Real estate transactions in Poland
INTRODUCTION

In general, Polish citizens, as well as Polish companies can purchase and sell real estates. Similar rules apply to citizens and companies from EU and EEA member states.

During the procedure of accession to European Union, Poland negotiated 12-year grace period of protection with regard to agricultural parcels. During this period EU residents were obliged to obtain a permit to purchase agricultural parcels. This protection period has ended in May 2016.

Nevertheless, there are still some restrictions concerning acquisition of the agricultural parcels. They apply to all potential purchasers, regardless the nationality.

Sale of agricultural parcels which are the state property has been suspended for 5 years commencing April 30th, 2016. There are also restrictions concerning sale of agricultural parcels owned by private persons. Detailed rules of acquisition of agricultural parcels are presented below.
GENERAL INFORMATION ABOUT REAL ESTATE TRANSFER PROCESS

The ownership of the real estate may be transferred by conclusion of several types of agreement, e.g.: purchase, exchange, donation agreement.

The agreement obliging to transfer the ownership of real estate must be executed in the form of notarial deed. The ownership of a real estate cannot be transferred conditionally or with a reservation of a time limit.

The common practice is to conclude preliminary agreement prior to conclusion of the main agreement. Legal consequences of such agreement will differ depending on its content and the form in which it was concluded. If preliminary agreement was concluded in form required for the main agreement (in this case notarial deed) entitled party may pursue conclusion of the agreement in court even if the other party refuses to fulfil its obligation. However, if preliminary agreement does not fulfil formal requirements, entitled party may only demand payment of compensation for the damage caused by the lack of conclusion of the agreement.

The ownership of the real estate may be also acquired by so-called usucaption (acquisitive prescription). In the event of adverse possession of a real estate (i.e. occupation without legal title), possessor of real estate acquires ownership of this real estate after specified period. The period depends on good faith of the possessor and amounts to 20 years - in case of good faith - or 30 years - in case of bad faith - of uninterrupted possession of the real estate.
USUAL SCENARIO OF THE REAL ESTATE TRANSACTION AND FEES

Due diligence

The majority of real estate in Poland are disclosed in land and mortgage registers. The registers are held by district courts and are public. They may be viewed free of charge on the website of Ministry of Justice.

Prior to conclusion of the agreement the purchaser should verify the legal condition of real estate he/she intends to buy in land and mortgage register. To check the real estate’s register the purchaser will need its registry number. The purchaser should in particular check the information about the owners of the real estate and any possible rights of third persons in relation to the real estate, e.g.: mortgage.

Polish law guarantees the authenticity of the information disclosed in the land and mortgage register. It means that in case of acquisition of the ownership or other right ad rem to a real estate from the person disclosed in land and mortgage register as the owner, the acquisition is valid even if this person was not in fact the owner of the real estate. However, such protection does not apply to the purchaser who knew about the inconsistency of the register or could have easily learnt about such inconsistency.

If the real estate is not registered in land and mortgage register, the purchaser should check land and building records. These records do not contain information as detailed as the land and mortgage register. Nevertheless, they include all basic information, such as real estate’s owners, their addresses of residence or seats, cadastral value of the property etc.

Conclusion of the agreement

The agreement which transfers the ownership of a real estate has to be executed in the form of notarial deed or else it will be invalid.

Notary fee for preparation of a notarial deed depends on the value of sold real estate. However, the fee
cannot exceed PLN 10,000.

The notary will also calculate due civil law transaction tax. The tax is paid to the notary at the conclusion of the agreement. The notary is obliged to transfer it to the relevant tax office.

**Obligations after the purchase**

After the conclusion of the agreement the purchaser of the real estate should file a motion for update information disclosed in land and mortgage register. The motion should be filed in the relevant district court. The court fee amounts to PLN 200. There is also a possibility to ask the notary to do it for us.

In the event of lack of land and mortgage register, the purchaser may establish such register for the purchased real estate. This also requires a motion to the district court with jurisdiction over the location of the property. The court fee in such case amounts to PLN 60.

The purchaser of real estate should also inform relevant municipal office about the change of the owner of the real estate in order to provide information about new payer of the property tax.

**LIMITATIONS OVER THE ACQUISITION OF THE REAL ESTATE**

**Acquisition of real estates by foreigners**

Acquisition of real estate in Poland by foreigners is regulated by the Act on Acquisition of Real Estate by Foreigners dated March 24th, 1920 (Official Journal from 2016, position 1061).

According to this Act the foreigner is:

- natural person not having Polish citizenship;
- legal person having its seat abroad;
- company without legal personality having its seat abroad, established by persons referred in point 1 and 2 in compliance with statutory law of foreign state;
- legal person (or company without legal personality) having its seat in Poland, which is directly or indirectly controlled by persons indicated above.

Under the Act acquisition of perpetual usufruct requires fulfilment of the same conditions as acquisition of ownership.

The acquisition of real estate by a foreigner requires a permit. The permit is issued by the Minister of Internal Affairs. The Minister of National Defence or the minister competent for rural development (in case of agricultural parcels) have a right to oppose such acquisition.

