Dear Readers,

a new issue of PRO HR is available. This time, it is devoted in full to employee taxation issues. With the start of the new year, our firm has strengthened its employee taxation practice, which I am proud to lead. Our team will support our Clients in areas such as the taxation and social security contributions of individuals, with special attention to international tax aspects of the employees' relocation abroad as well as into Poland, and labor cost optimization.

In the current issue, we are paying special attention to the hot topic of the application of the increased limit of tax deductible expenses by employees-creators in connection with the introduction of a closed catalogue of creative activities into the tax code. We will also turn our attention to the rules for determining the remuneration for the transfer of copyright in the light of the most recent individual tax interpretations.

We also remind our Readers about the annual individual tax return obligation for foreigners and for employees delegated to work abroad, as well as the consequences of the failure to report some of the foreign income in Poland. We will pay special attention to the situation where employees delegated to work abroad question their settlements with the employer on the account of the so-called tax equalization policy, encouraging you to examine how this issue is handled at your company.

Finally, we have some good news concerning social security benefits for managers who have signed a managerial contract within their sole proprietorship. As the Supreme Court has ruled, it is the sole proprietorship, and not the managerial contract, that constitutes the basis for contributions. We urge you to remain cautious, however, as according to the Supreme Court this does not apply to managers who are also management board members.

I hope you will find the contents useful,
Katarzyna Serwińska

Remuneration of employees-creators. Higher cap on deductible expenses is not for everybody

On January 1, 2018, a change was introduced to the regulations on personal income tax concerning the possibility of employees-creators using a higher limit of tax deductible expenses. On the one hand, these changes are positive, because the annual cap on deductible expenses has doubled to 85,529 zloty. On the other hand, they severely restrict the group of employees-creators who can use such deductions in the first place.

Until now, the option to deduct expenses at 50% was available to all the employees who created "works" within the meaning of the Copyright Act, transferring the rights to them to the employer in exchange for remuneration. Today, this option is only available to some creators, including those whose income comes from:

- The creation of architecture, literature, visual arts, music, photography and software;
- Journalism;
- Research and development;
- Research and teaching, or
- Opinion journalism.

Unfortunately, the regulations do not provide definitions for any of these categories. This leads to strong uncertainties concerning the legality of the use of the higher limit on tax deductible expenses. This is not the only problem, however. There are also doubts with respect to the way in which the author's royalties are determined. The fact that the higher limit on deductible expenses will apply only when copyright to the works created is transferred is reasonable (as opposed to a certain proportion of the working time being devoted to creative activities). However, the fact that costs will not be tax deductible when the author's royalty is determined contractually as a percentage of the total remuneration is difficult to understand and it constitutes excessive interference with the right that parties to agreements have to freely shape their relations. Given the above, I strongly recommend reviewing the list of employees to whom the higher limit on tax deductible expenses is applied, in order to make sure that both the category of employers-creators and the model under which remuneration for the transfer of copyright is determined are in compliance with the current legislation and tax authority approach.

Annual tax returns of foreigners in Poland and employees delegated abroad

April 30 is the deadline for the filing of annual tax returns for the preceding tax year. We would like to remind you to what special attention should be paid at in the context of the taxation of foreigners who worked in Poland as well as Polish citizens delegated to work abroad.

EVENTS

Global Mobility Day
16 May 2018

Global Mobility Day is a forum for the exchange of experiences on delegating employees, employing foreigners, taxation and social security charges as well as remuneration and benefits systems.

A paid event.

The program is available here.

The conference will be held on **16 May 2018 (Wednesday), 9:00 – 15:30**, at our offices at Bonifraterska 17 (21 floor) in Warsaw.

HR PHARMA FORUM
7 June 2018

It is an event where pharmaceutical employers can exchange their views.

A paid event.

The full program is available here.

The conference will be held on 7 **June 2018 (Thursday), 9:30 – 16:30**, at our offices at Bonifraterska 17 (21 floor) in Warsaw.

Please send questions and applications to:
prohrevents@raczkowski.eu

Tax settlements for cross-border employees are very complex, frequently requiring coordination with the countries in which the income was paid or obtained. The starting point is the determination of the scope of the taxpayer's tax obligation, i.e. the so-called tax residency. This is based on the criterion of the length of the stay in Poland and the taxpayer's personal situation and economic links (the so-called center of vital interests). Next, it is necessary to determine whether, in the light of double taxation agreements, the taxpayer's income is taxable in Poland, as well as, possibly, what method for avoiding double taxation will be applicable. It should be noted here that taxpayers frequently assume that only income paid in Poland is taxable here, to the exclusion of foreign income.

Katarzyna Serwińska, tax advisor

The next step is the conversion of the foreign income and (possibly) the tax paid in foreign currency to the Polish zloty, and the calculation of the income subject to Polish taxation, including the foreign income as well as any potential deductibles.
Finally, a tax return should be prepared with all the appropriate appendices, and filed to the appropriate tax office before the statutory, non-extendible deadline.
Without specialized knowledge, it is easy to make mistakes. Therefore, it is worthwhile to get professional support at the time of preparation of the tax return so that one does not have to fear negative consequences of a potential audit.

Do tax authorities have knowledge about foreign income of Polish residents?

