Ius Laboris Poland Global HR Lawyers
Raczkowski Paruch

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PRO HR

10 MOST SIGNIFICANT JUDICIAL DECISIONS

JANUARY 26, 2017

Dear Readers,

according to the latest available declarations of the government representatives, a bill related to the introduction of the so-called "unified tax" will not include the elimination of a separate, proportional tax rate for entrepreneurs (inappropriately called a "flat tax rate"). The government proposal will probably be presented at the end of December or early January. While awaiting the information which is of great importance to everyone, we encourage you to review the government activity aimed at tightening the tax system. We would like to draw your attention in particular to the issues concerning the taxation of the employee accommodation, which issue is still far from being resolved and taxation of gains resulting from incentive programs offered to employees, in which case the jurisprudence of the Supreme Administrative Court is uniform.

Enjoy the read.
Kazimierz Romaniec
legal advisor

Kazimierz Romaniec
Legal advisor, senior lawyer, Head of the Firm's Tax and Sports Practices, having a long-term experience in tax advisory in the scope of employment of workers and managerial staff of business entities.

CHANGES TO THE LAW

Exchange of information between the Social Insurance Institution (ZUS) and the Ministry of Finance

On November 4, 2016 the President signed an amendment to the Act on Tax Offices and Tax Chambers and to the Social Insurance System Act (“ZUS”) The Amendment involves the unification of data concerning the remitters and the insured, being simultaneously the tax payers. At the same time it is supposed to enable the exchange of information between the Ministry of Finance and Social Insurance Institution. The Head of the Ministry of Finance will become authorized to request the ZUS to provide individual data to verify information and conduct analytic and comparative activities. The aim is to improve the efficiency of tax collection.

EVENTS

10 MOST SIGNIFICANT JUDICIAL DECISIONS

You are kindly invited to take part in the 8th Conference on **the 10 MOST SIGNIFICANT JUDICIAL DECISIONS** issued in 2016, which are particularly significant in practice. The conference will be held on **January 26, 2017** at the Bristol Hotel in Warsaw. The number of participants is limited.

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

DRAFT AMENDMENTS TO LEGAL ACTS

A set of "33 facilitations for enterprises": controls based on risk analysis; "binding" interpretations; binding control findings

Works are in progress regarding a bill on amendment of some acts to improve a legal environment of entrepreneurs. It is the first part of the so-called set of 100 amendments for enterprises prepared by the Government. The project includes, inter alia, proposals concerning amendments to tax law:

(1) The tax payer will not be obliged to each time apply for an individual interpretation of tax law – the action complying with well-established interpretation (based on law interpretations prepared for other tax payers) will be protected. In determining a well-established practice of interpretation, the tax payer will be allowed to take into account the law interpretations prepared for other tax payers as well.

(2) If a fiscal control shows that an entrepreneur applied a VAT rate correctly, then the later control will not be able to undermine the previous findings until the law interpretation is changed.

(3) The limit of net revenues above which the enterprise is obliged to run a complete bookkeeping will be increased (up to EUR 2 million).

(4) The controls in companies will be conducted based on risk analysis. The tax offices will not be able to control cases that have already been controlled.

The bill is being processed by the Polish Sejm. Its first reading has been already held. It is scheduled to enter into force on January 1, 2017.

Act on the National Tax Authorities

The Sejm approved the amendments made by the Senat to the new Act on the National Tax Authorities which are assumed to be specialized governmental authorities that perform tasks related to collection of tax revenue, customs duties, fees and other non-tax budgetary receivables. Their tasks will also include the protection of interests of the State Treasury and appropriate support as regards payments by tax payers, remitters and entrepreneurs. The new unit is to combine the tax authorities, tax control authorities and Customs Service authorities, which at present function separately. Authors of the bill hope that the reorganization will enable more efficient combating of tax frauds and will be beneficial mainly for tax collection. Planned date of entry of the act into force - March 1, 2017

Karolina Schiffter, attorney at law, winner of the 5th edition of the competition Rising Stars Lawyers - leaders of tomorrow 2016

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INTERPRETATION OF TAX REGULATIONS

Is the payment for the employee accommodation a revenue? - dispute in the jurisprudence

In the letter dated July 26, 2016, the Ministry of Finance presented its opinion, according to which the provision of free accommodation for employees delegated to work in a different city generates a revenue under an employment relationship subject to income tax payment, and is the basis for determination of the social security premiums. This relates to the employees who are not mobile, i.e. whose work does not require constant traveling to duly perform their duties, thus - providing accommodation for the time of travel is not necessary.

