

Tax Newsletter



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In this issue of our monthly Tax Newsletter we would like to attract particular attention of firms which conclude transactions with related entities while these transactions are subject to transfer pricing documentation requirements. In accordance with the announced draft of amendments to the CIT Act for 2011, Obligatory elements of transfer pricing documentation can be supplemented by

a benchmarking analysis. In practice, this amendment might become a heavy burden for taxpayers. We will keep you informed regularly on further developments in the CIT Act.

Enjoy your reading!

Krystyna Szydłowska

EDITORIAL

IN THIS ISSUE

- ➔ A benchmarking analysis might be required for transfer pricing documentation *p. 2*
- ➔ Monetary bonus – new trend in the Ministry of Finance interpretation *p. 2*
- ➔ VAT adjustment does not depend on the contractor *p. 3*
- ➔ The deadline for submission of IFT-2R has expired *p. 4*

A benchmarking analysis might be required for transfer pricing documentation

A benchmarking analysis confirming the arm's length nature of transactions might become soon a necessary element of transfer pricing documentation.

According to the draft of amendments to the CIT Act published by the Ministry of Finance, once these amendments become effective (they are currently being finalized in the ministries) the list of obligatory elements of transfer pricing documentation (specified in article 9a of the CIT Act) will also include the description of method applied for transaction valuation, in particular the reasons for selecting this method and description of its application. Moreover, another obligatory element of tax documentation of transactions with related entities might be an economic analysis showing comparable data based on which the price of the object of the documented transaction is fixed.

Increasing the documentation requirements for taxpayers in the above scope is aimed at making possible and facilitating the verification of arm's length nature of transactions which is significant from the point of view of transfer pricing inspection carried out more and more often by tax authorities.

The confirmation of arm's length nature of transaction through analysis included in the documentation will allow the taxpayer to avoid the obligation of including information on transactions concluded with related entities under non-market conditions in the notes to the financial statements.

The plan to extend the wording of article 9a of the CIT Act does not only agree with the regulations resulting from the amendment of the Accounting Act in 2008 but also tends to adapt Polish regulations to European Union legislation¹ in the area of transfer pricing documentation and is consistent with the tax practice applicable in other countries of Eastern and Central Europe (e.g. in Hungary). On the other hand, the obligatory economic analysis will constitute a significant burden for taxpayers already at the state of preparing documentation (not only for inspection purposes). For many taxpayers, the lack of access to professional data bases might come up as a practical problem with preparing such analysis required as a necessary element of documentation.

Monetary bonus – new trend in the interpretation of the Ministry of Finance

In accordance with the recent interpretations (interpretation of Fiscal Chamber of Warsaw dated 17.02.2010 - IPPP1-443-1276/09-4JB, interpretation of Fiscal Chamber of Bydgoszcz dated 13.01.2010 - ITPP2-443-864/09/AK) a monetary bonus should be classified as a discount because it can be assigned to specific deliveries in a given reporting period.

It has been an issue for a few years now how to classify monetary bonuses paid to the purchaser for reaching a predefined level of purchase in a given reporting period.

General interpretation of the Ministry of Finance of 2004

Interpretation discrepancies started with the general interpretation of the Minister of Finance dated 30 December 2004 (PP3-812-1222/2004/AP/4026), according to which the monetary bonus should be treated, depending on circumstances, as a discount (if it is possible to assign it to a specific delivery) or as remuneration for a service (if the bonus is not related to a specific delivery).

In the first case, the seller should raise an adjustment to invoice to document the discount. In the adjustment to invoice he would decrease the tax basis by the amount of bonus paid to the

¹¹ Resolution of the Council and of the representatives of the governments of the Member States, meeting within the Council, of 27 June 2006 on a code of conduct on transfer pricing documentation for associated enterprises in the European Union

purchaser. However, if the bonus could not be assigned to a specific delivery, according to the Minister of Finance that would mean that there was a provision of service by the purchaser to the seller. The monetary bonus should be then treated as remuneration for a service and documented by VAT invoice issued by the purchaser of goods.

Position of administrative courts

The classification of monetary bonus as remuneration for services was questioned several times by the administrative courts which considered that it led to double VAT taxation which is against the local and European legislation (judgment of the Supreme Administrative Court dated 6.02.2007, I FSK 94/06, judgment of the Voivodeship Administrative Court of Warsaw dated 22.05.2007, III S.A./Wa 4080/06, judgment of the Supreme Administrative Court dated 10.06.2008, I FSK 707/07). Therefore, in line with the court position, the payment of bonus should be neutral in terms of VAT. This position was also adopted for some time by Fiscal Chambers (for example, individual interpretation of the Fiscal Chamber of Warsaw dated 1.07.2009 (IPPP2/443-346/09-2/BM), individual interpretation of the Fiscal Chamber of Bydgoszcz dated 6.07.2009, ITPP2/443-287/09/AD).

