

Tax Newsletter



NEWSLETTER | Issue # 4 - June 2010

Dear Sirs,

We are pleased to present our next Tax Newsletter in which we discuss recent amendments and most interesting judgments delivered recently by the courts.

We would like to draw your attention to the widely commented upon resolution of the Supreme Administrative Court according to which medical benefits packages often used by employees should be subject to PIT.

To those of you who conclude transactions with related entities we recommend that you get acquainted with the recent judgment of the Supreme Administrative Court which interprets the way of identifying transactions subject to documentation requirements.

Enjoy your reading!

Krystyna Szydłowska

EDITORIAL

IN THIS ISSUE

- ➔ **Transfer pricing - Obligation to prepare tax documentation for re-invoicing and contracts concerning many services** p. 2
- ➔ **Firms to perceive PIT on medical benefits packages** p. 3
- ➔ **Value of advertising gadgets without PIT-8C increased from PLN 100 to 200.** p. 3
- ➔ **Rental income – Notification about rental starting during the year** p. 4
- ➔ **Company distributing a non-monetary dividend does not have to disclose taxable income** p. 4
- ➔ **Invoice can be sent by e-mail or by fax** p. 4
- ➔ **Another unfavourable judgment concerning expenses for the issue of shares** p. 5
- ➔ **A new type of complaint in the administrative court proceedings – petition for statement of unlawfulness of a valid judgment** p. 5

Transfer pricing – Obligation to prepare tax documentation for re-invoicing and contracts concerning many services

Doubts concerning the application of limits defined in art. 9a

In the opinion of the Voivodeship Administrative Court in Warsaw expressed in two judgments of 17 May 2010 (reference III SA/Wa 2132/09, 2133/09), article 9a section 2 of the CIT Act (CIT Act) setting limits above which the documentation of transaction with related parties is required is ambiguous. Therefore, taxpayer's doubts expressed in the motion for individual interpretation regarding cooperation agreement with the shareholder in the area of administration, HR services, financial advisory and marketing services seem well-founded. The agreement covers also accounting services, IT system management and additional marketing and telecommunications services purchased by the shareholder for subsidiaries of third parties.

The remuneration for each of services actually provided was determined separately based on the calculation mechanism including specific parameters/indicators of a given service (e.g. the number of employees in the event of HR services). On the other hand, re-invoicing of costs of purchase of external services is based on actual costs of service for a given company without adding margin. When applying such calculations, the company – shareholder in fact only transfers costs of external services (at the purchase price) without providing any service for subsidiaries.

Documentation limits with respect to total value of services

According to the taxpayer's opinion confirmed by tax authorities, due to the fact that each of services provided under the cooperation agreement constitutes a separate service for which a separate price was established, the limit of EUR 30 thousand indicating the obligation of preparing documentation must be considered for each of the above services separately. In the opinion of Fiscal Chamber and the Court, in line with article 9a of the CIT Act, the obligation of preparing tax documentation applies to transactions whose total amount (or its equivalent) resulting from the agreement or the total amounts due actually paid in a given fiscal year exceeds the defined limits. The above means that the documentation obligation is triggered by the value of transaction or a group of transactions concluded with related entity if the predefined levels are exceeded in a given fiscal year (in this case EUR 30 thousand). In the event that the agreement conditions the price level on future factors (included in the calculation mechanism), unknown on the date of concluding the agreement, the total amounts due to a given contractor prove to be a quite significant factor.

The above-mentioned interpretation of regulations made by tax authorities is backed by teleological interpretation because a separate treatment of each of the services of a similar nature, i.e. services supporting the activity of subsidiaries in the discussed areas could lead to evasion of regulations on the obligation of documenting transactions with related parties through separation of petty services and determination of a different remuneration for each of services.

Re-invoicing of services subject to documentation obligation

In the discussed matter tax authorities disagreed with taxpayer's position that in the event of re-invoicing of external services without margin it cannot be considered that this activity represents a transaction in the sense of article 9a subject to documentation obligation, because the company acts only as intermediary between the service provider and the actual purchaser – user. In the opinion of Fiscal Chamber confirmed by the Court, re-invoicing should be treated as resale of previously purchased services at cost, which would be equivalent to provision of a previously purchased service. In the light of the above interpretation, there is a transaction between shareholders and subsidiaries, and therefore the parties to this transaction are obliged to prepare tax documentation relating to re-invoiced services.

Cooperation agreements of a similar nature, particularly in terms of the scope of services and price calculation mechanism are a widespread solution applied by related entities in the business practice and therefore, in the light of recent judgments a large group of entities should undergo

revision in terms of documentation obligation with respect to this type of agreements and derived benefits.

