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РЕГУЛИРОВАНИЕ НЕ ОБЛАГАЕМЫХ НАЛОГОМ РАСХОДОВ И НЕПЛАТЕЖЕЙ – ПРАКТИЧЕСКОЕ ПРИМЕНЕНИЕ И ВОЗМОЖНОСТИ НАЛОГОВОЙ ОПТИМИЗАЦИИ В ПОЛЬШЕ

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АННОТАЦИЯ

Предполагалось, что некоторые положения Закона о частичном снижении административной нагрузки в экономике, включая, среди прочего, ст. 15b Закона о налоге на прибыль организаций в Польше, будут способствовать сокращению просрочек платежей, возникающих в результате либо неплатежей, либо несоблюдения сроков оплаты. В настоящей статье автором изложены правила, касающиеся регулирования не облагаемых налогом расходов, и указывается, что в действительности вышеуказанные положения представляют собой источник налоговых рисков и способны привести к ухудшению финансового состояния налогоплательщиков (а не только должников). Правила, изложенные автором, являются инструментом обеспечения роста бюджетных доходов.

Ключевые слова: регулирование; не облагаемые налогом расходы; просроченные платежи; налоговая оптимизация.

TAX-DEDUCTIBLE EXPENSES ADJUSTMENT AND FAILURE TO PAY – PRACTICAL APPLICATION AND TAX OPTIMISATION POSSIBILITIES IN POLAND

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ABSTRACT

Reduction of payment backlogs issuing from failure to pay or from too long maturity dates was assumed to be effected by some provisions of the Act on the reduction of some of the administrative burden in the economy, introducing, among other things, Art. 15b of the Corporate Income Tax Act in Poland. An aim of the considerations carried out in this article is to present the rules concerning adjustment of tax-deductible expenses and to exhibit that in the reality those regulations are a source of tax risk and cause aggravation of the financial situation of taxpayers (not only debtors). In effect, these regulations are a further instrument of the growth of budgetary revenues.

Key words: adjustment, tax-deductible expenses, late payments/payment backlogs, tax optimisation.

INTRODUCTION

In the Polish legal order and economic life, there is functioning the freedom of contract principle. Its manifestation is, *inter alia*, the principle of freedom in setting the payment terms in transactions between enterprises. This principle, however, was and is misused by large entrepreneurs in relation to much smaller contractors. Large entrepreneurs impose often unfavourable payment terms on small or micro entrepreneurs who, being afraid of loss of the customer, agree, for example, on many-months payment terms. Elimination of such situations was to be provided by the introduction of a number of regulations fighting against financing of activities based on long-term trade credits [1, p. 576]. Such a regulation is, among other things, the Act on payment terms in commercial transactions whose aim was to discipline contractors as regards application of short

payment terms and to improve the situation of creditors[1]. The reduction of payment backlogs due to failure to pay or too long payment terms was assumed to be effected by some provisions of the Act on the reduction of some of the administrative burden in the economy[2], introducing, among other things, Art. 15b of the Corporate Income Tax Act (hereinafter referred to as CITA)[3].

The essence of the added since the year 2013 Art. 15b of CITA is, in the reality, departure from the accrual basis of accounting in favour of the cash accounting scheme related to those taxpayers who do not settle their liabilities within the time-limit or set very long payment terms. In such a situation, the Act obliges them to reduce the tax-deductible expenses or to increase tax revenues. The economic effects of this measure consist in an increase of corporate income tax charge.

An aim of the considerations conducted in this article is to present the regulations concerning adjustment of tax-deductible expenses and to exhibit that in the reality these regulations are a source of the tax risk, and that they not only fail to resolve the issue of late payments, but just lead to aggravation of the financial situation of taxpayers (not only debtors). In effect, these regulations are a further instrument of growth of budgetary revenues.

