Tax&Legal Highlights

Poland

Authorities' restrictive approach to tax exemptions in the Polish Investment Zone. Change in the interpretation of the law affecting entrepreneurs operating based on a decision to provide support.

Over recent months, the Director of the National Revenue Information System has issued a number of specific tax rulings which confirm that all income coming from activities specified in a decision to provide support and carried out in the area indicated therein may be exempted from tax (up to the state aid ceiling). However, recent rulings show that tax authorities have changed their approach to the detriment of entrepreneurs.

In its rulings (dated 22 May 2019, Ref. No. 0111-KDIB1-3.4010.113.2019.1.APO and dated 21 May 2019, Ref. No. 0114-KDIP2-3.4010.55.2019.2.MS) the Director of the National Revenue Information System stated that the taxpayer's argumentation that all income coming from activities covered by the decision to provide support is exempted from tax is correct, however, it is against the objective of the Strategy for Sustainable Development, namely to support the growth of private investment by introducing a new mechanism to encourage new investment

in Poland, as well as the constitutional equality of rights of taxpayers, and therefore it is not correct.

There have already been two such rulings which may suggest that these are not isolated cases and that the stance of the Director of the National Revenue Information System has changed. **In practice, such change may considerably impede the possibility of claiming the tax credit under the decision to provide support** (offered in the so-called Polish Investment Zone).

It should be noted though that such approach of the tax authorities is against the rule set out in the same law saying that if more than one permit or decision to provide support was given, the aid should be accounted for chronologically. In practice, the obligation to account for the aid chronologically would prevent an investor from using further decisions to provide support that they have secured (i.e. the investor would have to pay tax on the income earned on subsequent projects included in decisions to provide support, until the ceiling set out in the first decision has been reached).

Such ruling is also inconsistent with the new provisions of the tax law which explicitly require a divestiture and taxation of income, if operations are conducted outside a Special Economic Zone (SEZ) or the area specified in the decision to provide support.

Previous change in the stance of tax authorities

The above change in the way the laws are interpreted is not the only indication of inconsistency on the part of tax authorities. The stance on the possibility to sum the state aid ceilings available under several SEZ permits and to account for them chronologically has also changed over the years.

Until 2015 the tax authorities were like-minded and confirmed that tax payers may sum up their taxable income based on several SEZ permits. This approach then changed and the authorities issued a number of rulings stating that the taxable income has to be calculated separately for each investment project / permit.

However, there have recently been several favourable rulings and judgments of administrative courts which confirmed that joint records may be kept and used as the basis for calculating CIT-exempt income earned on operations carried out in a special economic zone under several permits.

Since the opinions presented by the authorities, both with regard to the activities carried out based on SEZ permits and now based on decisions to provide support, have been changing rapidly, there is a risk that the recent unfavourable specific tax rulings regarding the operations carried out under decisions to provide support may lead to another change in the so far favourable stance maintained by the tax authorities that the state aid ceilings may be combined based on several SEZ permits (and that the state aid may be accounted for chronologically).

Contact details

Marcin Mroczek
Director in Tax Advisory Department
Tel.: +48 61 8824239
e-mail: mmroczek@deloittece.com

Karolina Wawrzyniak
Senior Consultant in Tax Advisory Department
Tel.: +48 664 199 855
E-mail: kawawrzyniak@deloittece.com

The government adopts a bill to amend the VAT Act scrapping the obligation to submit a VAT return and turning it into JPK_VDEK

The plans of the Ministry of Finance to change VAT regulations are ambitious and may prove challenging for the taxpayers. The new reporting requirements will necessitate a review of the existing processes and procedures and will also pose a technological challenge. One may expect more amendments to VAT returns — the current bill, which scraps VAT returns, requires that the taxpayer correct errors within 14 days of their discovery. The new law is intended to come into force on 1 January 2020 for large enterprises (hiring over 250 employees and with a turnover in excess of EUR 50 million) and in July 2020 it will become binding for all other taxpayers. On Thursday (6 June 2019) the government adopted a bill to amend the VAT Act scrapping VAT returns and introducing new JPK_VDEK.

The uncertainty which continues to surround the change (e.g. lack of necessary technology) makes it difficult to outline a clear plan on how to adapt to the new law. The results of our latest tax survey conducted during a webcast only confirm the sense of uncertainty and confusion.

