

## Tax Newsletter



NEWSLETTER | Issue # 5 - July 2010

Dear Sirs,

We are pleased to present you the July issue of our Tax Newsletter where we focus on amendments to Fiscal Control Act which became effective on 1 July 2010.

The amendments are aimed at protecting taxpayers against negative effects of prolonged control procedures carried out based on the Fiscal Control Act (penalty interest accrual).

Moreover, the Regulation of the Minister of Finance to the Act on Customs Service concerning the control of some excise goods entered into force on 4 June 2010.

You will also find a thorough discussion of the amendments and most interesting judicial decisions and interpretations recently published which were selected by the Tax Advisory Department experts

Enjoy your reading!

*Krystyna Szydłowska*

EDITORIAL

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## Amendments to the Fiscal Control Act

*The Act of 5 March 2010 amending the Fiscal Control Act (Journal of Laws No. 76, item 492) became effective on 1 July 2010. The amendments are favourable to taxpayers and concern the rules of calculating penalty interest.*

In line with the amended Act on Fiscal Control taxpayers who do not receive a decision of the fiscal control office within 6 months of the institution of control proceedings will not pay penalty interest for that period. The above rule will not be applicable if the delay was caused by the controlled entity or the delay in giving the decision was caused by reasons independent of the controlling authority. The aim of this amendment is to equalize the situation of taxpayers subject to control by tax offices and fiscal control offices. Until now interest was not calculated only in the event of prolonged tax proceedings of the tax office (in accordance with art. 54 § 1 item 7 of Tax Ordinance, penalty interest is not calculated in the event when the decision of the first instance was not delivered within 3 months of the date of institution of proceedings).

## Amendments to regulations concerning the control of entrepreneurs subject to excise duty

*The regulation of the Minister of Finance of 7 May 2010 on the control of some excise goods (Journal of Laws of 2010, no. 86, item 555) entered into force on 4 June 2010, thus replacing the regulation of the Minister of Finance of 7 April 2004 on the exercise of special fiscal supervision in the part relating to excise goods.*

Major changes concern the control of excise goods' trade. Until now the control consisted mainly in exercising a special fiscal supervision over entrepreneurs on a permanent basis. Currently the customs services will carry out ad hoc controls depending on the fraud risk analysis in the given entity. The permanent supervision consisting in the continued presence of the officer in the entity will be applicable only to entities producing, distilling or dehydrating ethyl alcohol and producing spirits. The competent Head of the Customs Office might extend the permanent supervision also to other entities. In the event of imposing permanent supervision, the Head of the Customs Office must notify the entity 7 days before establishing such form of control. Other entities which are not covered by the permanent supervision will be obliged to send the relevant information to customs offices and register the production activities in the relevant registers.

The regulations regarding the documentation recording works related to the activity subject to control will also change, however entities running activity subject to control before 21 May 2010 are allowed to keep documentation in line with the template defined in the previous regulation until 31 December 2010.

## Complex services – VAT taxation

*In practice it sometimes happens that several activities subject to different VAT rates are interconnected. Therefore, the issue arising is how to classify such services and which VAT rate should be applied.*

The first step to ensure correct classification for VAT purposes is to define whether the taxpayer provides several services for the client or whether it is one comprehensive service (complex). It is considered that there is one service if the activities are so closely interrelated that in economic terms they form one service and its division into particular services would be artificial.

The next step is to define which service making part of the complex service is the primary service and which can be classified as auxiliary service. In order to determine the correct rate for the

complex service, a unified rate for the whole complex of activities should be adopted taking into account the character of the primary activity.

Defining which service is the primary one practically raises many doubts. This issue is addressed in the recent resolution of the Voivodeship Administrative Court of Cracow (I SA/Kr 1657/09) and Voivodeship Administrative Court of Poznań (I SA/Po 106/09), which follow the jurisdiction line presented in the judgment of the Supreme Administrative Court (I FSK 545/08). The courts draw attention to the fact that the most important element in classifying complex services is the **economic purpose of transaction**. The decisive criterion for assessment which of the services making part of the complex service is the primary one is not the value of this service or the name of contract but the **analysis showing which activity satisfied the basic need of the purchaser of a given complex service**. Auxiliary services are meant to help satisfy this need.

