

Tax authorities want to negotiate the interpretation of provisions with investors

I. The Ministry of Finance plans to introduce new agreements from 2022 on

In the draft tax law amendment prepared within the framework of the Polish Deal, the Ministry of Finance plans to introduce a new institution - the investment agreement. The draft provides for introduction in the Tax Ordinance of provisions allowing for conclusion, between an investor and a tax authority, of an agreement concerning the tax effects of an investment planned in the territory of the Republic of Poland. The main goal of the regulation is to increase the inflow to Poland of investments, foreign investments included, which is reflected in the definition of investor as an entity planning to launch in the territory of Poland a new investment project with a value of at least PLN 100 million (during the first three years under the new regulations; later on, i.e. from 2025, the required minimum value would be PLN 50 million). The agreement itself, as follows from the new regulations, is aimed at implementing the principle of tax law certainty and ensuring a uniform and consistent interpretation of tax law provisions.

The Minister of Finance wants to negotiate the interpretation of tax law provisions with investors whose investments will amount to at least PLN 100 million in 2022-2024, and PLN 50 million from 2025 onwards. Such common interpretation would then be included in the content of an agreement called an investment agreement.

II. The investment agreement will guarantee certainty of application of legal provisions

In practice, the sense of an investment agreement is to offer the investor certainty as to the tax consequences of a planned investment project and the tax administration's treatment of such project. Currently, in order to determine the tax consequences of a planned investment project and to obtain legal protection in relations with the tax administration, the investor has to approach various tax authorities and submit various applications for the issuance of various administrative acts serving as broadly understood official interpretations of the tax law (tax rulings, binding rate information, binding excise information, opinion on collateral). The investment agreement is to replace all such acts. The agreement may also contain an interpretation of tax law regulations outside the scope covered by tax rulings, binding rate information, binding excise information or opinion on collateral. The draft provides that an investment agreement would be binding at all times on the investor, the materially competent authority, and the tax authorities for settlement periods covered by such agreement.



III. Tax authorities want to negotiate the interpretation of tax regulations

The investment agreement is to be an agreement on the tax consequences of an investment project planned or commenced in the territory of the Republic of Poland, concluded at the request of an investor between that investor and a competent tax authority, or at the request of two or more investors - between them and that authority. However, an application for the agreement does not trigger the tax authority's obligation to enter into such agreement with the applicant. The investor, for its part, may amend or withdraw the application at any time. The agreement will be concluded in the form of a contract. This is a significant novelty, as there is currently in Polish tax law no such form of an official tax law interpretation which would be drawn up as a contract and at the same time produce substantive legal effects. What is important, it will be possible to conclude an agreement with respect to both a planned investment project and a project that has already been started.



IV. Both a Polish and a foreign company will classify as investor

As follows from the legal definition of investor, any entity that plans or has launched an investment project in the territory of the Republic of Poland classifies as investor. Here, the draft authors depart from the traditional construction of such definition (based on a typology of entities) in order to simplify it and thus cover the broadest possible group of eligible investors. An investor may be both a Polish and a foreign law entity. It may be both an entity already having the taxpayer status within the meaning of the Polish tax law, and a potential future taxpayer. It may also be both a taxpayer already conducting business activity in the territory of the Republic of Poland, having some tax history and investment achievements, and a completely new taxpayer, with no tax history or achievements and only planning its first investment project.

V. The concept of a new investment project will be borrowed from the Investment Promotion Act

The draft contains also a legal (statutory) definition of investment project. Thus a new investment project will mean, first, an investment in tangible or intangible assets relating to establishment of a new facility, increase of production capacity of an existing facility, diversification of production by introducing products not previously manufactured in the facility, or a fundamental change in the production process of an existing facility. Second, it will also mean acquisition of assets belonging to a facility that closed or would have closed had the acquisition not taken place, where the assets would be acquired by a business operator unrelated to the seller, and mere acquisition of a company's shares or stocks would be excluded. This definition is taken directly from provisions of the Act of 10 May 2018 on promotion of new investment projects.