THE CONCEPT OF COSTS ON THE GROUNDS OF CORPORATE INCOME TAX

In the light of economic sciences, enterprise's costs mean expenses incurred for production of goods and services in a time-period [2, p. 167]. Therefore, the cost is an intentional consumption of components: materials, services, fixed assets as well as human labour in a certain time-period (most often one year). A similar concept of costs is applied by the balance sheet law, though in this case the cost is perceived through the prism of increase or decrease of economic benefits [6, p. 115]. Costs (and losses) mean the made plausible decreases in the reporting period of economic benefits, with a reliably defined value, in the form of reduction of assets value or increase of the value of liabilities and reserves which will have led to a decrease of equity or an increase of deficit thereof in other manner than by way of withdrawal of assets by shareholders or owners[4]. The moment of appearance of the cost in accounting is the moment of consumption (use) of a given element, disregarding the fact whether that consumption is paid up or not (the accrual basis). This principle issues directly from Art. 6 of the Accounting Act, according to which in entity's books of accounts must be presented all the achieved, receivable thereby revenues (accounts receivable) and charging it costs related to those revenues concerning a given accounting year, irrespective of the term of payment thereof.

The definition of balance sheet costs is not, as to the principle, applied in the tax law. For the purposes of interpretation of the tax regulations we have to use the definition of tax costs, contained in Art. 15 of CITA (unless the legislator directly orders application of provisions of separate laws). Pursuant to Art. 15 para. 1 of CITA, the tax-deductible expenses are the costs incurred for the purpose of earning revenues except for the costs specified in Art. 16 para. 1 of CITA. Since 1 January 2007 the tax-deductible costs are also the costs incurred for the purpose of security or retention of the source of revenues. Based on this, one may ascertain that a given expense may be a tax cost if it meets the following provisions [4, p. 226]:

- it was really (definitely) incurred by the taxpayer,
- it remains in the relationship with the activity carried out by the taxpayer,
- it was incurred for the purpose of receiving revenues or may affect the amount of revenues received, or is aimed at security or retention of the source of revenues,
- it is not mentioned in the list of expenses exempted from the tax-deductible expenses[5].

[1] Act of 8 March 2013 on payment terms in commercial transactions, Journal of Laws of 2013, item 403.
[2] Act of 16 November 2012 on the reduction of some of the administrative burden in the economy, Journal of Laws of 2012, item 1342.
[3] Act of 15 February 1992 on corporate income tax, Journal of Laws of 2011, no. 74, item 397.
[4] Accounting Act of 29 September 1994, Journal of Laws of 2013, item 330.
[5] Act of 15 February 1992 on corporate income tax (Journal of Laws of 2011, no. 74, item 397, art. 16, para. 1.

In the light of case law, not every expense, even connected with the business activity carried out, is the tax cost. It is only such which implements the objective indicated in Art. 15 para. 1 of CITA. The objective must be apparent, and the expenses incurred should accomplish it or, at least, realistically assume the possibility of its achievement[6].

From the point of view of income tax settlement, important is the moment of recording of the cost in the tax bill. This, in turn, depends on the type of tax-deductible expenses which are divided by the legislator into direct and other than direct (hereinafter: indirect)[7]. As to the principle, the former are deducted in the year in which there were earned by the taxpayer the revenues corresponding to the expenses incurred[8]. Therefore, if the expenses were incurred in the year, when there were earned revenues being a result of the expense incurred, those expenses may be settled in that fiscal year. And if the revenues occurred, for example, in a subsequent year, one should wait with the cost recording in the tax bill to the next year. In practice, there may also occur the third situation: expense incurrence takes place in the year following the year in which the revenue was earned. As to the principle, in such a situation, those expenses will be recorded in the tax bill in the year in which they were incurred, except for the two cases[9]. Well, the tax-deductible expenses directly connected with revenues, relating to the revenues of a given fiscal year, while incurred upon expiration of that fiscal year till the day of[10]:

- preparing the financial statement, pursuant to separate regulations, not later, however, than prior to the deadline determined for the tax return submission, if taxpayers are obliged to prepare such a statement, or
- submitting the tax return, not later, however, than prior to the deadline determined for that tax return submission, if taxpayers, pursuant to separate regulations, are not obliged to prepare the financial statement
- are deductible in the fiscal year in which there were earned the revenues corresponding with them.