A more restrictive opinion was presented by the Supreme Court in the resolution dated December 10, 2015 (case ref. No. III UZP 14/15), according to which the value of the benefits to be paid by the employer for accommodation of the employees, including mobile employees, is a revenue under the employment relationship and is the basis for determination of the social security premiums, as no regulation imposes on the employer the obligation to pay for the accommodation of the employee (unless such employee is on a business trip).

Thus, according to the Ministry and the Supreme Court, causing that the employee does not incur the expenses results in a taxable revenue on the employee's part. Therefore, entrepreneurs must be prepared that the tax authorities will not approve a situation in which the expenses incurred by the employer to cover the costs of accommodation (provided that this is not a business trip) are not included in the revenue of the employee.

There is however a chance to defend an opposite opinion before the court. The opinion of the administrative courts is different than that of the Supreme Court and of the Ministry. For example, in the judgment dated August 9, 2016 (case ref. No. FSK 1970/14), the Supreme Administrative Court concluded that the costs of accommodation, creation of the appropriate back-up facilities and travel to the specified place of work which changes depending on the construction site location are primarily the costs of the employer, incurred for its benefit, but not for the benefit of the employee, and do not result in a revenue on the part of the employee. This opinion is compliant with the judgment of the Constitutional Tribunal dated July 8, 2014 (case ref. No. K 7/13), relating to the tax on free benefits.

Concluding the expiration of individual tax interpretations - what about the rulings of the administrative courts?

As of January 1, 2016, the amendments to the Tax Ordinance Act came into force, which enable the Ministry of Finance to conclude expiration of the individual interpretation which is non-compliant with the general interpretation issued in the same legal status. Provisions of the Tax Ordinance Act, including the interim provisions, do not however decide on the situation of the tax payers who obtained individual interpretations, subsequently controlled by the court and administrative authorities. Concluding the expiration of the individual interpretation whose judicial and administrative control was completed prior to the issue of the general interpretation would cause that the court ruling concerning this matter would no longer be valid. It would be contrary to the provisions of the Law on Proceedings before Administrative Courts, under which the valid court rulings are binding not only upon the parties and the court that made them, but also upon other public courts and bodies. The Ombudsman requested the Minister of Finance to issue his opinion concerning this matter. He also requested explanation of the practice when the general interpretations do not take into account the jurisprudence of the administrative courts, which is, according to the Ombudsman, unacceptable.

THE MOST INTERESTING JURISPRUDENCE

Share options as part of the incentive programs - tax at the time of disposal of shares

Obtaining by the employee of share option on preferential terms and exercising thereof does not result in a taxable revenue on the part of the tax payer. Gains obtained upon receipt of the shares are of potential nature only and exercising the option does not increase the property of the tax payer. Revenue is generated only as a result of disposal of the purchased shares. This was the opinion of the Supreme Administrative Court included in the judgment dated July 21, 2016, case ref. No. II FSK 1725/14.

The Supreme Administrative Court found that the material profit obtained by the tax payer in the form of shares acquired on preferential terms (i.e. for the price lower than the market price) does not result in the tax obligation upon exercising the share option. The gains will be included only at the moment of "collection of the income", i.e. during the sales of the shares subscribed or acquired in this manner.

The opinion of the Minister of Finance was different. He concluded that exercising the option rights through the acquisition of shares results in a revenue on account of exercising the rights under derivative financial instruments, and in this case, the market value of the shares at the date of their exercising minus the option exercising price was the taxable income. As a result, the disposal of shares obtained as above is another taxable activity. The Supreme Administrative Court rejected this opinion.

The opinion of the Minister is non-compliant with the prohibition of double taxation of identical values with the same tax. If this opinion was approved, it would mean that the revenue on account of acquisition of shares as part of the incentive program for the price lower than the market price would be subject to double taxation. For the first time, the difference between the share market price and the acquisition (preferential) price, was deemed the revenue taxable as of subscription (acquisition) of shares. Next, this difference would be part of the revenue from disposal of these shares against consideration.

The public interest cannot be automatically treated as the fiscal interest

The public interest cannot be automatically treated as the fiscal interest. This is the opinion of the Voivodeship Administrative Court in Warsaw included in the judgment (not valid yet), dated October 7, 2016 (case ref. No. III SA/Wa 2288/15). The case concerned the public interest precondition when granting tax reliefs. When justifying the judgment, the court pointed out that the public interest should be examined at various levels, taking into account the circumstances of occurrence of the given tax arrears. The Court clearly indicated that the public interest could not be automatically identified with interest of the tax authorities. According to the justification, as part of the public interest precondition assessment, the degree of the tax payer's default in performing the tax liability should be examined as well. The consequences of the above ruling may be far reaching, as it relates to the interpretation issue that extends beyond the individual case to which it referred, and which may be practically applied in each tax dispute.