

TAX NEWSLETTER

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[Warsaw, 19 September 2013, 9 a.m.](#)

INTRODUCTION

Dear Sirs,

in the holiday issue of our tax newsletter we remind you about changes regarding withholding taxation on interest and license fees paid out in Poland, which became effective on 1 July 2013, i.e. about full exemption coming into force, under the statutory conditions.

We also inform you about the new double taxation treaties – with USA and Malaysia. In addition, in this issue we present a selection of most important judgments and the review of tax rulings issued during the last few weeks.

I hope you will find it interesting.

Krystyna Szydłowska

International taxation: The principle of full exemption of interest paid out in Poland from the withholding tax became effective on 1 July 2013

The end of June 2013 marked the end of the 8-year transitional period with respect to the directive on a common system of taxation applicable to interest and royalty payments.

We would like to remind you that for the first 4 years, i.e. in the period from 1 July 2005 to 30 June 2009 there was a right in Poland to apply the tax at source with reference to interest and royalty payments in the amount not exceeding 10%, whereas in the period from 1 July 2009 to 30 June 2013 the rate was fixed at 5%.

Starting from 1 July 2013 the withholding tax will not arise if interest or royalties are paid by the Polish company or Polish establishment of a company with its seat situated in the European Union to a foreign company acting as its recipient.

In order to apply the 0% rate it is required to comply with several conditions resulting from the Corporate Income Tax Act, namely:

- The entity paying out interest/royalties should be a company which is a CIT tax-payer and has a register seat or management in the territory of the Republic of Poland (or a Poland-based permanent establishment a company subject to taxation on its total income in a EU Member State irrespective of the place where it is earned if the payments made by this permanent establishment are classified as tax deductible expenses when determining income subject to taxation in Poland),
- The recipient of income should be an entity subject to corporate income tax on its total income in a EU (EEA) Member State other than Poland irrespective of the place where it is earned and the recipient of these payments should be the very same company (or its permanent establishment if the income earned

as a result of receiving these payments is subject to taxation in the EU Member State in which this permanent establishment is situated),

- There should be appropriate links between the companies (one of them holds 25% shares of the other one) or there is another EU(EEA)–based company holding at least 25% shares of each of the companies, provided that the fact of holding shares is supported by ownership title, and shares have been held for an uninterrupted period of 2 years, however, the exemption of income is also possible if the condition of 2-year uninterrupted period of holding shares is met later).

The exemption will apply if the payer of interest or royalties has the residence certificate confirming the tax residence of the recipient and recipient's statement on non-use of tax exemption on their total income.

International taxation: Ratification of the new Double Tax Treaty (DTT) with the United States

On 21 June 2013 the Polish Parliament passed the Act on Ratification of the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income between Poland and the United States.

The passed Act means that the ratification process in Poland is coming to an end. The final step will be the ratification of the Treaty by the President and publication in the Journal of Laws.

We would like to remind that the new DTT with the United States introduces several important changes including:

- 5% rate of tax at source in case of payment of interest (currently exempted) and 15% rate in case of interest determined with reference to income, profit, sales, increase of the property of the debtor or a person related to the debtor, etc.;

- Reduction of tax rate applicable to royalties payment to 5%;
- Implementation of “beneficial owner” clause for dividends, interest and royalties;
- Implementation of 5% rate of withholding tax with respect to payment of “dividends” on the profit of an establishment, income from real property or gains from the alienation of property situated in the source State;
- Exemption with progression method as a principal method of double taxation avoidance (the credit method will continue to apply to income from dividends, interest, royalties, gains from the alienation of property and other income not covered by DTT);
- Implementation of the real estate clause;
- Extending the scope of the exchange of information clause and harmonising the procedure of mutual communication and equal treatment with the Guidelines of the OECD Model Convention.

International taxation: Signing a new Agreement for Double Taxation Treaty (DTT) with Malaysia

A new Agreement for the Avoidance of Double Taxation and Prevention of Fiscal Evasion with Respect to Taxes on Income (DTT) with Malaysia was signed on 8 July 2013 in Kuala Lumpur. The currently signed DTT should replace the former agreement from 1977.

The main objectives of the signed agreement are as follows:

- determining new rates of the withholding tax:
 - o 10% for interest (at present 15% cannot be exceeded),
 - o 8% for royalties and fees for technical services (currently 15%),
 - o 5% of the gross amount of dividends in case of dividends (currently exempt);

- Recognizing the tax credit method as the basic method for the avoidance of double taxation;
- Adding the clause on exchange of information between the tax authorities of Poland and Malaysia.