A large majority of participants stated that they would have problems with classifying their operations to relevant Product Group Codes (if the list of available groups is not changed). The respondents were also concerned about an onerous obligation to review bank accounts due to the planned introduction of the so-called "whitelist". At the same time, over 20 percent of the participants stated that the new list of taxpayers is a useful means of verifying counterparties.

Contact details

Krzysztof Wilk
Partner Associate in Tax Advisory Department
Tel.: +48 601 085 907
e-mail: kwilk@deloitteCE.com

Katarzyna Wróblewska
Senior Manager in Tax Advisory Department
Tel.: +48 512 315 952
E-mail: kawroblewska@deloittece.com

Klaudia Banasik
Manager in Tax Advisory Department
Tel.: +48 882 612 905
E-mail: kbanasik@deloittece.com

Old fiscal markings valid only for the next six months

What are the obligations of entities trading in goods required to carry a fiscal mark?

1 January 2019 saw the entry of new fiscal markings applied to tobacco and alcohol products which significantly reduces the possibility of using the existing fiscal markings.

What is it all about?

The Ordinance of the Minister of Finance of 29 May 2018 amending the ordinance on the designation of excise goods with fiscal marking (Journal of Laws of 2018, item 1178) sets out that as of 1 January 2019 tobacco and alcohol products have to carry new fiscal markings. The new fiscal markings contain a 2D bar code with information about the series and year the fiscal marking was made. The 2D bar code is intended to simplify verification of the legality of products and the authenticity of the fiscal marks — once scanned, the bar code will provide all information about the fiscal mark under review. Fiscal markings on tobacco products, which so far had the size of 45x22 mm, are now 32x16 mm.

What does it imply?

Although entities obliged to mark excise goods (mainly excise warehousekeepers) may no longer attach old fiscal markings, the excise duty act provides that goods which already carry an old fiscal mark may be traded until 31 December 2019. After that date, holders of such excise goods intended for sale and carrying inappropriate fiscal markings will have to buy special validating fiscal marks and attach them to the goods.

This means that all entities selling such goods are obliged to verify whether the markings are appropriate. The excise duty act provides that special validating fiscal marks are required e.g. in situations (other than duty suspension arrangements) when excise goods intended to be resold carry inappropriate fiscal marks.

Special regulations apply to tobacco products which may carry old fiscal markings until 20 May 2019, provided that the year of production on the markings is 2019. Goods carrying such markings may be offered for sale until the end of this year. The sale of tobacco products carrying old fiscal markings with the production year of 2018 was allowed until 28 February 2019.

It seems that, if excise goods carrying old fiscal markings are subject to the duty suspension arrangement, new fiscal markings, not necessarily the special validating markings, will be allowed. This was confirmed in a specific tax ruling of the Director of of the National Revenue Information System (0111-KDIB3-3.4013.42.2019.2.WR) issued on 26 April 2019.

What next?

Special attention should be given to goods carrying fiscal markings and intended for resale. Goods carrying old fiscal marking may be sold until the end of the year with no need for special validating markings. Special attention should be given to tobacco products carrying both old and new fiscal markings which may be sold with no need for special validating markings, provided the year on the marking is 2019.

We recommend that you review your stock of excise goods carrying fiscal markings to determine:

• whether the markings are appropriate, and

• the level of stock of products carrying fiscal marks valid until the end of 2019, i.e. whether special validating markings should be attached or whether other measures should be taken to avoid the need of making the products legal ,if they are subject to the duty suspension arrangement.

The spirits industry applied for an extension of the validity of their fiscal markings, however, so far the Ministry of Finance has not published any draft ordinance that would extend this period.

Contact details

Anna Wibig
Senior Manager in Tax Advisory Department
Tel.: +48 668 825 804
e-mail: awibig@deloitteCE.com

Mateusz Jopek
Manager in Tax Advisory Department
Tel.: +48 668 825 804
e-mail: mjopek@deloitteCE.com

Withholding tax. Explanations regarding the new withholding tax rules

On 19 June 2019 the Ministry of Finance published the long-awaited explanations regarding the new withholding tax rules, i.e. the rules of collecting a lump-sum tax on cross-border payments of interest, royalty payments, dividends and payments for purchases of intangible services. Please note that these are draft explanations open for comments until 30 June.

