entities located in jurisdictions applying harmful tax practices (directly or indirectly), are required to maintain relevant tax documentation describing, *inter alia*, the functions of the parties, anticipated costs of the transaction, the method and manner of calculating profits and pricing, a business strategy and factors defining the value of the transaction. Taxpayers must present the documentation within seven

days of any request of the tax authorities. Should the company fail to provide such documentation, the tax authorities may apply a 50 per cent tax rate to income reassessed by them.

According to the administrative court, the statutorily defined value of transactions triggering local transfer pricing reporting obligations (€50,000) refers to the aggregated value of all transactions executed by a taxpayer in any given tax year, rather than separately to the value of each transaction.

From 18 July 2013, the scope of a transfer pricing tax audit has been broadened to include restructurings by related parties of their activities, where such restructuring is defined as a transfer between such parties of substantial economic functions, assets or risks.

iv Tax clearances and rulings

The Minister of Finance, *ex officio* or upon the request of taxpayers and other entities, issues general guidelines applicable to tax rules governing selected tax issues that in the opinion of the Minister require uniform interpretation. If particular cases require interpretation of the tax rules, an entity (taxpayer, withholding tax agent and certain other entities) interested in securing the certainty of such interpretation may also apply to selected heads of tax chambers, who (representing the Minister of Finance) issue individual tax rulings within three months (tax rulings regarding local taxes are issued by local government tax authorities). If a ruling is not issued within this period, the tax interpretation presented by the entity in its application will become valid for the tax authorities (a silent ruling), which allows taxpayers to avoid unjustified delays in settlements of tax issues in business activities.

An existing tax ruling may be changed by a new one; however, a taxpayer complying with an original tax ruling that is subsequently changed may not be liable to taxation contrary to the contents of the original tax ruling, and if tax referred to in the original ruling is settled periodically (monthly, quarterly or yearly), the taxpayer is exempt from such tax by the end of the tax settlement period during which the new tax ruling was served to the taxpayer, except for cases arising prior to serving the original tax ruling to this taxpayer.

Taxpayers dissatisfied with any private tax ruling may file a complaint with a district administrative court within 30 days, and subsequently with the NSA.

X YEAR IN REVIEW

During 2014, investors continued to use local partnerships, including limited partnerships issuing shares that, in 2013, selected an accounting year different from the calendar year and that, as a result and according to the interim rules of Poland's new tax legislation, may remain tax-transparent until October 2015.

Investors also continued to use regulated mutual investment funds from other EU or EEA Member States to acquire shares issued by partnerships and other companies, or to invest in other Polish securities directly. Due to the full corporate tax exemption, no CIT is levied on local and foreign capital gains and other income of such investment

funds, including profits derived through such partnerships in proportion to a fund's shares in such partnership.

Since there applies legislation imposing, from 2014, CIT at a rate of 19 per cent on profits of previously tax-transparent limited partnerships issuing shares, investors have also been seeking alternative vehicles that can be used to continue their local business activities in a tax-efficient way; among these, tax-transparent Polish limited partnerships held via new Luxembourg-based tax-transparent special limited partnerships or via Dutch limited partnerships were suggested. Investors also came up with solutions in which a local limited liability company purchases assets from limited partnerships issuing shares for a relatively high price, which triggers a step-up in the depreciation basis in the limited liability company but is not taxed on the part of the selling partnership.

In 2014, company restructuring, transformations, mergers and acquisitions were prevalent in Poland.

In turn, the administrative courts issued the following positive judgments:

a denying that the Polish tax exemption on cross-border income of a US investment fund violates the freedom of movement of capital provisions under the TFEU, which also applies to third countries;

b commercial credits resulting from deferred payment terms of purchases of goods and services from a shareholder do not qualify as shareholder loans, and interest thereon should not be subject to thin capitalisation rules; and

c cross-border interest may be subject to a treaty withholding tax rate provided that a beneficial owner of the interest is a tax resident in a treaty state.

