

Tax Newsletter



NEWSLETTER | Issue # 13 - March 2011

Dear Sir or Madam,

In the March issue of the Tax Newsletter, I would like to point your attention to the issue of documenting monetary bonuses. After the last interpretations regarding this matter and decisions of administrative courts, it is becoming a common practice to issue collective correcting invoices documenting the awarding of bonuses.

This month we are also informing about a draft amendment to the Tax Ordinance Act. One of the proposed changes, which is to come into force on 1 July 2011, is an amendment to regulations on the conclusion of transfer pricing agreements. Modifications in this regard significantly increase the requirements concerning information which needs to be presented as part of the procedure of applying for the conclusion of this type of agreement.

Modifications in this regard significantly increase the requirements concerning information which needs to be presented as part of the procedure of applying for the conclusion of this type of agreement.

I would like to use this opportunity to inform you that the Tax Advisory Department of Mazars has a new member, Mr. Marcin Szygula, junior manager, who will be particularly involved in providing tax advisory services for financial sector customers.

I hope you will enjoy the newsletter

Krystyna Szygłowska

EDITORIAL

IN THIS ISSUE

- ➔ VAT – collective correcting invoice instead of monetary bonuses p.2
- ➔ CIT – Necessity of holding the original of a residence certificate in the context of the Supreme Administrative Court decision p.3
- ➔ CIT – Payments for the use of industrial equipment – a chance for exemption from withholding tax at source p.4
- ➔ CIT – A landmark court decision relating to “thin capitalisation” p.5
- ➔ Transfer pricing – Proposed amendments with regard to advance pricing agreements (APA) p.5
- ➔ Proposed changes in Tax Ordinance Act p.6

VAT – collective correcting invoice instead of monetary bonuses

Documenting monetary bonuses has long been connected with many doubts and disputes with tax authorities. Due to the stance of the Ministry of Finance in this regard, tax authorities used to consider a monetary bonus as a compensation for a service, which meant that it should be documented with a VAT invoice issued by the person receiving the bonus.

Administrative courts, in turn, used to rule that paying a bonus is not connected with any consideration from the person receiving the bonus (as it is not obliged to exceed any specific level of purchase from the vendor, for which bonuses are usually granted) and, consequently, a bonus is not subject to VAT and should be documented with a note. What raises doubts, then, is the right to deduct input tax from the invoice relating to the bonus.

In light of the above, the best way of documenting monetary bonuses seems to be **issuing a correcting invoice by the vendor and not invoicing the received bonus by the recipient**. This is confirmed by an increasing number of administrative court decisions where new theses are proposed (previously, most courts accepted the viewpoint that bonuses are not at all subject to VAT). For example, the Voivodship Administrative Court in Poznań in its decision of 16 December 2010¹ ruled that a monetary bonus in the form of a discount is **subject to VAT** – the discount is an amount-specific or percentage reduction in the price of a specific product, awarded most frequently to buyers, paying in cash, purchasing large amounts of goods, on a one-off basis or in a specific period of time, as well as awarded on account of product faults; it is therefore possible to relate the bonus in question to transactions made and invoices issued at a given time. The court decided that the fact of reducing the turnover on account of a discount should also be documented with an invoice, correcting the original turnover and the previously disclosed tax. The Voivodship Administrative Court in Warsaw issued a similar decision on 10 February 2011², according to which awarding a price discount to a business partner on account of large purchases results in the need to issue a correcting invoice. In this way the court concurred with an interpretation issued by the Tax Chamber in Warsaw on 19 February 2010³, according to which monetary bonuses are granted with the aim of intensifying the sales of goods. If the bonus is related to a delivery, then even if the bonus is paid after the payment is made, it should be treated as a discount referred to in Article 29 sec. 4 of the VAT Act. A discount should be understood as a reduction in the agreed price, expressed as a percentage or a specific amount. A distinction is made between discounts awarded before and after the price is agreed on (transactional and post-transactional discounts). The case related to a printer manufacturer that intended to conclude long-term agreements with printer distributors for the delivery of its products. The financial bonus, expressed as a percentage of orders, was to be awarded on a quarterly basis. In these circumstances, both the tax authority and the Voivodship Administrative Court decided that the manufacturer should issue a correcting invoice adjusting the turnover.⁴

The aforementioned latest decisions issued by administrative courts and interpretations of tax authorities (Ministry of Finance) issued in individual cases correspond with the latest amendment to VAT regulations. As of 1 January 2011 the ordinance of the Minister of Finance of 28 November 2008⁵ contains a provision regulating directly the possibility of issuing by a tax payer collective correcting invoices documenting awarded discounts.