Withholding tax — gist of the explanations

Though the explanations are rather general, even a cursory examination is sufficient to notice the restrictive approach of the Ministry of Finance to the interpretation of the new regulations. Polish entities will be obliged to fulfil a number of new, additional requirements to verify international counterparties (both those related and non-related) in terms of the permissibility of exemptions or lower withholding tax rates, specifically, when it comes to considering the counterparties as actual recipients of the payment in Poland. To a large extent the explanations discuss the due diligence on the part of Polish payers and provide general examples of conduct.

It seems that even greater obligations are placed on the managers of Polish entities making cross-border payments in excess of PLN 2 million a year (in practice, the management boards of Polish companies making cross-border payments). In the explanations, the Ministry of Finance explicitly specifies that by making the statement referred to in Article 26.7a of the CIT Act and Article 41.15 of the PIT ACT — exempting from the withholding tax or lowering its rate — the payer guarantees that the tax has been accounted for correctly and assumes all consequences of such a statement.

The explanations are sure to become the topic of an intense discussion.

Contact details

Robert Nowak
Partner in Tax Advisory Department
Tel.: +48 695 215 592
E-mail: rnowak@deloittece.com

Anna Rączkowska
Director in Tax Advisory Department
Tel.: +48 664 199 866
E-mail: araczkowska@deloittece.com

Paweł Komorowski
Senior Manager in Tax Advisory Department
Tel.: +48 662 227 654
E-mail: pkomorowski@deloittece.com

New requirements for bond issues as of 1 July 2019

The beginning of the second half of the year will see the entry into force of the majority of regulations under the Act of 9 November 2018 amending certain acts in connection with the strengthening of the supervision over the financial market and protection of investors in this market (Journal of Laws of 2018, item 2243). The amendment will trigger significant changes in the structure of bond issues, which will become subject to severe sanctions, and impose disclosure obligations on the issuers who have issued debt in recent years.

The most important changes taking effect on 1 July 2019 are that bonds will no longer be issued as certificates and that all issued bonds will need to be registered in the depository for securities (maintained by the Central Securities Depository of Poland) or a company which has been delegated to perform such function). Until now the registration duty applied only to the bonds issued via a public offering, whereas the records of private placements were kept by the bank acting as the bondholder. The above change will increase the costs of issues, because a fee will have to be paid for the registration of each series of issued securities. What is more, a sudden increase in the number of entities obliged to register bonds may also extend the period needed to process the applications by the Depository.

The registration data thus collected will enable the Depository to make important information publicly available, i.e. the information on outstanding

bonds issued by individual entities, on the amount of their liabilities arising from these securities, as well as the information allowing to determine the scope and timeliness of performance of the obligations.

To ensure greater security of bond issues and to streamline the process of bond registration with the Depository or with a different authorised entity, the amendment requires that the issuer enters into an agreement with the issue agent before the private placement. **The issue agent will be obliged, among other things, to verify the legal requirements of issuing and offering bonds, as well as to support the issuer in the process of registering securities in the depository. Only investment firms authorised to maintain securities accounts (e.g. brokerage houses) or custodian banks will be allowed to perform that function.**

This is important insomuch as not all banks have the status of custodian banks. Bringing another entity to the issue will further increase costs.

The regulations provide for **a fine of up to PLN 2,000,000 for failure to provide or for improper provision of information about the bonds or the issuer in the securities' registration procedure where such data are important for the assessment of the admissibility of the registration**. Furthermore, a fine may be imposed on both the management board members and the attorneys acting on behalf of the issuer or the issue agent.

The above rules will apply to bond issues carried out after 1 July 2019. **Earlier securities not redeemed by that date will be subject to the existing provisions, however, issuers will be bound by an additional disclosure obligation — by 31 March 2020 they will have to provide the Depository with information on the bond issues conducted so far, specifically the number of securities, their interest rates and the dates of fulfilling obligations arising therefrom, as at 31 December 2019. A failure to provide such information will also be subject to a fine of up to PLN 2,000,000.**

The bond issuers that — on the basis of the relevant contracts — are permitted to issue bonds both before and after 1 July will face most difficulties. The emergent dualism will necessitate adapting the issue documentation so as to enable continuation of bond issuing after 1 July 2019 without the risk of sanctions.

Contact details

Mariusz Banaś
Advocate, Senior Associate, Deloitte Legal
Tel.: +48 22 166 72 82
E-mail: mbanas@deloittece.com

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