

Tax Newsletter



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Dear Sirs,

In the latest edition of our monthly Tax Newsletter we inform you about the amendment to the Polish excise duty act. New regulations will come into force on 1 January 2011.

We also draw attention of the companies which consider to acquire capital by stock exchange listing to the fact that there is a possibility of a change in the unfavourable case-law of the administrative courts which question the treatment of the stock exchange listing expenses as costs which don't constitute a tax deductible cost. It is to be definitively judged by the Supreme Administrative Court in the extended panel of seven judges.

Also the approach of the tax bodies to the issue of taxation of various types of fringe benefits becomes strained. It is surely the consequence of the unfavourable resolution of the Supreme Administrative Court in the issue of taxation of medical packages. In one of the recently published interpretations the bodies took a position in the scope of taxation of participation in orientation parties. You will find the details in further part of the text.

I encourage you to read the newsletter.

Krystyna Szydłowska

EDITORIAL

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Amendment to the Polish excise duty act

On 1 September 2010 an extensive amendment to the excise duty act came into force. A decided majority of the provisions are already binding from 1 September of the current year.

Importantly, there is an exception constituted by provisions governing the excise movement with application of the procedure of excise suspension – new regulations (so called e-AD) will be applicable from 1 January 2011 and in the case of movements under the procedure of excise suspension performed exclusively on the territory of Poland application of these regulations will be optional in 2011 and obligatory from 1 January 2012.

In our opinion, the most important changes relate to the following issues:

1. electronic excise movement and control system (EMCS)
2. new institution of a registered sender
3. new rules of profiting from outside fiscal warehouses
4. new rules of submitting declarations when purchasing fuel oils
5. new excise exemptions

Electronic excise movement system

The amendment to the Polish excise duty act relates above all to the implementation of the Excise Movement and Control System (EMCS). The paper documents, which hitherto had to accompany the excise movement in the excise suspension procedure, shall be eliminated. From January 2011 the electronic system should be applied for intra-EU movement. Therefore, there is little time left to adapt the IT systems to the electronic conduct. Implementation of the new system entailed also a necessity to define new notions for the purposes of excise (e.g. registered receiver – instead of the previous registered / non registered tradesman).

New institution of a registered sender

From 1 September 2010 the rules of excise import from outside EU change in a significant way. This change will be the most important for excise importers (e.g. LP gas). A completely new institution of a “registered sender” will be introduced. He will constitute the entity taking care of the products on the border of European Union and then sending these products without paying the excise to the fiscal warehouses in Poland or in other countries of the European Union.

Former rules of importing to Poland might be applicable until the end of 2010, therefore the entities importing for example from the East should already now make the decision concerning the way they will conduct their activity after this date.

There are several possibilities. Firstly, an importer can get the status of a “registered sender” by himself. Obtaining a special authorization in this scope will be necessary. In this situation an excise commodity will be moved from the border to the fiscal warehouse on behalf of the importer. This option is the most legitimate in the case of entities having at present their own fiscal warehouse to which they supply the gas from abroad.

Alternatively, “registered service senders” may appear (e.g. customs agency) and take care of shipping the excise commodities from the border to the fiscal warehouses in the country of destination through service. The importers will be able to use services of such entities instead of getting the status of registered sender by themselves. It may also concern the situations in which the importer does not have a fiscal warehouse himself and at present he profits from the outside services, most often of the border fiscal warehouses where the imported products are introduced.

Then, the present “service fiscal warehouse” will become a “service registered sender”. In that manner an importer will not have to get the permission for an activity of this type by himself.

Storage of products in outside fiscal warehouses

The amendment changes the situation of entities which store their products in outside fiscal warehouses. Usually such entities take the products out of outside fiscal warehouses with the excise paid and pay the excise 25 days after releasing the products from a fiscal warehouse. Such operation pattern is frequent in the oil and gas industry. The legislator, in order to protect the State Treasury's interests, imposed on the entities releasing the products from the outside warehouses with the paid excise the obligation of submitting an additional excise security for the 25 days from releasing the products to the payment of excise. New regulation entails the fact that every entity taking the products out of the outside warehouses with the excise paid, have to get the special authorization in 3 months time. The service fiscal warehouse keepers should check if all their customers got such security.

Declaration of fuel oils sale destination

From 1 September the declarations that the sellers of fuel oils will have to collect from their contractors will have to contain more customer's data, mainly as far as NIP number is concerned. The legislator decided also to partly meet the demands of the fuel oils sellers and simplified a little the system for collection of declarations. In the case of sales for the benefit of public administration, army, schools and hospitals, there will be no need of obtaining a declaration concerning the product destination each time. Such declaration, under certain conditions, will be able to be placed in the agreement only once.

