

Tax Newsletter



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In May issue of our Tax Newsletter we focus particularly on the planned amendments to the CIT Act which will significantly narrow the scope of the tax exemption of corporate profit sharing. It would be recommended to effect the planned transformations before 1 January 2011. We also present major amendments to the Act on Civil Law Transactions effective as of 22 April 2010. We would like to remind the

companies which are under obligation to create Employee Benefit Fund that the deadline for transferring the first tranche of funds to the account of the Fund expires on 31 May.

Enjoy your reading!

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EDITORIAL

IN THIS ISSUE

- ➔ **Amendments to the Act on the Tax on Civil Law Transactions** p. 2
- ➔ **Business trips – draft of a new regulation** p. 3
- ➔ **31 May is the deadline for transferring the first tranche to the Employee Benefit Fund** p. 3
- ➔ **VAT – the adjustment after price increase is recognized in the current reporting period** p. 3
- ➔ **PIT – managers not entitled to flat tax rate** p. 4
- ➔ **Exemption from article 22 section 4 of the CIT Act – planned changes** p. 4
- ➔ **Tax authorities' position on free-of-charge guarantees and sureties** p. 5

Amendments to the Act on the Tax on Civil Law Transactions

On 22 April 2010 the Act of 22 January 2010 amending the Act on the Tax on Civil Law Transactions (Journal of Laws No. 44, item 251) came into force. Below you will find the description of major changes.

Making a contribution is always subject to tax on civil law transactions (pcc)

In the legal framework applicable before coming into force of the amendment, the articles of incorporation or its modification, in the event when one of the parties was a VAT payer, were eligible for exemption from the tax on civil law transactions. According to the amendment of article 2 item 4 the articles of incorporation or its modification will be in principle subject to pcc regardless of their treatment under the VAT Act. The aim of the amendment was to eliminate controversy concerning pcc taxation of the contribution when this activity was subject to VAT. Further to the amendment of the Act of 22 January 2010, the articles of incorporation and its modification will be subject to pcc regardless of VAT levy, exemption or exclusion. The amended regulations will therefore give rise to charging both VAT and tax on civil law transactions on non cash contributions to the company, except for *qualified (restructuring) contribution*.

Exemption of qualified contribution from tax on civil law transactions

In line with the amendment, the scope of exemption applicable to formation of a company (a limited-liability company, a joint-stock company) or its modification as a result of making a qualified (restructuring) contribution was extended. Following the amendment to the Act, articles of incorporation and its modifications related to making the contribution in the form of enterprise or organized part of the enterprise against shares will not be subject to tax on civil law transactions. Until now, this exemption was applicable when a branch of a company was brought in as contribution to another company. The above amendment extending the scope of exemption of restructuring contribution from tax on civil law transactions should be viewed as a positive one because in line with the current regulations, in order to apply the exclusion from pcc, tax authorities required the subject of contribution such as enterprise or organized part of enterprise to be a registered branch of a company.

Taxation basis upon sale: only market value

New regulations on tax on civil law transaction harmonize principles of establishing taxation basis for sale agreements. It is defined as market value of things or property rights to which pertains the agreement – whether this transaction is entered into by residents or non residents. When harmonizing the taxation basis for sale agreements the legislator cancelled regulations that were practically dead letter which defined the taxation basis for sale agreement concluded by non residents where the taxation basis corresponded to PLN equivalent of the amount defined in the exchange permit. This change should be considered as a positive one because it helps adjust the law to the reality of ever-changing economic and legal environment while in the current legal framework agreements concluded by non residents do not require any exchange permit.

Extending the scope of exemption of the sale of financial instruments from pcc

The amendment introduces a major change as to the scope of tax exemption relating to the sale of financial instruments. In line with the regulation to date, the sale of financial instruments was exempted from pcc provided that it was made as part of organized trade, i.e. where the buyer or intermediary is an investment firm running brokerage activities in Poland. The amendment explicitly says that the rights of investment firms also refer to foreign investment firms. It was also added that the sale of financial instruments made by an investment firm or a foreign investment firm is exempted from pcc also when it is made outside the organized trade – it is to be emphasised that the exemption applies only to these cases when the investment firm or foreign investment firm sells financial instruments which were previously purchased within the organized trade.