Different rules concern time recognition of indirect costs. For example, they will be overheads, administrative workers' salary, advertising costs, costs of audits of financial statements, and legal expenses [3, p. 301]. These costs and expenses are deductible on the date of their incurrence. Therefore, immaterial is, in the context of recognition of these costs in the tax bill, the date of revenue occurrence. If those costs relate to the time-period exceeding one fiscal year (for example, a few years' advertising campaign), and it is not possible to determine what part thereof concerns a given fiscal year, in such a case they are tax-deductible expenses proportionally to the length of the time-period they refer to[11].

The cost recognition in the tax bill depends on the fact of its incurrence. As to the principle, as the date of tax deductible expense incurrence there is considered the day, on which the expense is recognised in books of account (recorded) on the basis of the invoice (bill) received, or the day, on which the expense is recognised on the basis of another proof in the case of lack of invoice (bill), except for the situation when it would relate to the reserves recognised as costs, or accrued expenses[12]. The expense incurrence is, therefore, not the same as its actual payment, with certain exceptions. For example, the cash basis should be applied to being paid some wages and salaries and contributions to social security made as back payment[13] or interest[14]. The basic principle of recognition of costs in the tax bill always was, therefore, the so-called accrual basis. This rule was changed by way of introduction to the

[6] The Supreme Administrative Court's (NSA) judgement of 24 April 1996 in Poland, sygn. SA/Gd 2959/94.

[7] In the Act on income taxes, there is no definition of direct and indirect costs. It is assumed that the direct costs will be those expenses, which are strictly related to the earned revenues that are gained by a given entity in relation with the nature of activities carried out thereby. This close connection means that it is possible to state what specifically revenues are earned in result of the incurrence of specific expenses. The nature of the activity being carried out is of the fundamental importance for establishment whether a given expense has the nature of direct cost, as the same expense may be for one taxpayer a direct cost, whereas for another it may be an indirect cost.

[8] Act of 15 February 1992 on corporate income tax, Journal of Laws of 2011, no. 74, item 397, art. 15 para. 4.

[9] Ibid, art. 15 para. 4c.

[10] Ibid, art. 15 para. 4b.

[11] Ibid, art. 15 para. 4d.

[12] Ibid, art. 15 para. 4e.

[13] Ibid, art. 15 para. 4g and 4h.

[14] Ibid, Art. 16 para. 1 point 11.

Corporate Income Tax Act of Art. 15b[15]. Art. 15b of CITA is a specific hybrid combining the principle of accrual and cash basis[16].

THE ESSENCE OF TAX-DEDUCTIBLE EXPENSES ADJUSTMENT

In the light of Art. 15b of CITA, the taxpayer is obliged to adjust the tax-deductible expenses in every situation when the expense considered as the tax cost on the accrual basis is not settled within the time-period stated on the invoice (bill or another proof of the cost). The obligation to adjust costs will take place when the expense is not settled within the time-period of[17]:

- 30 days from the payment due date in the case of the payment term shorter than or equal to 60 days, or
- 90 days from the date of recognition of that expense to the tax costs in the case of payment term longer than 60 days.

The legislator has introduced the principle, according to which the debtor in arrears with debt repayment to the contractor is obliged to make an adjustment in the month, in which there elapsed 30 days from the date of payment term (which cannot be longer than 60 days), or in the month, in which there elapsed 90 days from the day of qualification of the expense to the tax costs. If in that month the taxpayer did not incur tax-deductible expenses or if the incurred expenses are lower than the amount of adjustment, then they are obliged to increase their revenues by the amount by which the tax-deductible expenses were not reduced.

Settlement of the debt amount in full or in part makes the taxpayer in the month, in which they settled their liability, eligible to increase their tax-deductible expenses by the amount of reduction effected earlier. In this regulation, there can be seen a certain asymmetry being either the result of neglect of the legislator or their intentional action. Well, at the stage of adjustment, the taxpayer is required to reduce the tax cost or to increase revenues. At the moment of debt repayment, upon the already effected adjustment, the taxpayer is eligible to carry out a reverse adjustment, but acting only within costs, as there is no provision which would regulate reduction of revenues.

