

Tax Newsletter



NEWSLETTER | Issue # 15 - May 2011

Dear Sir or Madam,

We are happy to present to you another issue of Tax Newsletter, prepared by Mazars' Tax Advisory Department. This time, we continue our commentary on amendments to the VAT Act. We dedicate this part especially to those who conclude transactions with non-residents – since 1 April there have been significant changes in the area of VAT settlement (the tax is now to be settled by the Polish taxpayer).

However, there are some exceptions from this rule – we described them in our Newsletter. We would also like to inform you about the doubts raised by the simplification of documentation of taxi, parking and gastronomy services in the light of other expected amendments to the VAT Act.

I invite you to an attentive lecture of all our topics.

Krystyna Szydłowska

EDITORIAL

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VAT – Permanent Establishment – deduction of VAT from non-residents

Another amendment to the VAT Act was made on 1 April. Among many changes, we will find the amended rules concerning the issue of invoices by foreign entities registered for VAT in Poland.

Until present, in most cases, taxpayers having their seats abroad but registered as Polish VAT payers and performing domestic supply of goods and services had to issue invoices with Polish input VAT. Currently, with exception to real estate, in such situations the foreign entity shall issue invoices without indicating the VAT amount. **The tax payable for the concluded transaction shall be settled by the Polish taxpayer, who purchased the goods or services from a non-resident.** The Polish taxpayer shall bear in mind that as from 1 April they are not allowed to deduct input VAT if the foreign company continues to issue invoices including Polish VAT. Furthermore, they are not exempted from calculating the tax payable for this transaction.

Exception from this rule refers to a situation in which a foreign entity, apart from being registered in Poland, has here its Permanent Establishment used for the entity's trade activities and provision of services. In this case, the foreign taxpayer shall issue invoices indicating the amount of VAT – which the Polish client has the right to deduct (he does not settle the VAT payable by himself). **Our problem is to define the Permanent Establishment.** Due to the ambiguity of this notion, in some situations the only solution is to apply to the Minister of Finance for an individual interpretation of the specific case. The importance of this question is visible in the jurisdiction of ECJ, in which the Court partly explained that while defining the Permanent Establishment, we should verify whether the taxpayer possesses human and technical resources necessary to conduct the activity.

The Permanent Establishment will be also defined in the EU executive order to the Directive which is supposed to enter into force soon.

It is worth mentioning that the Permanent Establishment should not be identified with a plant within the meaning of provisions on income tax and agreements on avoidance of double taxation. It may happen that a foreign taxpayer has a Permanent Establishment, but not a plant, in Poland. In this case he will not be obliged to settle the income tax.

VAT – Abolishment of invoicing obligation

The parliament is currently working on another amendment to the VAT Act. According to the plans, the taxpayers providing taxi, food and parking services will not be obliged to issue VAT invoices provided that they record their turnover with a cash register (unless the customer claims an invoice). This rule is to concern also services provided to the benefice of VAT payers.

The question arises whether the planned amendments conform to the EU provisions. The **Directive 112** amended in 2010 **allows issuing simplified invoices if the amount does not exceed EUR 100**. After consulting the VAT Committee, it is sometimes possible to issue simplified invoices, even if the amounts are higher.

It should be pointed out that a simplified invoice is still a VAT invoice, which generally entitles the customer to deduct the VAT raised in such invoice. The objective of amendments to the Directive is merely to imitate the formalities related to invoice issue.

Yet, the Polish legislator does not plan to introduce simplifications connected to invoicing and the VAT invoices (to some extent) are to be replaced with cash register receipts. This only apparently formal difference may have substantial meaning for the VAT payers purchasing the above mentioned services. In fact, the VAT payers obtaining cash register receipts instead of VAT invoices will not be entitled to deduct the raised tax. This consequence is far from complying with the objectives of amendments introduced by the Directive. Taxpayers resigning from claiming VAT invoices shall be aware of consequences of their decision.

CIT – Common CIT base – a chance to abolish the transfer pricing evidence obligation.

The cancellation of the transfer pricing evidence obligation would be one of the consequences of introducing the Common Consolidated Corporate Tax Base (CCCTB) in the European Union, according to the project of Council Directive (COM (2011) 121).

A Common Consolidated Corporate Tax Base, as presented in the Council Directive, the adoption of which is inferred by the European Commission, would apply to companies seated in the European Union, in particular to multinational groups operating in common market, as well as to plants owned by companies from Third Countries but fixed in the European Union.