Firms to perceive PIT on medical benefits packages

Pursuant to the resolution of the Supreme Administrative Court of 24 May (ref. II FPS 1/10) firms are obliged to perceive Personal Income Tax on medical benefits packages from their employees.

The Court underlined that an employee who is offered a medical benefits package by the company gains real benefits which represent a tax gain. The Court did not agree with argumentation that employees can be covered by the package against their will because they can always renounce such benefit.

We would like to draw your attention to the fact that tax offices started to collect data about medical benefits packages purchased by employers for their employees. Tax offices asked Warsaw medical centres to draw up lists of legal entities that purchased medical benefits packages for their employees by the end of June. The list should comprise not only the name of the company but also the address of its registered office, date of contract, amount of monthly fees and the list of natural persons covered by the contract.

Value of advertising gadgets without PIT-8C increased from PLN 100 to 200

On 20 May the amendment to the PIT Act became effective. Further to this amendment those entrepreneurs who distribute advertising gadgets as part of its promoting and marketing actions will not be obliged to deliver PIT-8C for persons who receive these gadgets unless the gadget value exceeds PLN 200.

At present the limit of PLN 100 is compulsory and if the value of the benefit exceeds this limit, firms are obliged to prepare PIT-8C information. The increase of limit will surely facilitate the economic activity and will at least partly dispense entrepreneurs (for gadgets up to PLN 200) from the disclosure obligation which significantly limits promotion and advertising actions.

Rental income – Notification about rental starting during the year

The amendment to the PIT Act which came into force on 20 May introduced some beneficial changes for persons who start to derive income from rental (e.g. of an apartment) in the course of fiscal year.

Until now, in order to be subject to flat tax on income registered according to a beneficial rate of 8.5% introduced at the beginning of the year regardless of the volume of income, taxpayers have had to submit a declaration on the choice of this option not later than one day before receiving related income. Taxpayers who often did not know about the obligation would inform the tax office too late and would lose the right to apply the flat rate. At present, in accordance with the amendment they will be able to notify the tax office about the choice of the flat rate taxation also after the signature of lease agreement and receipt of money until the date of obligation to pay the first flat rate tax on the rent obtained (i.e. until 20 day of the next month).

Company distributing a non-monetary dividend does not have to disclose taxable income

Such was the judgment of the Voivodeship Administrative Court in Warsaw (WSA) of 29 April 2010 (III SA/Wa 374/10).

The case concerned the motion for interpretation of tax regulations. The Company asked the Minister of Finance whether a dividend given to a shareholder in the form of right to trademark constitutes an income of the company in the sense of art. 12 section 1 of the PIT Act. The Company believes that providing a dividend in a non-monetary form does not give rise to a taxable income for the company. Commercial Companies' Code provides for the payment of dividend both in the monetary and non-monetary form. Warsaw Fiscal Chamber did not agree with the company's position and the case was brought to court. WSA judged that the company which pays a dividend does not obtain an increment of property. According to WSA it is not founded that the dividend in monetary form has other effects than non-monetary dividend. The settlement was not unanimous so the controversy over this case might continue.

Invoice can be sent by e-mail or by fax

An invoice sent by e-mail or by fax is just as valid as the invoice sent in paper version. Such was judgment of the Supreme Administrative Court (NSA) of 20 May 2010 (II FSK1444/09).

The judgment was a breakthrough because until now the courts rejected the possibility to send VAT invoices without electronic signature. NSA considered that a taxpayer can issue invoices using software and send them by e-mail under PDF format, but they must be stored in the addressee's place in the form of printout. The addressee of an invoice sent by e-mail or by fax will be entitled to deduct VAT from such invoice, provided that this invoice is printed and the e-mail is preserved in the archives.

Another unfavourable judgment concerning expenses for the issue of shares

The Supreme Administrative Court stated in its judgment of 14 April 2010 (II FSK 1990/08), that the expenses borne for admission to trading on Stock Exchange are connected to the share capital and not to income, so they cannot be considered as tax deductible costs.

NSA disagreed with the first instance judgment of the Voivodeship Administrative Court in Warsaw which considered that expenses connected to the preparation of issue prospectus, legal and financial consulting, services provided by the brokerage house and other costs and fees related to the admission to Stock Exchange do not correspond to revenues obtained for the increase of share capital. According to WSA these expenses meet the criteria for recognition as tax deductible costs and are not excluded by the legislator from the catalogue of tax deductible costs so the company has the right to recognize them as tax deductible. NSA reversed the judgment in its entirety and stated that because the cash obtained for setting up or increasing share capital does not constitute tax revenue, expenses connected to the increase of share capital cannot be recognized as tax deductible costs.