Business trips – draft of a new regulation

The Ministry of Labour and Social Policy prepared a draft of regulation on the amount and criteria for determining the amounts due to employees employed in the national or local self-government units on account of business trip on the national territory or abroad.

The new regulation will replace two current regulations on national and international business trips. Changes in the draft concerning local business trips are as follows: travel daily allowance was increased from PLN 23 to PLN 30, and the manner of decreasing the allowance due in the case when free meals are provided to the employee was defined. As far as trips abroad are concerned, daily allowances and accommodations limits set out in the draft of regulation were increased for most of the countries, and the currency was changed (from USD to EUR) in several countries.

31 May is the deadline for transferring the first tranche to the Employee Benefit Fund

Although the allowances made for a given calendar year are to be transferred to the account of the Fund until 30 September, the first tranche is required to be transferred by the employer managing the Employee Benefit Fund to the specially designed account by 31 May.

The amount of the first tranche is equal to at least 75% of the value of basic allowances. The amount of basic allowance is defined based on the average monthly salary in the national economy in the previous year or in the second half of the year if this was higher (as a result, the basis for calculating the allowance in 2010 is the average monthly salary in the second half of 2009 or PLN 2,794.25).

The deadlines for transferring funds to the Employee Benefit Fund as defined above are applicable to employers who are obliged to create the Employee Benefit Fund (public finance units regardless of the number of employees, or employers who hire as at 1 January at least 20 full-time employees).

The above deadlines do not apply to employers who hire as at 1 January less than 20 full-time employees but who decided to create the Employee Benefit Fund.

VAT – the adjustment after price increase is recognized in the current reporting period

The valid regulations of the VAT Act do not indicate explicitly the moment when the adjustment increasing VAT should be made in the event of issuing the adjustment invoice after price increase. It raises a doubt whether the adjustment to the invoice, if the reason for price increase occurred after issuing the initial invoice, should be recognized in the period when the initial invoice was recorded or in the current period.

Voivodeship Administrative Court in Warsaw in the judgment of 13 January 2010 (III SA/Wa 1634/09) ruled that if the reason for price increase occurred after the issue of invoice, the adjustment to invoice should be recognized in the current reporting period.

The matter concerned the company which applied for individual interpretation in order to decide when the adjustment invoices issued as a result of price increase should be settled. The Company adopted the position that if the circumstances affecting the price occur after the conclusion of contract, or as it may often happen, after the completion of a service and payment of the fee and do not depend on the company, and they are not known upon issuing of the invoice, the invoice adjusting the price should be settled in the current reporting period. According to the Company, the adjustment invoice should be settled upon issuing of the initial invoice only when the need for price

increase existed already at the moment of issuing the initial invoice. The Company's position was not accepted by the Director of Tax Office who considered that the adjustment invoice should be settled in the same period when the initial invoice was issued because the change of price is based on the contract concluded by the parties and hence the parties have an indirect impact on the change of price.

Voivodeship Administrative Court in Warsaw did not agree with the opinion of the Director and decided that in the situation presented by the company the adjustment invoice should be settled in the current period because the tax payer should not suffer negative tax consequences of the events that he was unable to predict upon issuing the initial invoice.

PIT – managers not entitled to flat tax rate

Four days before the submission of annual tax returns for 2009 the Supreme Administrative Court ruled that managers – partners of commercial partnerships earning revenues within this partnership under management contract are not entitled to 19% flat rate.

Judges considered that managers earning revenues from management services derive revenues from activity carried out in person even if they are earned as part of a registered economic activity. Therefore, they are subject to taxation bracket, at the rate of 18 or 32 %.