New trend in interpretation

According to the recent interpretations (interpretation of Fiscal Chamber of Warsaw dated 17 February 2010 (IPPP1-443-1276/09-4JB), interpretation of Fiscal Chamber of Bydgoszcz dated 13 January 2010 r. (ITPP2-443-864/09/AK) these bonuses are not neutral in the light of VAT regulations. In any case they should be treated as a discount. Chambers which opt for this solution argue that bonuses are usually related to purchases made in a defined reporting period – so it is possible to assign bonuses to specific deliveries done in this period. The above-mentioned interpretations are in line with the recent judgments as to one issue, – i.e. bonus should not be treated as remuneration for service provided by the purchaser to the seller of goods. As a result, input VAT recognized by the purchaser in the invoice documenting the alleged provision of services cannot be deducted by the seller (as per the interpretation of Fiscal Chamber of Bydgoszcz dated 12 January 2010, ITPP1/443-991/09/MS and interpretation of Fiscal Chamber of Warsaw dated 18 December 2009, IPPP1/443-1001/09-2/MP).

Taking into consideration dramatically changing and contradictory interpretations of Fiscal Chambers over the last few years, a question arises whether this position will persist. As long as this is not the case, the surest way seems to be filing the request for individual interpretation which will protect the taxpayer in case of tax inspection.

VAT adjustment does not depend on the contractor

A taxpayer who issues an adjustment to invoice reducing the output VAT is entitled to enter it into records immediately without waiting for confirmation of receipt by the purchaser of goods or services.

Such was the judgment of the Voivodeship Administrative Court of Warsaw (WSA) dated 31 March 2010 (reference number. III SA/Wa2100/00). According to the Court article 29 section 4a of the VAT Act that makes conditional the reduction of output VAT on confirmation of receipt of adjustment to invoice by the contractor is against the EU legislation.

WSA acceded to the reasoning of the taxpayer according to which article 29 section 4a of the VAT Act in some cases deprives entirely the taxpayer of the right to adjustment (e.g. due to liquidation of the contractor). This regulation is against EU legislation and the taxpayer is not obliged to apply it.

This is another WSA judgment favourable to taxpayers concerning the obligation of gathering receipt confirmations for adjustments to invoices in order to reduce the output VAT. In the judgments dated 5 October 2009 (ref. number. III S.A./Wa851/09) and 12 November 2009 (ref. number III SA/Wa1255/09) WSA in Warsaw stated that the obligation of having the confirmation of receipt of the adjustment to invoice is against EU legislation.

Favourable judicial decisions of voivodeship courts are confirmed by the stand of the Supreme Administrative Court (NSA). The judges of NSA have adjudicated several times already that after Poland's accession to the European Union there is an obligation of interpreting the national law in accordance with the wording and intention of the directives and that the regulation which says that the taxpayer can reduce its turnover only after having received the confirmation of receipt of the adjustment to invoice does not comply with the directive on the harmonisation of legislation of Member States concerning turnover taxes – common system of value added tax (judgment of 20 February 2009 ref. no. I FSK 1978/07; judgment of 19 June 2009 ref. no. I FSK 491/08; judgment of 15 July 2009 ref. no. I FSK 1166/08; judgment of 3 December 2009 r. ref. no. I FSK 1672/09).

The deadline for submitting IFT-2R has expired

Until 31 March 2010 payers of Corporate Income Tax whose tax year coincides with the calendar year were obliged to submit the IFT-2R information on payments made and perceived tax for the year 2009.

The obligation of sending the information covers entities which paid to the taxpayers without seat or management in Poland the amounts due relating to:

- interest, copyrights and associated rights, rights to invention projects, trademarks, fees for services provided in the field of show business, entertainment, advisory and accounting services, market research and other sources specified in article 21 section 1 of the CIT Act,
- dividends and other income from profit sharing.

The information on the form IFT/IFT-2R should be sent to the taxpayer not having its seat or management in Poland and to the tax office competent for taxation of foreign entities.

Please note that the obligation of preparing this information arises also when the taxpayer was not obliged to perceive tax under the Act or Convention on Avoidance of Double Taxation.

Payers who do not fulfil the above obligation on time are exposed to tax and criminal liability (penalty of a fine). In order to avoid potential criminal liability, the IFT form must be filed with the competent tax office along with the information on non submission of the information on time (so called "active repentance"). The submission of "active repentance" will prove ineffective if the tax authority is already aware of the non fulfilment of the obligation.

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