The CCCTB system assumes the possibility of consolidation of individual tax results of companies/branches owned by international groups, and of subsequent division of consolidated tax base between all the entitled member countries according to a **predetermined pattern**. The allocation formula is based on three factors: workforce, assets and

sale. The proposed regulations concern the unification of tax rates in the European member countries.

The objective of creating a common tax base would be to eliminate additional costs related to adaptation of companies conducting cross-border activity to different fiscal systems, as well as of the costs of transfer pricing documentation, while permitting a cross-border settlement of losses and eliminating possible double taxation. The model of unified construction of tax base, which assumes a rapprochement of tax and accounting approaches, is also a favorable solution.

The CCCTB solutions presented above would suppose to **increase the competitiveness of EU companies by decreasing costs related to legal provisions and above all induce investments in the EU**, while stimulating the economic growth and new job creation..

Nevertheless, the member countries, including Poland, are not willing to introduce CCCTB, in fear of negative influence of the proposed formula on the level of budgetary revenue that could cause a necessity of increasing tax rates. Moreover, introduction of the new system would result in high state administration costs, in particular due to the optional character of this solution. As a result, a necessity would arise of existence of two parallel tax systems in every country: the domestic one and the common one.

Due to a negative opinion of the Polish government, the introduction of consolidated tax base is rather a far perspective. It is though worth to be mentioned that the Ministry of Finance supports the efforts to harmonize the tax base in the European Union and the works conducted in order to suppress the barriers and to unify the European taxation rules.

CIT – Taxation of software as royalties

The constant development of information technique entails a wider scope of transactions including computer software. At the same time, more and more doubts arise concerning the application of relevant classification of royalties paid to foreign entities for this kind of transactions.

While the rights relating to computer software may be transferred in many different ways (sale, lease, tenancy of a part or totality of software, copy license, etc.), the income gained in relation to agreement on avoidance of double taxation may be considered as:

- Capital profit or company's profit taxable on general basis,
- Royalties taxable with lump-sum withholding tax.

One of the presented approaches admits that in agreements on avoidance of double taxation, the notion of „royalties” relates to amounts paid for usufruct or right to usufruct of software considered as literary or scientific work. What follows, the scope of royalties does not comprise contracts the object of which is disposal of computer software, but only those, which establish a right to computer software usufruct. This means that in the case e.g. of sale of totality of rights to a software, the payment should not be considered as royalty within the meaning of agreements on avoidance of double taxation. It should be then admitted that those payments are taxable on general basis as capital profits or economic profits.

In order to be able to classify the taxation, it is necessary to state whether computer software is a scientific or literary work. The Commentary to the OECD Model Tax Convention states that computer software shall be considered as literary, art or scientific work, **unless otherwise directly specified by the internal legislation relating to copyrights.**

This legal base is cited by Directors of Tax Chambers in the recently issued individual interpretations in which they incline to the thesis classifying the computer software as royalties. The individual interpretation of Director of the Tax Chamber dated 10 December 2010¹ states that according to art. 12 of the OECD Model Tax Convention, in relation to the fact that the definition of “royalties” does not include incomes arising from usufruct or right to usufruct of computer software, the latter shall be considered as literary, art or scientific work and the income arising from usufruct of such software shall be treated, for tax purposes, as royalty. The same was stated in the individual interpretation of Director of the Tax Chamber in Poznań issued on 16 February 2011².

¹ Ref. ILPB4/423-184/10-2/ŁM

² Ref. ILPB3/423-876/10-4/MM

A quite different view is presented by the administrative jurisdiction. The Supreme Administrative Court opinioned on taxation of computer software in its judgment dated 14 January 2011³, according to which the definition of royalties does not include computer software. The Commentary to the OECD Model Tax Convention contains a recommendation to treat the computer software as literary arts, but only in accordance with internal law. In the opinion of SAC, the Polish law does not allow such possibility.

The Corporate Income Tax Act does not define royalties, but this definition may be interpreted from the content of the Copyright Act. In the latter, computer software constitute a distinct category, which proves that the Polish legislator does not consider computer software as literary or scientific work. According to SAC, computer software is an independent work which only enjoys the legal protection of a literary work. This fact excludes their qualification as royalties by the Polish law.

³ Ref. II FSK 1550/09

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