The rules of costs adjustment due to lack of payment in definite terms also concern depreciation (decreasing or increasing amount thereof) of tangible fixed assets and intangible assets. Well, in the situation when the terms, referred to earlier, expire not later than in the month following the month of recording the asset in books, the tax-deductible expenses include capital allowances of those assets in the part, in which their purchase price or production cost stemming from the cost-related document were settled in the term determined in para. 1 or 2 of Art. 15 of CITA. Therefore, unpaid liabilities do not constitute the original component value of the asset. If the liability is settled in a later term, the taxpayer shall, in the month of settlement of that liability, increase the tax-deductible expenses by the amount of depreciation expenses which were not considered as the tax-deductible expenses.

PRACTICAL APPLICATION OF REGULATIONS

The legislator assumed that adjustment of tax-deductible expenses ought to contribute to reduction of the scale of late payments (or backlogs). Unfortunately, achievement of this worthy goal (no doubt well-founded in the period of financial crisis) miscarried. The reasons for this should be seen, first of all, in the construction of the very regulations, in misdrafting thereof as well as in isolation thereof from the economic reality. In effect, instead of resolving the problem of delays in liabilities payments, the regulations on costs adjustment may contribute to deterioration of the enterprises' financial situation, growth of the tax risk connected with improper use of the tax law provisions and, in consequence, may lead to deterioration of the creditors' financial condition.

An example of an unclear drafting of the newly introduced regulations is the formulation concerning how to count 90 days since the

[15] The same amendments were introduced to the Personal Income Tax Act, Art. 24d.

[16] The introduction of such a regulation does not mean abandonment of the use of the principle of accrual basis as generally taxpayers will still use it for the purpose of qualification of the incurred expenses to the tax-deductible expenses. On the other hand, in the situation when they fail to make payment in due time, then they will be obliged to carry on a relevant cost adjustment and to shift to the cash basis.

[17] Act of 15 February 1992 on corporate income tax, Journal of Laws of 2011, no. 74, item 397, para. 1 and 2.

day of recognition the expense as a cost[18]. So, in this case, the legislator requires a cost adjustment after 90 days dating from the date of recognition of the expense as tax costs. However, in the doctrine, there is emphasised that the income tax is the tax where there are settlement periods. These are: the month or the quarter for payment of income tax advances and the year for the final settlement of the tax, and never the day. Therefore, the doubts concern the day, from which there should be started the dating of the 90-day deadline, as in the light of the Accounting Act, this day depends on the adopted by the taxpayer the rules of recognition of business events in ledgers. Therefore, one may assume that this day will be the last day of the month [3, p. 352]. This is of a particular importance in the context of tax optimisation [7, p. 9–26], as the shift of the moment of recognition of the expense among tax costs to the last day of the month will not alter the amount of tax liability for a given month, but, on the other hand, it will postpone the moment of making cost adjustment.

The basic substantial reproach against the new regulations is lack of unambiguous rules of conduct in the case of adjustment being made by manufacturing enterprises. There is the principle that the value of products can be considered in the tax costs only at the moment of sale thereof (this is the direct cost). The essential characteristic feature of manufacturing enterprises is that the manufacturer settles in the tax bill the so-called unit cost of production of goods sold (which is comprised of various types of costs), which is not identical with the expense. The problem is still more complicated by the fact when the materials purchased by the taxpayer are of a homogenous nature (for example, flour) and may be purchased at different times and at different prices. Not having the information what material was used for production (from the point of view of the practice of activity of manufacturing enterprises it is not possible to have such information), the taxpayer is not able to exclude definite expenses from costs. What's more, application by such a taxpayer of fixed book values prevents them from ascertainment what part of the specific purchase invoice was settled in the specific production unit. Lack of specific provisions addressed to such taxpayers is certainly a source of the tax risk as it leaves a broad margin for interpretation, which may be used by the tax authorities. The tax authorities may charge of dishonest bookkeeping, considering the adopted by the taxpayer adjustment method as improper, and make income estimation.