Many Polish tax residents (especially foreigners) believe that the taxation of income obtained abroad in the source county automatically waves the obligation to declare such income in their settlements with the Polish tax authorities. This assumption is incorrect as a rule. What is more, Polish tax organs have the tools facilitating easy access to information about foreign income, and they have a real ability to find taxpayers who fail to report them in tax returns.

RANKINGS

The Legal 500 Hall of Fame

Bartłomiej Raczkowski has been entered into The Legal 500 Hall of Fame in the Employment category.

Chambers & Partners

The best law firm according to a Chambers&Partners Europe 2018 ranking (Band1) in the category Employment.
Individual nominations in the *Employment category:*
Advocate Bartłomiej Raczkowski – (Band1)
Legal advisor Sławomir Paruch - (Band 2)
Legal advisor Iwona Jaroszewska- Ignatowska, Ph.D. - (Band 3)
Legal advisor Katarzyna Dobkowska –(Band 4)

Advocate Dominika Stępińska-Duch has been recommended in the Chambers & Partners Europe 2018 ranking in the category *White-Collar Crime* (Band 2).

Please send your questions to:
prohrevents@raczkowski.eu

Senior associate Tomasz Kret

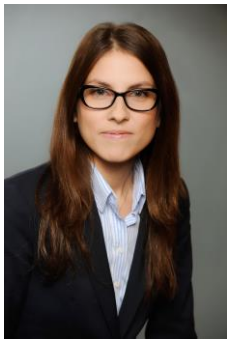
In the European Union, there is a system of automatic information exchange. In each member country, an agency transfers to its counterparts in the other member countries information concerning its residents, including:

a) Employment income;
b) Directors' remuneration;
c) Pensions and disability benefits;
d) Property owned and income obtained from it;
e) Income from interest, dividend, other income from assets held and income from the sale or redemption of financial assets.

The tax organ, having received such information, asks the taxpayer whether the income of a given type obtained abroad has been properly accounted for in the Polish tax return for a given tax year. In case such income was omitted, taxpayers must file a corrected return and pay tax arrears with interest. It is not possible to effectively use the so-called "voluntary disclosure" (*czynny żal*), which raises the risk of tax penalties. A similar system of information exchange is also stipulated by the Agreement between the Government of the Republic of Poland and the United States Government on the fulfillment of international tax obligations and the implementation of FATCA. In order not to deal with the time-consuming and burdensome corrections and disclosures, as well as costs in the form of late payment interest, taxpayers should collect full information on foreign income when they prepare their returns (including any small income), and settle it in accordance with international tax treaties and internal regulations.

Delegation abroad and tax equalization

When an employee is delegated abroad, a situation may arise where his or her tax burden will be higher than hitherto faced in Poland. In order for the delegation not to result in additional burden for the employee (or additional tax advantages), employers frequently use the so-called tax equalization policy.



Legal advisor Sandra Szybak-Bizacka

The objective of tax equalization policy is neutralizing the tax consequences of delegating the employee to another country. On this basis, the employer guarantees the employees that in the course of their work abroad they will not face either a more favorable or a more disadvantageous tax situation than if they had stayed in Poland. This means that the employees will receive the same net remuneration that they would have received without leaving Poland.

The goal of this policy is to protect not only the employee but also the employer. It prevents the situation where employees can benefit at the expense of the employer as a result of the partial financing of the employee's tax burdens by the employer in the country of delegation, resulting in overpayment.
In our practice, we frequently encounter the situation when employees question the settlements on tax equalization. From time to time, such cases end up in court. The legality of the application of tax equalization has not been questioned by court rulings (c.f. Polish Supreme Court decision I PZP 3/12). However, in order to fully safeguard your interests in the case of litigation, we recommend a closer look at your tax equalization practices with respect to their correct implementation as well as compliance with labor law and tax regulations.

Taxation of managerial contracts within sole proprietorships

On 17 June 2015 the Supreme Court ruled that in the situation where a management board member signs a managerial contract within his or her sole proprietorship, the basis for social security charges is such contract, and not the sole proprietorship. Thus, social insurance premiums should be paid on the entire remuneration received on the basis of such agreement (which is still capped this year, a fact that is likely to change next year), rather than on a declared amount which cannot be less than 60% of the forecasted average monthly remuneration, which is the case with sole proprietorships.
In a subsequent ruling of 29 March 2017, the Supreme Court has verified its position, ruling that the managerial contract (and not the sole proprietorship) is the basis of social security only for managers who are management board members. Managers who are not management board members should pay premiums on account of the sole proprietorship. According to the Supreme Court, this is a consequence of the fact that a manager who is a management board member acts on behalf of and in the name of the company under management, as a guardian of its management organ, which deprives him or her of the qualities of an entrepreneur. In the case of managers who are not management board members, the situation is different, because they perform management duties on their own and in their own name.
Given that, in practice, management board appointments are frequently a secondary issue, sometimes of accidental nature (it does happen that management board members are foreigners from the parent companies, while the actual management is in the hands of managers who are not board members), it is difficult to agree with the Supreme Court's view. Having said that, it is a positive development, especially in the context of the approaching elimination of the cap on social security premiums. A managerial contract within sole proprietorship and without management board membership makes it secure to pay premiums on the declared income only - at least as long as the courts maintain this position. It should be remembered that the tax must be paid on the progressive scale.

Legal advisor
Katarzyna
Dobkowska