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## | Purchasing business assets in Poland-how to avoid tax risk

## Introduction

In many cases buying an existing business is a better solution than setting up a new one. Beginning from scratch is connected with a number of issues such as start up planning, choosing the location, hiring employees, marketing activities, building the clients' portfolio, not to mention dealing with business plans and handling legal issues relevant to planning and warm-up periods.

When an investor purchases an existing business he may count on immediate profits using its assets. What is also worth noticing is the fact that it is easier to receive financing for a business with a proven positive track record than for a pioneer's project.

## How am I responsible for the seller's outstanding taxes?

Upon acquiring an enterprise in Poland one must be aware of the potential tax risks connected with the acquired assets. It should be made sure that the seller has no outstanding liabilities towards the tax office because according to the Polish Tax Law, the party to the asset deal, i.e. the acquirer of an enterprise (an enterprise should be regarded as an organized set of assets allowing to run a business activity including property, business name, rights, liabilities, licenses, etc.), or an organized part of such enterprise is jointly and severally responsible with the seller for any unpaid tax obligations (related to the subject business).

The acquirer is therefore liable for any tax arrears arisen until the day of the acquisition unless he was not aware of them while maintaining proper care. It should be emphasized that the successor's tax liability may apply to all budgetary dues, such as income, property and employment taxes.

## Tax certificate- how does IT help?

How should we understand the term “proper care”? At first glance it might be associated with the process of due diligence. When performing a share deal, a due diligence review is the most common procedure to mitigate tax risk allowing to assess whether the company to be acquired has any unpaid state and local taxes. As all outstanding potential tax liabilities discovered during the due diligence may possibly remain with the target entity, in practice all such revealed tax risks are quantified so that the amounts covering identified risk influence the share deal value (the same rule applies to legal, financial or environmental due diligence reviews). However, as acquisition of companies (share deal) is not the topic of this article, let’s turn back to the asset deals.

The buyer of the assets does not necessarily have to run formal risk mitigation procedures such as the costly and time consuming pre-transaction due diligence reviews mentioned above. The buyer can be diligent in another way since the joint responsibility for tax dues from the past can be limited.

Firstly, the general rule states that the maximum limit of the responsibilities attached to the acquired enterprise or its organized part constitutes their value. This is quite obvious and there is no specific procedure one ought to follow.

Secondly, according to the Polish Tax Law (article 112 of the Tax Ordinance) the acquirer of an enterprise will not be responsible for any unpaid tax obligations of the seller not disclosed in an indebtedness certificate issued by the Polish tax authorities. Tax authorities, upon an application of the buyer submitted to the authorities along with a written consent of the seller, issue a certificate on the amount of tax arrears of the seller as at the day of issue of the certificate.

What is important - the said certificate not only makes the buyer not responsible for non-disclosed tax obligations but also excuses him from joint liability for the seller's tax obligations if he manages to acquire the assets within 30 days from the day of the issue of the said certificate. If that 30-day deadline is missed the buyer must not rule out the risk of potential tax consequences connected with the new purchase. In practice, to eliminate the said risk he should apply for a second certificate (with practically the same content) and – if needed – another one until the 30-day deadline can finally be met.

The Polish regulations on indebtedness certificates are being changed now. Only with respect to the transactions made before 1 January 2009, the acquirer of the component assets, connected with the economic activity carried out if their unit value on the day of transfer is at least 16 100 PLN (approx. 4 000 EUR), may also apply for such certificate. The assets connected with the economic activity should be understood as fixed assets except for long-term debtors, loans granted and long-term prepayments and accruals. Starting 2009 only the buyer of the business in the form of enterprise or its organized part can apply for the said certificate.

## Conclusion

Foreign investors should be aware of the tax responsibilities attached to an acquired business but also that their succession liability can be limited through arranging for an indebtedness certificate – a document indicating that the seller of an enterprise is in compliance with tax laws and has no outstanding tax payments.

Obtaining an indebtedness certificate is relatively easy and not connected with any material costs. Preparation of the application is also not too time-consuming. Unfortunately, our experience shows that the possibility of receiving that tax clearance document can be often overlooked during the acquisition process in Poland.