In 2014, the tax authorities changed their policy regarding local taxation in several important matters. In particular, the Minister of Finance and local tax authorities issued individual tax rulings confirming the following:

a a Polish investment fund's cross-border income from profits distributed by a Luxembourg based tax-transparent simple limited partnership is tax-exempt in Poland;

b a Polish investment fund's cross-border income from the acquisition of shares in a Luxembourg based tax-transparent simple partnership in exchange for shares in a Polish company is tax-exempt in Poland; and

c the distribution of amounts to partners upon liquidation of a general partnership is not subject to tax; however, such amounts are taxable upon liquidation if they were earned by a limited partnership issuing shares that has been transformed into a general partnership before the distribution of these amounts to partners.

XI OUTLOOK AND CONCLUSIONS

From 2015, a number of amendments to the CITL and DTTs will enter into force, including the following.

i CIT

The scope of the amended thin capitalisation rules has been broadened to include any loan from a shareholder holding at least 25 per cent of shares in the equity of a borrower,

directly or indirectly; has changed the debt-to-equity ratio from 3:1 to 1:1; and has set forth an alternative regime for limitations of deductions of interest on any loan, whether from a related or unrelated lender (see Section VII.i, *supra*). The CFC rules require the incorporation of the income of foreign subsidiaries (or PEs) from non-treaty low tax jurisdictions into the taxable base of a Polish parent company, unless the foreign subsidiary has a business substance (see Section IX.ii, *supra*). The definition of a tax-exempt exchange of shares in which a majority of shares is transferred to an acquiring company will also include a series of transfers of smaller numbers of shares within a six-month period.

In addition, the amended corporate law also includes rules that exclude foreign income derived from hybrid instruments from the Polish inbound dividend tax exemption; explicitly broadens the transfer pricing reporting obligations to cover the execution of partnership deeds, joint-venture agreements and similar agreements between related parties; and sets forth a 12-month validity period for foreign tax residence certificates that do not themselves determine their validity period.

ii DTTs

Poland has signed new DTTs with Guernsey and Singapore, and new protocols to Poland's current DTTs with India and Slovakia will enter into force in 2015.

In 2014, Poland also executed new DTTs with Belgium and Bosnia and Herzegovina, which are expected to enter into force after ratification and exchange of diplomatic notes by the contracting states in 2015 or 2016. In addition, Poland has ratified a new DTT with the United States, which will enter into force regarding withholding taxation two months after an exchange with the United States of the pertinent diplomatic note, and regarding the DTT's remaining provisions, from the beginning of the next calendar year following the year in which the United States exchanges the diplomatic note. It is envisaged that the new DTT with the United States will enter into force in 2015 or 2016. The new DTT will replace the existing treaty, which was executed in 1974 and does not include the limitation of benefits clause.

Appendix 1

ABOUT THE AUTHORS

JAROSŁAW BIEROŃSKI

Sołtysiński Kawecki & Szlęzak

Jarosław Bieroński has provided counselling services to a number of Polish businesses, including within the Warsaw office of Ernst & Young, where he specialised in tax and foreign exchange law. He joined SK&S in 1993 and has been a partner at the firm since 2000. He established the firm's tax, customs and foreign exchange practice, and has been coordinating it ever since. He is a highly regarded specialist in international tax law, and has extensive experience in representing clients in tax disputes before tax authorities and administrative courts, in tax planning and implementation – M&A, real estate, business restructuring, tax audits, transfer pricing documentation and wealth tax management. Apart from tax law, he deals with customs and foreign exchange law, company transformation and debt restructuring. In the ranking of tax firms and tax advisers, published by the daily newspaper *Dziennik Gazeta Prawna*, in 2010–2014 he was placed second and first in Poland in the category of the 'best tax adviser' in M&A transactions and in international taxation. He provides advice to international and local clients, such as the General Electric Company, Mars Inc, Goodyear, the Gillette Company, Autodesk, Philips, Toyota, Sony Computer Entertainment, Viacom Global, Bakoma, Bank BPH, BlackRock Investment Management, MassMutual, SallieMae, ING Bank Śląski SA, and Carlo Tassara and Alior Bank SA.

Mr Bieroński graduated with a law degree from Poznań University Law School in 1990. He is admitted to practise as a legal and tax adviser. He is also a member of the International Fiscal Association and other international tax organisations.

SOŁTYSIŃSKI KAWECKI & SZLĘZAK
ul Jasna 26
00-054 Warsaw
Poland
Tel: +48 22 608 70 52
Fax: +48 22 608 70 70
jaroslaw.bieronski@skslegal.pl
www.skslegal.pl