Rules of exemptions for denatured alcohol

Producers of home care products using the denatured alcohol by the contaminants defined in the Minister of Finance regulation will have to settle the amounts of used alcohol. If they use the denatured alcohol in the amounts exceeding the standards issued to them by the customs head officer, they will have to pay the excise on the above-average consumption.

New excise exemptions

There is a very important change which concerns the enlargement of the scope of exemption from the excise on the energy products used for electric energy production. The previous exemption concerned only the energy products used to produce the energy in the power plants (some fuel oils profited from exemption at the production in heat and power plants). At present the exemption is extended to all the cases of electric energy production (heat and power plants, generators of all kinds not being part of a power plant or heat and power plant).

The remaining changes concern the new conditions of avgas and shipping fuels exemptions and, what's interesting, an exemption determined in the EU energy directive as optional has been added and it concerns exemption of engine fuels used to produce, examine, develop and conserve aircrafts and ships. Changes of this type should be judged positively with regard to the improvement of competitiveness of Polish entrepreneurs on the EU market.

CIT – Hope for tax payers in relation to the expenses on issue of shares?

Issues of expenses related to the tax results of stock exchange listing still raise doubts.

According to Article 12 Section 4 Point 4 of the Polish CIT act the revenues received for establishment or increase of share capital shall not be considered as revenues. Among the expenses related to the stock exchange listing the most commonly mentioned cost is the cost of preparation of the issue prospectus, legal representation costs, notary's fees and tax on civil law transactions. Ministry of Finance reckons that these expenses, not being related to the non-taxable

revenue (increase in the share capital), cannot be recognized as tax deductible costs. This interpretation is also shared by tax chambers.

The above mentioned approach of the tax bodies raises doubts not only among tax payers. Voivodship Administrative Courts agree, as a matter of principle, with the tax payers by recognizing that the expenses on issue of shares constitute the tax deductible costs. The VAC in Poznań stressed that the expenses related to the increase in share capital influence the development of economic activity of a company. The court recognized the revenues related to the mentioned expenses as revenues acquired from a financial activity by the share capital (I SA/Po 309/09).

As we mentioned in the tax news nr 6/2010, the Supreme Administrative Court consistently reckoned that the expenses on issue of shares do not constitute a tax deductible cost. However, the fixed direction of the court's jurisprudence has been recently questioned since the Supreme Administrative Court referred the case for settling by the extended panel of judges of the Supreme Administrative Court (II FSK 577/09).

As a consequence of non recognition of expenses related to stock exchange listing as tax costs there is no possibility of deduction of VAT charged on the costs incurred for that purpose.

Tax bodies claim that that this possibility is dependent on the qualification of incurred expenses as tax deductible costs. If, for the tax purposes, the revenue acquired to increase the share capital is not recognized as revenue, therefore the expenses related to increase in capital cannot be treated as tax costs. The decisions of administrative courts more and more frequently reject this opinion. The SAC in its decision from 19 August 2010 stressed that the refusal of the right of deduction of VAT charged in relation to the expenses on issue of shares transgresses the rules of European Community Law, including proportionality and neutrality (I FSK 1287/09). Furthermore, the case-law of the Court of Justice of the EU stresses that the expenses related to the increase in capital are in a direct and close relation to the economic activity, therefore the charged VAT deduction right applies on them.

Doubts of the SAC in the matter of recognition of costs related to the issue of shares as tax costs and of the possibility to enjoy the right of deduction when incurring above mentioned expenses raised hopes of tax payers for the expected solution, favorable for them, in the resolution of seven judges of the SAC, that may have a revolutionary influence on the previous direction of the court's jurisprudence.

VAT – New directive in the matter of invoices sent by electronic means

On 20 August 2010 the directive of the Council nr 2010/45/UE of 13 July 2010, changing the regulations in the matter of a common system of the Value Added Tax in relation to the regulations concerning invoicing, came into force.

The purpose of the directive is to simplify, modernize and harmonize the regulations concerning invoices. On the basis of the performed changes it will be possible to send invoices in any format without fulfilling rigorous conditions concerning the electronic signature. The directive allows usage of any technology which would ensure the authenticity of source, the integrity of content and legibility of the invoice. On the basis of the changes made by the directive, Poland will have to enable tax payers to apply any techniques of electronic invoicing. The member countries including Poland are obliged to introduce the directive's regulations until the end of 2012. Therefore, after the implementation of the directive's regulations it will be admissible and not questionable to send invoices via e-mail on condition that the invoice is legible, authentic and its content cannot be changed.

