

EEA collective investment undertakings – discriminatory Polish taxation

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Despite an amendment to Polish tax law which came into force on 1 January 2011, Polish tax law applicable to EEA collective investment undertakings (“**foreign CIU**”) remains discriminatory. This is because frequently foreign CIU do not benefit from the exemption granted by Polish corporation tax law unless they satisfy certain restrictive conditions.

Under Polish tax law prior to 1 January 2011, foreign CIU were subject to withholding tax at the rates of 19% and 20%, whereas domestic CIU were exempt from such tax. The Polish taxation of foreign CIU discouraged them from making investments in Poland and also discouraged Polish residents from investing in CIU in other EEA states. Thus, Poland was in breach of two fundamental EU freedoms provided in Articles 56 and 63 of the TFEU and Articles 36 and 40 of the EEA Agreement – freedom to provide services and the free movement of capital.

Due to these breaches, on 23 March 2007 the European Commission sent a reasoned opinion (second step of the infringement procedure provided in Article 258 of the TFEU) to Poland with regard to its imposition of higher taxation of interest and dividends paid to foreign CIU (case no. 2006/4093). This was the beginning of a ‘battle’ between the Polish Ministry of Finance and the EC, which continued until the Polish personal income tax and corporation tax acts were amended on 29 November 2010. These amendments entered into force on 1 January 2011.

According to the provisions effective from 1 January 2011, any CIU established in an EEA member state (other than Poland) is exempt from Polish corporation tax if it meets requirements similar to those applicable to Polish investment funds. Consequently, the corporation tax exemption applies if the following conditions are met:

- the CIU’s sole aim is to undertake collective investments in transferable securities, money market instruments and other financial assets with capital raised from a public or private offering of the CIU’s units;
- the CIU is subject to corporation tax on its worldwide income in its home state (being exempt from this tax could also be considered as being subject to tax, but this is a debatable matter);
- the CIU operates in compliance with the authorisation granted by the competent authority of its home state;
- the CIU is subject to the supervision of a competent authority; and
- the assets of the CIU are entrusted to a depositary.

Some other conditions must also be met to achieve exemption from Polish corporation tax. Polish taxpayers who pay dividends, interest or royalties to a foreign CIU may apply the exemption to these payments provided that the foreign CIU supplies them with:

- a certificate of tax residence;
- a written statement that the foreign CIU is the beneficial owner of the payments;
- proof that there is a legal basis for the exchange of information and for the tax authorities to obtain information (double tax treaty, mutual assistance directive etc.); and
- a written statement from the Polish subsidiaries paying dividends, royalties or interest to the foreign CIU that all the abovementioned conditions have been fulfilled.

Due to the fact that all these conditions must be met for the exemption from Polish corporation tax to apply, even after the amendment of Polish tax law as of 1 January 2011 Polish and EEA CIU are still treated differently. In this respect the newly introduced limitations on foreign CIU seem to be excessively restrictive and be in contravention of relevant EU principles. In particular, the unlimited tax liability requirement imposed on foreign CIU does not appear to be justified in light of EC law and recent ECJ case law. As a result, on 16 June 2011 the EC once again formally requested Poland to amend its tax legislation. Namely, the EC stated that despite the fact that Poland took corrective measures in November 2010 in response to a previous request, the country was still not fulfilling its obligations under Articles 56 and 63 of the TFEU and Articles 36 and 40 of the EEA Agreement.

In summary, we expect that the Ministry of Finance will soon take the appropriate steps in order to ensure the conformity of Polish tax law with EC law. However, it will take several months for any new provisions to be introduced as the legislation process in Poland is rather time-consuming.

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