¹ I SA /Po 818/10.

² III SA/Wa 1429/10.

³ I PPP1/443-1245/09-2/IG.

⁴ Analogically: interpretation of the Ministry of Finance through the Tax Chamber in Poznań, ILPP2/443-1085/09-4/MT.

⁵ Ordinance of the Minister of Finance of 28 November 2008 on tax rebates to certain tax payers, advance tax rebate, issuing invoices, manner of storing invoices and the list of goods and services which are not exempt from the tax on goods and services (Polish Journal of Laws, Dz. U. No. 212, item 1337, as amended)

Pursuant to the new sec. 2a in § 13, if a tax payer awards a **discount relating to all deliveries of goods or services performed for one recipient in a given period**, a correcting invoice should contain at least the following information:

- 1) a subsequent number and issue date;
- 2) data specified in § 5 sec. 1 items 1 and 2 (i.e. the names, addresses and tax identification numbers of the seller and the buyer);
- 3) **period to which the awarded discount relates**;
- 4) the amount of the awarded discount and the amount of the decrease in the output tax.

The provision quoted above clearly regulates the technical aspects of issuing collective correcting invoices. Previously, tax payers also had a possibility of issuing collective correcting invoices, based on the common practice, court decisions and interpretations of tax authorities. When issuing a correcting invoice, however, it was necessary to refer to individual original invoices which were being corrected (at least by quoting their numbers). Now it is enough to indicate on a collective correcting invoice the period to which the discount relates and the total amount of the awarded discount and VAT decrease (without assigning these amounts to individual deliveries). This change has a practical character and will make it considerably easier for tax payers to settle discounts, including **the possibility to document bonuses awarded for a given period of time. In our opinion, it will also contribute to promoting the stance that awarded monetary bonuses should be documented by the seller by issuing a collective correcting invoice.**

CIT – Necessity of holding the original of a residence certificate in the context of the Supreme Administrative Court decision

A Polish tax withholding agent holding an appropriate residence certificate is allowed to use a preferential tax rate following from the agreement for avoidance of double taxation or even not to withhold the tax if the agreement provides for such a solution.

Pursuant to the provisions of the CIT Act, a residence certificate is a document confirming the place of residence for taxation purposes issued by the competent tax administration authority of the given state.

According to the Supreme Administrative Court (decision of 5 January 2011, file ref. no. II FSK 1363/09), the expression „document confirming the place of residence for taxation purposes issued by the competent tax administration authority of the given state” refers to an official document which cannot be replaced with a copy without these qualities, i.e. without the status of an official document.

Similarly, according to the Supreme Administrative Court, a translation of a residence certificate copy prepared by a sworn translator cannot replace the original or officially certified original.

The court added that if it were not for such a restrictive interpretation, Polish tax authorities would not be able to verify whether the withholding agent settled the tax correctly. According to the Company, such a viewpoint is beneficial for withholding agents, as they are responsible for the tax charged, collected and remitted to the tax office.

A practical consequence of the quoted Supreme Administrative Court decision for companies is the obligation to hold the original of the residence certificate or an officially certified document. According to the decision, a copy is acceptable if it is certified by a notary, in accordance with the provisions of the Notary Public Act. Submitting a copy is also possible if it has been certified as true to the original by the entity's plenipotentiary being a solicitor, legal counsel or tax advisor.

Then, pursuant to the Tax Ordinance Act, the certification included in the copy has a status of an official document.

Consequently, the discussed decision of the Supreme Administrative Court excludes the possibility of sending the document in a foreign language by e-mail or fax, which is a common practice among foreign entities. Justifying this by common business practice is irrelevant from the point of view of the law.

CIT – Payments for the use of industrial equipment – a chance for exemption from withholding tax at source

In accordance with the provisions of the CIT Act, amounts paid by Polish tax payers to tax non-residents on account of using industrial equipment are subject to taxation in Poland ("tax at source"). The responsibility for withholding and remitting the tax rests with the entities making payments to non-residents.

Principally, the rate for tax at source is 20%, but it can be reduced under the relevant agreement for avoidance of double taxation (or based on the provisions of Article 21 sec. 3 – 8 of the Corporate Income Tax Act).

In this context, doubts may arise concerning the meaning of the term "industrial equipment". When interpreting this term, tax authorities have usually referred to its meaning as defined in dictionaries. The PWN Dictionary of Polish Language defines "equipment" as a kind of mechanism or complex of elements, devices used for performing certain activities, facilitating work. The term "industrial" means "relating to industry, connected with industry, used in industry."