The judgment of NSA is another judgment refusing taxpayers the right to recognize share issue costs as tax deductible costs. This position is widely criticized by tax law specialists. The only institution which consequently takes another stand on this issue is the Voivodeship Administrative Court in Wrocław which considers that the aim of share issue is to raise additional funds and hence increase the competitive edge on the market. So the expenses are oriented towards the increase of income which will be potentially earned as a result of expansion of activity using funds from the share capital.

A new type of complaint in the administrative court proceedings – petition for statement of unlawfulness of a valid judgment

On 10 April 2010 new regulations of the Act on proceedings before administrative courts (article 285 a – 285 l) came into force introducing a new type of complaint: petition for statement of unlawfulness of a valid judgment.

This petition can be lodged against valid judgments of Voivodeship Administrative Courts (hereinafter: WSA) and judgments of the Supreme Administrative Court (hereinafter: NSA), however, in the second case the petition can be lodged only if the unlawfulness of the NSA judgment results from flagrant violation of the legal norms of the European Union.

The new type of petition can be particularly appealing to entrepreneurs who unduly paid tax or customs liabilities following unfavourable valid administrative judgments. Stating of unlawfulness of a valid judgment by NSA pave the way to repair damage caused by such judgment through civil action. The basis for indemnification is the claim based on article 417¹ § 2 of the Civil Code.

Substantiation of damage

A petition for statement of unlawfulness can be lodged against a valid judgment of WSA if the party suffered damage because of this judgment. In the petition the party must provide evidence substantiating the damage and define its form and time and the causal connection with the unlawful judgment. However, the petition cannot be lodged if the damage has not yet arisen.

Exhausting all legal remedies

In principle, the petition can be lodged by a party who had exhausted all legal remedies to challenge the judgment. This results from the fact that this petition is an extraordinary measure of appeal and is possible only if the change or reversal of the challenged judgment has not been or is not feasible by other measures. The petition is not admissible if the party knowingly renounced a cassation or if the party could not apply this measure through its own fault. Exceptionally, despite not having exhausted all legal remedies, the party can lodge a petition for statement of unlawfulness of a valid judgment if this unlawfulness results from the violation of elementary principles of law order or constitutional liberties or human rights or citizen rights.

Unlawfulness

The petition should also indicate the specific regulation which the valid judgment does not comply with. It can be both the violation of substantive law or procedural law which caused the unlawfulness of the judgment. For example, such violation can include **apparent errors of the court** or **flagrant violation of law interpretation principles**. It is not sufficient to state that the judgment is unlawful if the court chooses one of possible law interpretations in the event of a regulation which can be construed in several ways and each of them can be supported by valid arguments. The judgment cannot be declared as unlawful only because the leading interpretation line after giving this judgment has evolved.

Deadline for petition

The petition for statement of unlawfulness of a valid judgment can be lodged to court which delivered the challenged judgment within 2 years after the judgment became valid. This rule applies to judgments which became valid after the effective date of new regulations i.e. 10 April 2010. The legislator also set out a specific rule concerning judgments which became valid in the period from 1 January 2004 to 1 April 2010. In the case of such judgments the petition can be lodged within 2 years after the effective date of the amended act, i.e. until 10 April 2012.

Formal requirements

The petition for statement of unlawfulness of the valid judgment is subject to a fixed charge which amounts currently to PLN 500. Similarly to cassation, this petition is subject to compulsory barrister's acting – it can be prepared by a barrister, legal adviser or tax adviser – in the cases concerning tax obligations.

Please be informed that this newsletter is of general character and cannot replace specific consulting in individual cases.

Subscribe to Tax Newsletter

Tax Newsletter is a free-of-charge monthly newsletter concerning tax issues.

In order to subscribe, please send an e-mail to: podatki@mazars.pl with the following data:

First name and surname

Position

Name of the company.

If you do not want to receive the newsletter in the future, please send an e-mail with "NO" in the subject heading at: podatki@mazars.pl

Contact:



Krystyna Szydłowska
Director
k.szydłowska@mazars.pl



Urszula Zarębska
Manager
u.zarebska@mazars.pl

Tax Advisory Department
Mazars
Ul. Piękna 18
00-549 Warszawa
Ph.: +48 22 25 55 200
E-mail : podatki@mazars.pl
www.mazars.pl