VI. The Minister will decide at discretion with whom to conclude contracts

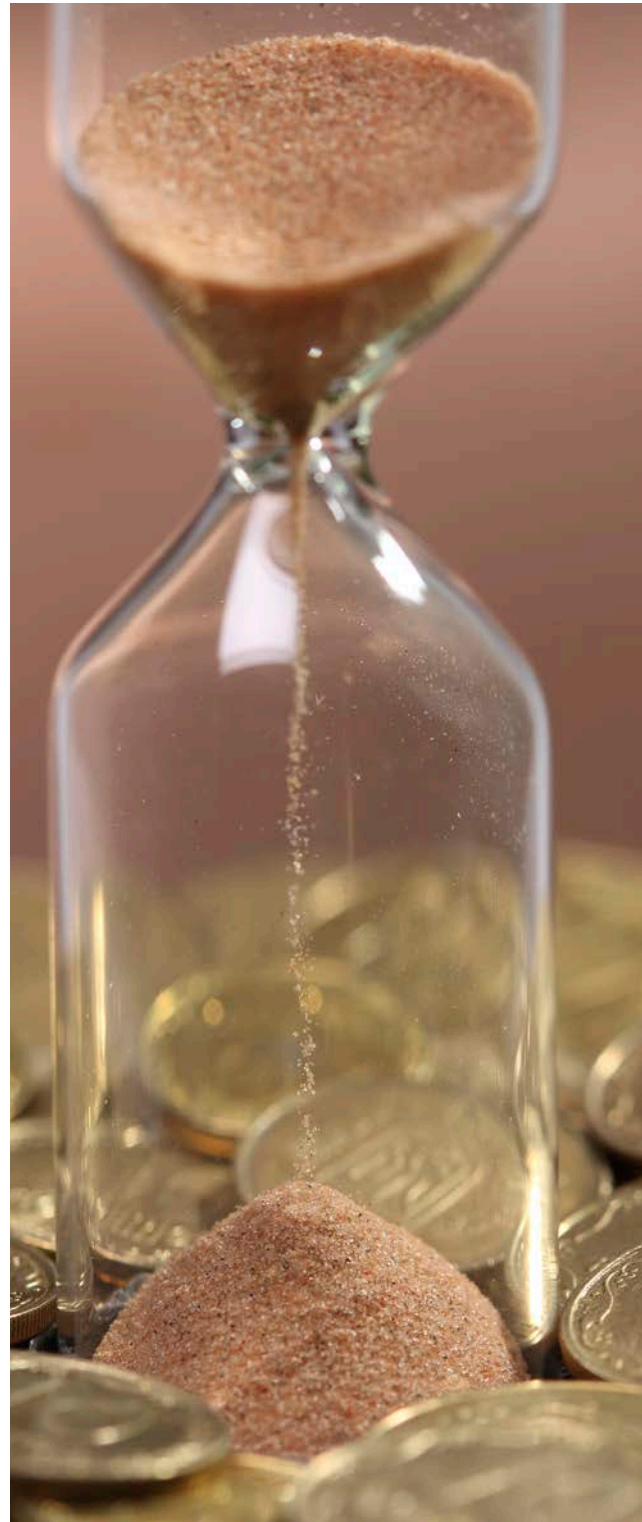
On the part of the tax authorities, the agreements will be handled by the Minister of Finance (although the task may also be delegated). The new regulations provide that the Minister may at discretion refuse to conclude an agreement. Whether the agreement is concluded or refused depends solely on the Minister's decision. However, the decision refusing the agreement has to be substantiated. In such a case, the Minister merely notifies the investor of the refusal to conclude the agreement. No decision is issued in such case, hence the refusal cannot be challenged. As stressed in justification to the draft, refusal to conclude an investment agreement is to be treated as a measure of last resort, used only in a situation of objective impossibility or exhaustion of possibilities of dialogue with the investor. Further, the agreement will be concluded for the period agreed therein but no longer than 5 tax years.

VII. The investor's application will be required to conclude the investment agreement

The application will contain the investor's identification data; an address for electronic delivery, unless the investor has agreed to delivery of correspondence via the tax portal; a description of the planned or commenced investment project; the declared value of the investment project and an explanation how that value has been determined; the proposed duration of the agreement; the proposed subject of the agreement. Thus conceived, the application may be submitted in Polish or in English (no need to provide a translation). An application with some of the necessary elements missing will not be refused or left unconsidered. Any deficiencies of the application may be rectified voluntarily by the applicant by way of amending or, at the request of the Minister of Finance, by way of supplementing the application. If the application is not supplemented, the Minister of Finance may refuse to conclude the agreement.

VIII. The investors will pay for the application and for conclusion of the agreement

The application for conclusion of an investment agreement will require payment of so-called initial fee. The initial fee will be PLN 50 thousand from each investor submitting the application for conclusion of the investment agreement, paid to the account of the materially competent authority within 30 days of the date of submission of the application. If the initial fee is not paid by any of the investors by that deadline, the application will not be considered. Importantly, the initial fee will be subject to refund within 30 days of refusal to conclude an investment agreement. Notwithstanding the above, a principal fee will be due if the agreement is concluded. The draft provides that conclusion of the investment agreement is subject to the principal fee in the amount set forth therein, but no less than PLN 100 thousand and no more than PLN 500 thousand. When determining the amount of the principal fee, the value of the investment project as well as the scope and complexity of the investment agreement will be taken into account. The investor(s) will be obliged to pay the principal fee within 30 days of the date of conclusion of the agreement.



IX. The agreement will be open to amendment by negotiation during its term

The draft provides for the possibility of amendment of the agreement during its term. The new regulations are to provide that any party to the investment agreement may request an amendment to that agreement, and such amendment requires the consent of all parties. In addition, the amendment may also consist in a new investor joining the agreement. In the latter case, the initial and the principal fees will be due from that new investor only. For the amendment procedure it is sufficient to apply the provisions on application for conclusion of the agreement and those on its conclusion accordingly, with the initial fee on the application being PLN 25 thousand and the fee on amending the agreement being no less than PLN 50 thousand and no more than PLN 250 thousand. Besides, the draft authors propose that an amendment resulting from a change in the regulations would not be subject to fees, such reason being beyond the investor's control.



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X. Change of regulations or court decisions may provide the basis for cancelling the agreement

Termination of a concluded agreement will be possible. The investor may do so at any time. The termination is effective as of the first day of the following tax year. As a result of termination, the agreement expires in its entirety. The Minister of Finance is to enjoy less freedom in terminating the agreement. The Minister will be entitled to terminate the agreement in the case of its irregularity, taking into account, among other things, the case law of the Constitutional Court, the Court of Justice of the European Union or the Supreme Administrative Court. This will also be possible in the same cases in which it is possible to repeal the existing interpretation acts based on the Excise Duty Act or the VAT Act. The draft also provides that the investment agreement expires by operation of law on the date of entry into force of new tax law provisions if inconsistent with those provisions.



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