A further source of the tax risk sticks in the application of Art. 15b of CITA in the case of financial leasing. The feature of this form of financing is a gradual repayment of the original value of the leased asset and a simultaneous possibility of depreciating thereof by the user. The wording of Art. 15b para. 6 and 7 of CITA provides that adjustment covers those depreciation expenses which relate to the purchased and produced fixed assets and to the purchased intangible assets. Being guided by the linguistic interpretation, one may, therefore, to put forward the thesis that the adjustment will, hence, not cover those capital allowances which relate to the assets being used on the grounds of financial lease contract. Unfortunately, the tax authorities, breaking the principle rules of interpretation, apply a specific overinterpretation[19] extending the application of adjustment also on financial leasing[20].

The solution adopted by the legislator in Art. 15b of CITA may have an adverse effect that the intended one. Particularly it concerns the situation where the legislator requires adjusting costs by way of increasing revenues; for example, in the situation when the costs are too low. Such a manner of making adjustment may contribute to an increase of late payment, deterioration of liquidity and to growth of the tax risk. The legislator requires paying tax (income tax advance) on the income which has really not occurred. Therefore, there can be the situation when the tax on hypothetical income will be higher than the actual income. This, in turn, will cause that the entrepreneur will seek for other than income

[18] Act of 15 February 1992 on corporate income tax, Journal of Laws of 2011, no. 74, item 397, art. 15 para. 2.

[19] Individual interpretation of 9 July 2013 (IBPBI/2/423–445/13/PP), Individual interpretation of 5 September 2013 (IPTPB3/423–214/13–3/GG).

[20] In individual interpretations, the fiscal authorities, contrary to the basic rules of interpretation, reject the linguistic interpretation as prevailing in the tax law, making use of the broad interpretation instead.

Table 1

Number of taxpayers making use of simplified advance payments

Year	2006	2007	2008	2009	2010	2011	2012	2013
Number of CIT taxpayers	6,938	9,565	10,849	10,522	10,369	10,682	11,044	14,276
Percentage change	–	37.8	13.4	-3.0	−1.5	3.0	3.4	29.3
Number of PIT taxpayers	21,980	28,728	34,112	31,878	30,784	32,259	32,152	41,812
Percentage change	–	30.7	18.7	−6.5	−3.4	4.8	−0.3	30.0

Source: Author's own elaboration based on the data from the Ministry of Finance in Poland
The information was obtained by e-mail by way of submitting the request at the address: kancelaria@mofnet.gov.pl.

forms of financing the tax or they will not pay the tax at all. Both situations will cause aggravation of that indebtedness, with the exception that failure to pay the tax may in practice appear to be less favourable having in mind potential penalties stemming from the Penal Fiscal Code.

An undisputable question is also growth of costs of the application of new regulations. This growth concerns all entrepreneurs and not only those who fail to timely settle their liabilities. This results, first of all, from the fact that the new regulations require from taxpayers adjustment of bookkeeping and IT systems to monitoring payments in order to recognise the proper moment of tax cost settlement. What's more, fulfilment of tax obligations may also affect growth of employees' wages or even growth of employment of persons who will be responsible for payments monitoring.