The permit is issued upon the foreigner’s request if:
the acquisition of real estate does not threaten the defense or security of the state or the public order, as well as if the interest of social policy and public health do not oppose to such acquisition;

- foreigner proves that there are circumstances which confirm his/her ties with the Republic of Poland (e.g. Polish nationality, marriage with Polish citizen, doing business in Poland in accordance with Polish law etc.).

Permit is also required in case of acquisition of shares in a company with its seat in Poland by foreigners, as well as any other legal action concerning shares of the company, if:

- in the result of such action the company which is an owner or a perpetual usufructuary of real estate in Poland will become a controlled company or
- if the company which shares are acquired is a controlled company and the shares are acquired by a foreigner who is not a shareholder of this company.

Acquisition of a real estate which violates the provisions of the Act on Acquisition of Real Estate by Foreigners is null and void.

Most of the limitations do not apply to residents of member states of European Union, European Economic Area and Swiss Confederation.

**Acquisition of agricultural parcels**

In general acquisition of agricultural parcel is reserved for so-called “individual farmers”.

Individual farmer is a term introduced by the Act on Shaping the Agricultural System dated April 11th, 2003 (Official Journal from 2016, position 2052) and means a natural person, who:

- is the owner, perpetual usufructuary, autonomous possessor or tenant of agricultural land of total utilised agricultural area not exceeding 300 hectares,
- possess agricultural qualifications (i.e. is educated in agriculture or has appropriate work experience in agriculture),
- is residing in the municipality, on the territory of which the agricultural parcels are located for at least 5 years;
- personally runs the farm for all the time stated above.

The acquisition of the agricultural parcels by persons who are not individual farmers is possible in following cases:

- the purchaser is close relative of the vendor (which means descendants, ascendants, siblings, sibling’s children, spouse, adoptive parents and adopted children of the vendor);
- the purchaser is an entity of local self-government or the State Treasury;
- the purchaser is a church or religious association;
- the purchaser is a national park – in case if the acquisition of agricultural parcel is associated with nature conservation;
- inheritance of a real estate;
- acquisition of a real estate on basis of article 151 and article 231 of Civil Code;
- acquisition of a real estate in the course of restructuring proceeding.
Obligations of a purchaser of agricultural parcels

The purchaser of the agricultural parcel is obliged to run the farm, which was a part of acquired agricultural parcel for at least 10 years from the date of acquisition. If the purchaser is a natural person – he/she is obliged to fulfil this requirement personally.

During this 10-year period the acquired agricultural parcel cannot be sold or given into the possession of other person.

Priority right

The tenant of agricultural parcel, who fulfils requirements specified in the Act on Shaping the Agricultural System, has a priority in purchasing it. If there is no tenant entitled to priority right or if he/she does not exercise this right, the priority in purchasing the agricultural parcel is passed to the State Treasury.

The above rules do not apply if:

▪ the purchaser is a person close to the vendor, an entity of local self-government or the State Treasury;
▪ relevant authorities granted a purchaser a permission to acquire the agricultural parcel;
▪ the sale is concluded between legal entities of the same church or religious association.

All aforementioned restrictions do not apply to agricultural parcels of area less than 0.3 hectares.

Acquisition of agricultural parcel or its part, as well as acquisition of shares in company being the owner of agricultural parcel, which violate provisions of Act on Shaping the Agricultural System is null and void.
REAL ESTATE TRANSFER TAXATION

As mentioned above, real estate can be sold either through a direct sale of the property (an asset deal) or indirectly through sale of shares in the company owning the property (a share deal). These two types of transactions have different tax implications under the Polish tax regulations.

Asset deal

The revenues derived from the sale of real estate are subject to the standard taxation rules of Polish corporate income tax. Taxable revenues are reduced by the net book value of the property. Thus, effectively, only the “capital gain” is taxed at the rate of 19%. If the sales price differs substantially and without a justified reason from the market value of the real estate, the revenue may be assessed by the tax authorities according to the market value. This price adjustment may be applied to transactions between related and unrelated entities.

Costs incurred by the buyer for the acquisition of real estate: purchase price, transaction costs including advisory, civil law transaction tax – if applicable, financial costs accrued till the purchase, etc., are to be allocated to the initial value of the real estate and are recognized as tax deductible costs through depreciation write-offs or upon sale. As the value of the land is not subject to depreciation.

VAT on the sale of real estate

The supply of buildings, infrastructure, or parts of buildings or infrastructure is generally VAT exempt, except for:

- the supply of a building, infrastructure or part of a building or infrastructure in the course of its first occupation or prior to it; and
- the supply of a building, infrastructure or part of a building or infrastructure made within two years of the first occupation;

in which cases the supply of buildings, infrastructure or parts of buildings or infrastructure are generally subject to VAT.