VAT – Assignment of claim – latest judicial decisions

Voivodship Administrative Court in Poznań in the decision of 18 August 2010 (I SA/Po 282/10) stated that acquisition of a claim by assignment should be treated by the party acquiring the claim as a debt collection service.

It means that it is not subject to exemption from VAT provided for financial intermediation services and that it should be taxed by 22% VAT. The tax base that VAC indicates is a so called discount, i.e. the difference between the nominal value of the acquired claim and its lower acquisition price. A similar position was taken frequently by tax bodies, among others the Tax Chamber's Interpretation of 6 April 2010 (ILPP1/443-286/09-2/BD).

However, the case-law of administrative courts represents also a different opinion according to which a claim acquisition, without any conditions, on the basis of assignment, should not be taxed by VAT or it should be exempted from it as a financial intermediation service.

In relation to the arising differences, the Supreme Administrative Court referred the case for cognizance by the panel of seven judges. The judgment of the SAC which has been given should solve the doubts of the parties acquiring the claim.

PIT – Not only medical packages but also orientation parties constitute the income of an employee

Following the resolution of SAC concerning prepaid medical care packages the tax bodies present a more and more pro-fiscal position concerning free-of-charge benefits obtained by employees.

According to Article 11 Section 1 of Polish PIT Act, revenues include among others money and pecuniary values obtained by or available to tax payers in the calendar year and the value of the obtained benefits in kind and of other free-of-charge benefits. Revenues under employment relationship are also defined by Article 12 Section 1 of the Polish PIT Act as cash benefits incurred by an employee as well as the value of other free-of-charge benefits or shared-cost benefits.

In the recently published interpretations the tax bodies reckon that the above mentioned definition of revenues contains also in its scope the participation of an employee in orientation parties, even if it has an open character and does not require declaration of participation. In the opinion of treasury office which derives its position by referring to the resolution of seven judges of SAC of 24 May 2010 (file reference number II FPS 1/10) a free-of-charge benefit obtained by employees is constituted by mere guaranteeing of the possibility to profit from the benefit (here: enabling the participation in orientation party) (*vide*: the Katowice Tax Chamber's Director's interpretation of 8 July 2010, file reference number IBPBII/1/415-411/10BD). Therefore it is not the actual participation in a meeting, consumption size or active participation in other attractions offered to the employees (but only declaration of participation) that decides about the origin of revenues for employment (*vide*: the Warsaw Tax Chamber's Director's interpretation of 17 May 2009, file reference number PPB2/415-127/10-2/MK).

The tax bodies reckon that for the tax purposes it is only the possibility of profiting from the operation parties offered by employer that is important, without the necessity to analyze if and what kind of benefits the employee actually gained on these grounds.

The next issue, which is still controversial both for taxable persons (employers) and for tax payers, is the qualification of prepaid medical care packages as the employee's revenue.

The Ministry of Finance did not agree for the introduction of tax amnesty for the entities which secured for their employees medical packages without paying income tax provision on them by indicating that the taxable persons are obliged to pay the income tax on all taxable revenues

earned by them, with the exceptions provided by the Polish PIT Act. Given the lack of appropriate justification for the introduction of tax amnesty concerning the medical packages, only the companies which in the previous years got favorable individual interpretations or decision of the court in this issue, may not fear the consequences that bears the unequivocal position of the bodies concerning taxation of packages (i.e. description of tax debt on these grounds together with calculation of interests for the delay, necessity of correcting the tax payers' tax returns, as well as taxable persons' tax returns concerning the income acquired in a given fiscal year under relationship of employment).

PIT – The family tax credit should favor third and next child

The Minister of Finance stresses that the structure of family tax credit should aim the fertility rate.

The Minister of Finance considers increasing the efficiency of pro-family policy. This would be the role of one system joining the newborn allowance and the family tax credit. This solution would allow the budget to save PLN 5 billions a year.

However, favoring of the third and next child would mean elimination of support for the persons raising one or two children and living in poverty. Additionally, such structure would prevent many families from profiting from the allowance due to little incomes.

Instead of abolition of tax credit for persons having one or two children there is a proposition of limitation of preferences, e.g. by more effective favoring of multi-children families.

Events

We would like to invite you for business breakfasts and seminars conducted by Mazars tax experts:

- ➔ **16-17 November 2010 r. Hotel le Meridien Bristol in Warsaw**
Financial Security of Companies

For more information and registration: www.konferencje.pb.pl

- ➔ **24 November 2010 r. at 9.30, Mazars Office in Warsaw**
Transfer Pricing – How to manage the risk?

For more information and registration: Małgorzata Zgoda, m.zgoda@mazars.pl, tel. 22 25 55 200

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