

Legal opinion

New taxes to hit real estate-owning firms in 2021

On 29 November the Sejm passed legislation under which limited partnerships in Poland will be treated as corporations for income tax purposes – i.e., will be required to pay the corporate income tax – already from 2021, leading to double taxation. Unfortunately, this is not the only way in which the tax burden on business will increase next year. Real estate-owning firms, especially those in the retail sector, will be particularly affected. That is because the government plans to introduce two new taxes: the retail tax and the so-called rain tax.

Retail tax

The retail tax is a tax on retail sales. It was enacted already back in 2016 – in one of the current government's first fiscal initiatives – and was supposed to take effect in September of that year. However, it had to be suspended before it could come into force due to a legal challenge mounted by the European Commission, which argued that it infringed EU state aid rules. On 16 May 2019, in a surprise ruling, the General Court of the European Union found in the Polish government's favour. The Commission appealed the decision to the Court of Justice of the European Union, which is yet to deliver a verdict. Indications are, however, that the appeal will be rejected. That's because the CJEU's Advocate General Juliane Kokott on 15 October issued an opinion (C-562/19 P) stating that the tax does not infringe EU state aid rules. While the Advocate General's opinions are not binding for the CJEU, it usually follows them in its rulings.

Under the (suspended) law introducing the retail tax, it kicks in where a retailer's monthly turnover from the sale of goods to consumers exceeds PLN 17m (€3.8m), and has two rates:

- 0.8% on the portion of monthly turnover between PLN 17m (€3.8m) and PLN 170m (€38m);
- 1.4% on the portion of monthly turnover above PLN 170m (€38m)

Thus, the tax is based on turnover, not income, which is very unfavourable for payers; and it has a progressive character.

Rain tax

The rain tax is to be levied on properties bigger than 600 m² which are at least 50% built up. According to the draft law, it will have three rates:

- PLN 1.50 (€0.33) per 1 m² per year – for properties without any rainwater storage facilities
- PLN 0.90 (€0.20) per 1 m² per year – for properties with rainwater storage facilities capable of storing up to 10% of the annual discharge from the built-up area
- PLN 0.45 per 1 m² per year – for properties with rainwater storage facilities capable of storing 10%-30% of the annual discharge from the built-up area

The stated objective of the tax is to raise revenue for projects and programmes to increase rainwater harvesting in Poland, and to encourage real estate owners to invest in storage facilities. The way it has been structured, the highest payers of the rain tax will be companies that own properties with shopping malls, warehouses, or manufacturing facilities on them.

Is there a chance that the government might change its mind, and decide not to impose these new fiscal burdens? A very slim one, in our view. The key question is not whether they will be introduced; it is what their exact scope and timing will be. Lewiatan, the employers' federation, has been insisting in its conversations with the government that the retail tax should apply only to retail sales turnover generated from 1 January 2021, for example. Given the unprecedented uncertainty surrounding the introduction of the new taxes, we strongly advise the affected businesses to act proactively and take part in meetings both at ministerial and parliamentary-committee level. They may be able to secure favourable concessions, such as exemptions or deferments.

Warsaw, 30 November 2020

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