“First occupation” is understood as handing over a building, infrastructure or part of a building or infrastructure within the context of the performance of VAT-able activities (subject to VAT or VAT exempt) to the first acquirer or user, after the:

- initial completion; or
- improvement (if the expenses incurred for the improvement constituted at least 30% of the initial value).

of that building, infrastructure or part of a building or infrastructure.
Taxpayers may choose not to apply the exemption and charge VAT if:

- buyer and seller are VAT registered; and
- before the day of supply they submit the appropriate joint statement to the tax office of the purchaser.

The supply of buildings, infrastructure or parts of buildings or infrastructure which should be subject to VAT (i.e. supply in the course of first occupation or within two years of the first occupation) must be VAT exempt (no option to tax allowed) if:

- the seller was not entitled to deduct input VAT; and
- the seller did not incur improvement expenses on which he had right to deduct VAT, or such expenses did not exceed 30% of the initial value of the building, infrastructure or part of a building or infrastructure (unless the improved real estate was used for taxable activities for no less than 5 years).

The VAT treatment of transfer of land or perpetual usufruct (RPU) over in general the VAT treatment of the buildings developed on the land.

However, if an RPU is acquired for the first time from the State or local authority, the transfer is always subject to 23% VAT, even though the buildings developed on the land may be exempt from VAT.

The supply of ownership title / RPU to undeveloped land qualified as land for development purposes is subject to 23% VAT (supply of agricultural land exempt from VAT).

Supply of residential buildings and separate apartments is subject to a reduced 8% VAT, except for part of residential buildings whose usable floor space exceeds 300 m2 and apartments whose usable floor space exceeds 150 m2. In such a case the part exceeding the thresholds is subject to a 23% VAT rate.

**PCC**

If the supply of real estate is VAT exempt, it is subject to civil law transaction tax payable by the buyer. The applicable rate is 2% of the market value of the real estate. This tax is levied on the total value of the building, infrastructure, or parts thereof, and the land / RPU.

### Recoverability of input VAT by the buyer

Input VAT is recoverable if the company performs or intends to perform activities in the future which are subject to VAT (e.g. lease of the commercial real estate). Input VAT will not be recoverable if the company performs or intends to perform activities in the future which are VAT exempt. If this is the case, the input VAT will increase the initial tax basis of the real estate.

If business activities are partly exempt, any input VAT which cannot be matched directly either to VAT-able sales or VAT exempt sales may be recovered according to the proportion of the net value of the taxed supplies to the total value of all supplies (a so called pro rata recovery). During a calendar year, the proportion is calculated based on the volume of supplies made in the previous year. At the year end, the amount of deductions is adjusted to the actual percentage calculated for the whole year. In the case of
real estate subject to depreciation for tax purposes, the percentage of input VAT which may be deducted is subject to adjustments over the period of 10 years.

As of January 1st, 2016 taxpayers also need to take into account so called preliminary pro-rata that limits input VAT recovery on purchases, if linked both with the business of the taxpayer and other activities not related with business operations.

**Declaring input VAT for recovery**

The right to recover input VAT arises in the period when the tax point with respect to the acquired goods or services arose (i.e. in the month in which the services were rendered, or the goods were acquired by the purchaser). It cannot be, however, recovered earlier than in the period in which the taxpayer receives the respective invoice (prepayment invoices do not fall under this rule: they must be paid in order for input VAT to be reclaimable).

**Direct refund of input VAT**

A direct refund of any surplus input VAT should be made within 60 days of the submission of the application for the refund provided that in the period for which the refund is claimed the taxpayer performed VAT-able supply.

This deadline can be shortened to 25 days at a taxpayer's request when a number of conditions are met, such as providing bank payment proofs for invoices, invoices paid in cash amount to less than PLN 15,000 in total.

In the case where VAT-able supplies are not made in the period for which the refund is claimed. The period for the refund is extended to 180 days, unless a form of security is provided (in which case the refund must be made within 60 days).

**Share deal**

A capital gain on the sale of shares is subject to Polish corporate income tax at the standard rate of 19%.

If the selling party is a foreign shareholder, the applicable tax treaty influences the tax implications of such a transaction.

Significant part of Polish tax treaties (e.g. with Spain, France, Denmark, Sweden, Germany, Luxembourg) provide that a sale of shares in a company holding mainly real estate assets should be regarded as a sale of real estate. Consequently, income earned on the sale of shares in the Polish company will be taxed in Poland (the so called real estate clause).

The sale of shares in the Polish company is subject to a 1% civil law transaction tax (on the fair market value of shares) payable by the buyer. This is irrespective of where the transaction takes place or where the parties to the transaction are tax residents. A share transaction is not subject to Polish VAT. However, where a share transaction is treated as being made in the course of business activity (rather
than as a one–off transaction), it may be classified as a VAT exempt financial service. However, it will still be subject to civil law transaction tax.

Costs which must be incurred in order to acquire shares (e.g. purchase price and notary fees) may be recognized as tax deductible costs upon the sale of shares.

Other costs indirectly connected with acquisition of shares such as financing costs may be recognized as tax deductible costs when incurred (in certain cases recognition over time may occur).

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