Based on these definitions, tax authorities considered the term "industrial equipment" to have a broad meaning, covering most technical devices.

Lately, however, administrative courts have changed their approach to the matter in question. In this context, it is particularly important to cite the decision of the Voivodship Administrative Court in Warsaw of 8 November 2010 (ref. no. III Sa/Wa 748/10). In this case the court decided that construction equipment cannot be considered industrial equipment, as construction is a type of business activity separate from industry. Consequently, an entity paying fees for rental or lease of construction equipment to foreign business partners is not obligated to withhold tax at source (in this respect it is also recommended to have the tax residence certificate of the foreign business partner).

This court decision gives a chance for exemption from withholding tax at source in the case of future payments for using construction equipment, but also makes it possible to recover the tax which was unjustly withheld in the previous years.

It should be pointed out that in its decisions issued in the past administrative courts confirmed that such equipment as freight cars (although the decision relates not only to railway cars, but generally to means of transport) or IT equipment (laptops, scanners, printers, monitors, etc.) cannot be considered industrial equipment.

If you are interested in obtaining information on the practical possibilities of saving tax money in the scope presented above, please contact us.

CIT – A landmark court decision relating to “thin capitalisation”

The dispute concerned the term “amount of debt” used in Article 16 sec. 1 items 60 and 61 of the Corporate Income Tax Act (CITA). So far tax authorities and courts had interpreted this term in the same manner – “amount of debt” includes all liabilities to qualified entities, i.e. also liabilities on account of goods and services, trade credit, derivatives, etc.

In its decision of 3 December 2010 (ref. no. III S.A./Wa 2365/10) the Voivodship Administrative Court in Warsaw ruled that the term “amount of debt” covers solely loans defined in Article 16 sec. 7b of CITA, i.e. the amount following from agreements under which the lender undertakes to transfer a specific amount of money to the borrower (including issuance of debt securities, deposits and irregular deposit agreement).

This means that the Court agreed with the stance of the tax payer that regulations on thin capitalisation should be interpreted not only literally but also taking the intent into consideration. These regulations were introduced in order to limit the financing of companies operating within one group with debt (instead of capital increase) and are an exception from the general rule according to which interest constitutes a tax-deductible expense. As an exception from the rule, regulations on thin capitalisation should be interpreted strictly and no extensive interpretation should be used. Adopting a viewpoint according to which to the “amount of debt” one should add all liabilities towards qualified entities, contrary to the wording of Article 16 sec. 7b of CITA, results in extending the scope of using the regulations in question.

The decision is not legally binding.

Transfer pricing – Proposed amendments with regard to advance pricing agreements (APA)

The proposed amendment to the Tax Ordinance Act presented recently by the Ministry of Finance introduce many modifications of regulations in the part dedicated to agreements on the determination of transaction prices.

Most proposed changes are intended to regulate and specify more precisely individual issues in order to remove any interpretation doubts connected with using these regulations valid as of 1 January 2006. In particular, the proposed changes include:

- explicit indication of entities and authorities to which decisions on individual pricing agreements (unilateral, bilateral and multilateral) should be delivered,
- clarifying the regulations concerning the prolongation of the validity period for a decision on an agreement.
- clarifying the issue of collecting evidence in the course of preliminary investigation proceedings by adding a statement that the authority competent for the agreement should apply for a clarification of doubts regarding the contents of submitted documents, This will enable the authority to collect and investigate exhaustively all the evidence, not just the documents attached to the application.
- clarifying issues relating to the text of the authority's notification on finding obstacles making it impossible to accept the choice or manner of using the method of determining the transaction price, including the possibility of suggesting another method by the authority; also regulating the scope of decisions dismissing the proceedings in the case of withdrawing the application after receiving such a notification,

- adapting the provision constituting a legal basis for issuing a decision on an agreement for a foreign entity to the provisions of tax acts, consisting in the change of the previously used expression "seat and plant" to "seat and management".

- regulating the issue of lack of possibility of concluding an agreement in the case of transactions where the transaction price or the manner of determining it follows from acts and normative acts issued on the basis thereof.

The most significant changes, which are to come into force already on 1 July 2011, consist in extending the list of mandatory elements of the application for concluding an agreement and, at the same time, adapting the elements of the decision to the scope of information included in the application.