As the effect of the judgment to be observed in cases settled by all voivodeship administrative courts, there is no possibility to include the actual deductible costs in the settlement of revenues, because costs applicable to managers are the same as those applicable to employees working full-time (on average PLN 1,335).

The judgment discussed above has also specific consequences for entities purchasing services from a company providing management services which acts as a payer in this situation and has to perceive from the manager the advance for tax after having considered social charges. Therefore, one can expect more thorough tax inspections with respect to managers, despite the fact that tax authorities in their interpretations issued in 2007 admitted the solutions which are now questionable. Only those tax payers who have such interpretations might be relieved from negative effects of the judgement of the Supreme Administrative Court. The others might be obliged to file the adjustment of tax returns for the last 5 years and pay additional tax with due interest for delay; for managers employed with the companies listed on Warsaw Stock Exchange whose average salary amounts to PLN 420 thousand this might go up to PLN 43 thousand per month on average.

Exemption from article 22 section 4 of the CIT Act may apply only to dividend – changes to be introduced in the CIT Act

The Ministry of Finance published the outline of amendments to the CIT Act for 2010

As part of implementation of the European Directive 90/453/EEC, Article 22 section 4 of the CIT Act is to be amended; this article in its current wording provides for tax exemption of the revenue from dividends and other revenues from corporate profit sharing once the predefined conditions are fulfilled. The exemption applies currently to – apart from dividends – revenues generated as a result of division of companies, value of property resulting from liquidation of a business, additional payments and payments in cash, revenue generated from redemption of shares, revenue from the sale of shares to the company against remuneration with a view to redeeming these shares.

The planned changes significantly narrow the scope of exemption. If the draft prepared by the Ministry becomes effective, the exemption will cover only revenues from distribution of dividends, undistributed profits brought forward or amounts transferred from supplementary and reserve capitals to be distributed. On the other hand, the revenue from liquidation of a company,

redemption of shares or additional payments in cash paid out to shareholders of companies under acquisition, merger or division will be subject to taxation with no exception.
In the light of this unfavourable change, entrepreneurs who plan a transformation of companies are recommended to consider the transformation before 1 January 2011.

Tax authorities' position on free-of-charge guarantees and sureties favourable to taxpayers in the light of Supreme Administrative Court judgments

Speaking of the topic of obtaining free-of-charge guarantees and sureties from related entities discussed already in the March issue of Mazars Tax Newsletter, we would like to draw your attention to the interpretation of the Fiscal Chamber of Katowice of 1 March 2010 (IBPBI/2/ 423-1489/09/PC), where the tax authority accepted the position of the taxpayer that the free-of-charge guarantee or surety do not constitute a revenue from a free-of-charge service.

According to the company, obtaining joint guaranty or surety from a parent entity for releasing a bank credit to develop sales network or invest in means of production for which no remuneration was provided cannot be treated as a free-of-charge service (in the sense of art. 12 section 1 item 2 of the CIT Act) because there is no increment of property (relating to costs or another equivalent) with real financial dimension.

The above interpretation conforms to the position adopted consistently by tax authorities saying that taxable revenue of the entity obtaining guarantees free of charge might arise only if the services resulting from the contract are carried out and the beneficiary receives related financial benefits at the expense of the guarantor.

Despite the fact that the opinion of tax authorities was also confirmed by numerous judgments of voivodeship administrative courts, in the light of uniform judicial decisions of the Supreme Administrative Court supported by the recent judgments of 8 December 2009 (II FSK 1156/08) and of 26 January 2010 (II FSK 1417/08) a change in the very flexible – until now - approach of tax authorities could be expected. According to the Supreme Administrative Court granting a guarantee under normal market conditions is a paid service and the amount saved that the company would normally pay to a non-related entity for such financial services has to be considered as taxable income of the company.

As a result, the persisting divergence of opinions makes that the qualification of free-of-charge guarantees or sureties as non constituting free-of-charge service by tax payers, without individual interpretation concerning a given company, might be questioned, in particular in the light of valid decisions of the Supreme Administrative Court.

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