## Increase of share capital as a result of debt conversion is taken into account for the purpose of thin capitalization

*The share capital which was increased following the contribution of outstanding trade liabilities should be taken into account while determining the value of share capital for the purpose of thin capitalization.*

The method of determining the capital necessary to calculate the shareholders' loan (credit) interest ratio not recognized (based on art. 16 section 1 items 60 and 61 of the CIT Act) as tax deductible costs is set out in art. 16 section 7 of the CIT Act.

Pursuant to the above regulation the clause excluding from the capital the part which was not actually paid raises doubts. This regulation excludes also from the share capital the following components:

- part which was covered by liabilities relating to loans (credits) from shareholders and interest on these loans, and
- part which was covered by intangible assets on which depreciation allowances are not made (e.g. goodwill arising as a result of contribution of enterprise).

As to liabilities, the exclusion applies only to liabilities relating to loans or interest.

Thus, there are no reasons for exclusion of trade liabilities brought by contribution from the calculation basis of the share capital to determine the ratio for purposes of thin capitalization. Such position was also confirmed by the Fiscal Chamber of Poznań in the individual interpretation of 2 April 2010 (ILPB3/423-86/10-3/EK).

Data entered in the commercial register serve to determine the value of share capital for thin capitalization. When registering the increase of capital made by contributions, management board members are obliged to certify that the contributions were paid in full. Therefore, the requirement of actual transfer to capital applies in practice mainly to joint-stock companies whose capital might be not paid in full for a certain period of time.

## Taxation of medical benefits packages

*The resolution of the Supreme Administrative Court (NSA) of 24 May 2010 (ref. II FPS 1/10), discussed in the last issue of our newsletter, concerning the taxation of medical benefits packages might have far-reaching consequences for tax inspections and change in the way of proceeding of firms with respect to medical benefits packages.*

These inspections might be expected quite soon because one of tax authorities has asked the biggest medical services provider in Warsaw to present data of clients having purchased medical benefits packages for their employees. It is to be expected that a large part of these inspections

might end in court. This is caused by the lack of indications in the resolution of the Supreme Administrative Court as to the method of recognition of taxable income. So it can be expected that the inspectors will not be able to give the right decision determining the amount of taxable income of each employee.

Another practical effect of the Supreme Administrative Court resolution will be the modification of contracts signed with medical services providers so that the value of income for the employee is clearly visible. This will be in the best interest of firms that are trying to implement safe regulations in this respect. The economic burden of taxation of medical packages will be borne by the employee from the remuneration of whom is perceived the tax due.

## Taxation of insurance policies for management board members and supervisory board members

*The above-mentioned resolution of NSA of 24 May 2010 (ref. II FPS 1/10) might also have negative consequences for taxation of other employee benefits e.g. insurance policies for management and supervisory board members.*

In our opinion, tax authorities can invoke the resolution not only for inspections concerning [medical] packages but also insurance taken out for management and supervisory board members.

However, these benefits bring a big practical problem with determining taxable income. It is not enough to divide the value of insurance premium by the number of people being members of the bodies eligible for insurance but another element to be taken into account is that the scope of responsibility of management board members differ from the responsibility of supervisory board members, which makes it impossible to determine correctly the taxable income. In the dispute with tax authority taxpayers may support their argument by the judgment of Voivodeship Administrative Court of Warsaw of 27 April 2010 (III SA/Wa 2039/09), where the Court confirmed that if the insurance policy of the management and supervisory board member does not specify the actual persons, the taxable income does not arise. However, it is to be noted that similar arguments were invoked also in the dispute as to the medical benefits packages settled by taxpayers' unfavourable resolution of seven judges of the Supreme Administrative Court.

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

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