In accordance with recommendations following from the works of the EU Joint Transfer Pricing Forum, guidelines relating to APA in the European Union and OECD guidelines, an entity applying for the conclusion of an agreement is obligated to present a description of critical assumptions justifying the ability of the proposed price determination method to precisely reflect the principle of full competition in the prices of future transactions. The critical assumptions (relating e.g. to tax regulations, currency exchange rates, market conditions, sales price and volume, etc.) should be adapted to the individual situation of the tax payer, its business environment and the type of the examined transaction in order to ensure a reliable prediction of elements covered by the agreement.

The Ministry of Finance hopes that the proposed changes will increase the transparency of the agreement conclusion process and facilitate the process of submitting applications for concluding or prolonging the agreements. It cannot be excluded, however, that such a significant extension of the scope of information and analyses required by the Ministry may in practice limit the number of entities which are able to meet the information requirements of the application as well as extend the duration of the agreement conclusion process by the time required for the analysis of the presented critical assumptions.

Proposed changes in Tax Ordinance Act

The Ministry of Finance proposes a change in the rules of rounding the tax base and the amount of tax due with regard to interest and other earnings on funds accumulated in the tax payer's accounts or in other forms of saving, storing or investing.

Pursuant to the currently valid regulations, the tax base and the amount of tax due on income (revenue) referred to in Article 30a sec. 1 items 1-3 of the Personal Income Tax Act (in particular interest on bank deposits) is rounded based on Article 63 § 1 of the Tax Ordinance Act, according to which the decimal parts of amounts smaller than PLN 0.50 are rounded down, while those equal to or larger than PLN 0.50 are rounded up.

This means that in the case of deposits with daily compounding of interest offered by some banks where the compounded interest amounts to no more than PLN 2.49, no tax will be collected by the withholding agent (bank). However, if the compounded interest amounts to PLN 2.50, the tax due amounts to PLN 1.

Bank clients opening deposit accounts (with daily compounding of interest) with small amounts of the deposited capital take advantage of these rules and do not have to pay tax until the tax base exceeds the amount of PLN 2.49.

Pursuant to the assumptions of the Ministry of Finance for the draft amendment to the Tax Ordinance Act and to the Personal Income Tax Act, the existing rules of rounding the tax base and the amount of tax due will be changed. According to these amendments, the tax base and the

amount of tax due on income (revenue) referred to in Article 30a sec. 1 items 1 – 3 of the Personal Income Tax Act will be rounded up to full grosz (PLN 0.01).

The proposed changes of the Ministry of Finance are justified by introducing competitiveness to the market of deposit accounts and using fair solutions with regard to taxing interest on deposits. It seems, however, that the real reason for amending the act is to increase budget revenues.

Introduction of such significant changes in the tax law for the banking sector, where the costs connected with reconfiguring IT systems responsible for computing the tax base and the amount of tax due will reach millions of zlotys, should be accompanied by the Ministry of Finance offering solutions providing an appropriate compensation for these expenses. A reasonable solution would be a provision similar to a tax relief for new technologies for banks to use in this situation and an appropriately extended effective date of these regulations. It should be pointed out that in its amendment assumptions the legislator does not take into account the possible minor mistakes in computing, withholding and remitting tax by the withholding agent, which have been so far eliminated by the current rounding rules.

Events

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

➔ **11 May 2011, Mazars Office in Warsaw, Piękna 18 Street:
Tax Conference – “Withholding tax – practical aspects”**

For more information and registration: Emilia Biała, e.biala@mazars.pl, tel. 22 25 55 200

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

The purpose of this Tax Newsletter is to keep readers informed of the recent tax developments. The presented information were elaborated with the due care, however, they are presented in summary and general form. Accordingly, the information in this publication is intended for general guidance only and does not constitute any legal or tax advice. Mazars Audyt Sp. z o.o. does not assume any responsibility for the use of the presented information. Before making any decision or taking any action, we recommend consulting professional advisers from Mazars Audyt Sp. z o.o.

Contact:



Krystyna Szydłowska
Director of the Tax Advisory Department
k.szydłowska@mazars.pl

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



Kinga Baran
Manager
k.baran@mazars.pl



Paweł Skwarek
Junior Manager
p.skwarek@mazars.pl

Tax Advisory Department
Mazars in Cracow
Wenecja 3 Street
31-117 Cracow
Tel.: +48 12 43 11 088
E-mail: podatki@mazars.pl
www.mazars.pl



Michał Galejczuk
Manager
m.galejczuk@mazars.pl



Przemysław Dybała
Tax Advisor
German Desk
p.dybala@mazars.pl