The thesis of deterioration of the taxpayers' financial condition can also be proved on the grounds of the very construction of the provisions of Art. 15b of CITA, which do not have the symmetrical nature. It is so as they concern one side of the transaction — the debtor. At the same time, the creditor is not eligible to revenues adjustment[21] despite the fact that in case of failure to make payment by the debtor they will actually be charged by the tax on income that in fact has not been received. We must also remember that the creditor may, at the same time, be a debtor. In such a situation, on the one hand, they have to reduce costs or adequately increase revenues, while, on the other hand, are not eligible to reduce revenues. And just these taxpayers will feel negative effects of the new regulations most severely. They are not the taxpayers who deliberately and intentionally do not pay their liabilities but the taxpayers who have experienced backlog not being at their fault. Deterioration of the financial situation of such taxpayers, and in extreme cases even bankruptcy, in turn, directly translates to their creditors and their financial condition what, in effect, conduces an increase of the scale of late payments. If, therefore, the real purpose of introduction of the new regulations was to resolve the problem of late payments and not, as it seems, growth of budgetary revenues, the legislator should facilitate the taxpayer a symmetric adjustment on the side of revenues. Lack of such possibility in the present regulations causes that the only and real beneficiary of the new regulations is the Treasury, which, in case of lack of payment between two contractors, receives the tax from the debtor and the creditor.

TAX OPTIMISATION

In the earlier considerations there was indicated that application of the new regulations is not only disadvantageous for the debtor and creditor, but also it entails a number of interpretational doubts as regards the very application of the regulations. For this reason, entrepreneurs should look for such tax solutions which will level negative effects of the application of the

[21] Such an adjustment is possible only based on Art. 16 para. 1 point 25 of CITA. The procedure of recognition of liabilities as the tax-deductible expense is, however, lengthy and not always it ends up by a success for the creditor. Most often it is connected with court proceedings.

provisions of Art. 15b of CITA. Worth of consideration in this case may be quarter advances for income tax[22], which consist in that payment takes place only after the whole quarter and not after every month. Therefore, there is probability that making adjustment and the actual payment, hence the reverse adjustment, will occur in the same quarter. Thus the taxpayer will not feel, in terms of amount of the income tax advance, an effect of cost adjustment. Still more benefits the taxpayer may gain choosing the simplified system of payment of income tax advances[23] whose amount during the year is, as to the principle, stable and dependent on the tax reported two years earlier. Thereby, whatever shifts on the side of current revenues and costs are not important for the taxpayer from the point of view of amount of the income tax advance. In 2013, there took place a considerable growth of the number of taxpayers settling their tax this way. Hence, we may suppose it was an effect of introduction of the regulation on tax-deductible expenses adjustment; see *Table 1*.

RESUMPTION

The regulations on reduction of some administrative burdens in the economy assumedly were to serve improvement of the existence, *inter alia*, of entrepreneurs. However, a part of those regulations is merely camouflage for the growth of fiscal burdens of enterprises and tantamount with deterioration of their financial stance. What's more, quality of the very tax law expressed in Art. 15b of CITA leaves much to be desired. A number of interpretational ambiguities are a source of the tax risk at enterprises. Entrepreneurs, even if they wanted to apply the new regulation in practice, are not sure if they do it properly.

Therefore, if the actual objective of the legislator amending the acts on income taxes was to improve the payment system between enterprises, the defective regulations should be corrected not only in terms of the very legislative technique but also in terms of their construction — entrepreneurs should have the right to a symmetric adjustment on the side of revenues.

[22] Act of 15 February 1992 on corporate income tax, Journal of Laws of 2011, no. 74, item 397, art. 25 para. 1b.
[23] Ibid, art. 25 para. 6.

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НАУКА И ИННОВАЦИИ

19 июня 2014 г. в Финансовом университете состоится конференция «Аутсорсинг и облачные ИТ-решения для банков: как применять наиболее эффективные технологии, оставаясь в рамках бюджета». Организаторы конференции, посвященной обсуждению наиболее эффективных технологий и актуальных тенденций рынка банковского программного обеспечения – Агентство Bankir.Ru, Институт краткосрочных программ Финансового университета, компания Marketvisio, эксклюзивный партнер Gartner в России, компания MISYS, один из мировых лидеров в области разработки банковского программного обеспечения, и компания «Ай-Теко», ведущий российский системный интегратор. В рамках мероприятия пройдет круглый стол с участием профильных экспертов, ведущих менеджеров и руководителей отечественных банков и финансовых организаций.

Источник: http://www.fa.ru/news/Pages/2014-06-04-autsorsing-i-oblachnye-it-resheniya-dlya-bankov.aspx