Currently the agreement is being subject to ratification in line with the appropriate procedures applicable in both countries and requires the exchange of diplomatic notes. The entry into force of the new DTA is planned for 1 January 2014.

VAT: Insurance of the leased item – general interpretation of the Minister of Finance

Following the judgement of the Court of Justice of the European Union (CJEU) in case C-224/11 BGŻ Leasing Sp. z o.o. concerning the exemption from value added tax of the transaction consisting in providing insurance cover for a property which is the subject of a lease, the Minister of Finance issued a general interpretation on this matter on 26 June 2013 (ref. PT3/033/1/101/AEW/13/63224). The purpose of this interpretation is to explain the consequences of the CJEU judgment for Polish taxpayers.

The issued interpretation implies that the lessors who applied the previously binding rules arising from tax regulations and the Supreme Administrative Court resolution (resolution of 8 November 2010; ref. I FPS 3/10) and issued corrective invoices taxing the service of insurance of the leased item in the same manner as the lease service itself and additionally charging tax to the lessee, at present can issue corrective invoices and settle the correction in the current tax declaration. However, they can only do that on the condition that they reimburse to the lessee this part of fee that corresponds to the amount of the formerly computed VAT.

Moreover, if the lessor issued a corrective invoice by taxing the leased item insurance in the same manner as the lease service and the corrective invoice includes the gross amount (the price remains the same) and thereby the lessor accepts the tax burden relating to the corrected part, the taxpayer can raise a

corrective invoice and settle the correction in the current tax declaration.

The third case raised by the Minister of Finance in the interpretation occurs in the moment, when lessor accepted the tax burden and paid VAT but has not documented this change with a corrective invoice. Then the taxpayer has the right to correct tax and settle the above-mentioned correction in the current declaration or correct the declaration in which the initial calculation was made.

It should be underlined that the Ministry of Finance considered that the operations of lessees will depend on receiving the corrective invoice issued by the lessor. Once it is received the lessee is obliged to correct the deducted input VAT in the current tax declaration.

CIT/Transfer pricing: Estimation of income in a limited partnership

Based on the individual interpretation of the Director of Tax Chamber in Poznań issued on 11 June 2013 (ref. ILPB4/423-93/12/13-S/MC), tax authorities can estimate the income of partners of partnerships if the profit distribution they have decided about differs from the conditions that would have been set out between non-related parties.

The company which lodged the application for tax interpretation concerning the regulation on corporate income tax was a company being a shareholder of a limited liability company, which was supposed to be transformed into a limited partnership. In the new entity the applicant (also a limited liability company) would act as a general partner whereas the applicant's shareholders would become limited partners. Under the partnership foundation deed the general partner, despite greater contribution brought into the partnership, would participate in its profit to a minimum degree as compared to limited partners. Despite the fact that the Commercial Companies' Code provides for free determination of the profit sharing in a limited partnership, in the analysed case, due to the fact that the applicant (a limited liability company) and its shareholders constitute equity-related entities, under

Article 11 of the CIT Act the tax authority can estimate their income with respect to the terms and conditions of contracts concluded between these entities. It stems from the above interpretation that Article 11 applies not only to commercial transactions concerning purchase/sale of goods or services but also covers all economic relationships between related parties (including the conclusion of foundation deed, which establishes a distinct entity and defines rights and obligations of shareholders), in particular those having the impact on the level of taxation of these entities.

PIT/CIT: Highway tolls and parking fees are tax deductible

In line with the Supreme Administrative Court judgment delivered on 7 June 2013 (ref. II FSK 1945/11), the taxpayer keeping the car mileage records has the right to classify the expenses incurred by his employee in connection with the use of private car for business purposes as tax deductible expenses. According to the Supreme Administrative Court judgment all expenses which constitute charges for parking or highway tolls incurred by the employee during his business trip can be classified as tax deductible costs of the employer, however, only to the limit defined in the CIT Act.

A similar jurisprudence was presented in the judgment of 9 November 2010 of the Voivodship Administrative Court in Poznań (ref. I SA/Po 626/10) and the judgment of 5 February 2010 of the Voivodship Administrative Court in Warsaw (ref. III SA/Wa 1502/09).

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