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Apartment lease does not entitle taking advantage of housing tax relief

Tax Alert

Dear Readers,

On 29 July 2016 the Director of the Tax Chamber in Katowice issued yet another negative interpretation on housing tax relief (ref. IBPB-2-2/4511-532/16/JG). The tax authority refused the taxpayer the right to housing tax relief in the case in which the taxpayer was going to lease an apartment and reside there in the future.

The case concerned a taxpayer who, through inheritance, acquired a share in the ownership of a property which later, within five years, was sold. A preliminary agreement to sell the property was concluded, under which the taxpayer received a down payment. The funds received were used to buy a share in a property (the acquisition of the new premises preceded the conclusion of the final agreement to sell the inherited property). After receiving the remaining amount from the sale, the taxpayer purchased another property. Both properties were included in his personal property. The taxpayer indicated that he was going to live there himself or let his children use them as their residence. Until then, he did not exclude leasing the apartments.

The taxpayer wondered whether he would be entitled to housing tax relief if he had purchased more than one apartment and whether the premises might be temporarily rented. He also deliberated whether financing the acquisition of a property from the received down payment entitled him to use the exemption if the agreement to sell the inherited apartment was concluded after the acquisition of the new premises and the completion of payment.

Fulfilment of housing needs

According to the tax authority, when regulating the issue of exemption, the legislator did not limit the use of funds received from the sale of property to one purpose defined in article 21 section 25 of the act of 26 July 1991 on personal income tax (i.e. Journal of Laws of 2012, item 361; as amended; hereinafter: the PIT Act). As a result, to qualify for housing relief the taxpayer is not limited to purchase of only one housing premises. The condition is that each of the purchased premises must be used to actually satisfy his own housing needs. Thus, the taxpayer may use the income from the sale of property to purchase more than one apartment, provided that he will actually live there.

The tax authority pointed out that apartments that are not inhabited by the taxpayer, i.e. are not used for residence or are used for other purposes than fulfilment of own housing needs, do not entitle the taxpayer to take advantage of the relief. The intended residence in the purchased property does not constitute fulfilment of the housing purpose. The requirement of fulfilling own housing need should be met at the time of purchase. Fulfilment of the housing purpose means the provision of a so-called „roof over the head”, it is not sufficient for the taxpayer to become the owner of an apartment. The purchase of property and its subsequent lease does not entitle taking advantage of the housing relief.

The approach of the authorities is confirmed by the rulings of administrative courts. For example, the Provincial Administrative Court in Lodz in its ruling of 15 March 2016, ref. I SA/Łd 1356/15 found that basing the right to the relief on the intention of purchasing property to fulfil own housing needs may lead to tax relief abuse. Using the housing relief is intended to support the taxpayer's housing needs, and thus purchase of an apartment and its subsequent lease is not consistent with the purpose defined in the regulation. Also, in the ruling of 20 October 2014 the Provincial Administrative Court in Lodz (ref. I SA/Łd 908/14) decided that purchase of a premises with the intention of residing there, and finally leasing it, does not entitle a taxpayer to the relief.

It should be emphasized that both the tax authorities (in the past) and administrative courts are not unanimous on this issue. For example, the Provincial Administrative Court in Bydgoszcz in its ruling of 20 October 2015, ref. I SA/Bd 791/15 ruled that temporary lease of a residence purchased with the intention of fulfilling own housing needs does not mean that the expenditure on loan repayment was not incurred for own housing needs.

Purchase of housing with down payment funds

In the issued interpretation, the tax authority decided that purchase of a residential premises with the funds from a down payment received in connection with a preliminary agreement cannot constitute the grounds for exemption. In its opinion, the exemption may include income which is only disbursed from the day of sale. This means that to calculate the exempted income only the expenditure incurred no earlier than on the day of property sale may be taken into account. This is indicated by the literal wording of article 21 section 1 item 131 of the PIT Act and the phrase „starting from”, specifying from which moment a specific action may be performed. In terms of the exemption it is important for the income to be disbursed no earlier than on the day of sale.

In the ruling of 19 January 2016 the Provincial Administrative Court in Gdansk (ref. I SA/Gd 1629/15) expressed quite a different position. The important issue for the possibility of taking advantage of the relief is the purpose of the acquisition of a residence. According to the Court, it cannot be concluded from the regulation that the acquisition of a housing premises must occur no earlier than the receipt of the income from property sale. In addition, the Court indicated that the conclusion of a preliminary agreement and the receipt of the down payment from the purchaser, and then the completion of the process with the conclusion of an agreement is a sequence of events that make up the sale. It emphasised that the conclusion of the preliminary agreement is the first day in the process of property sale. As a result, the „day of sale” referred to in article 21 section 1 item 131 of the PIT Act may be deemed to be the first or the last day of that process.

The ruling of the Provincial Administrative Court in Opole of 7 May 2014, ref. I SA/Op 264/14, was different. The Court pointed out that the inclusion of the down payment might lead to abuses as possible later termination of the agreement would lead to unauthorised use of the relief.

The regulations concerning the housing relief remain controversial. They pose interpretation problems due to the fact that they are not sufficiently precise. Therefore, both the case law and interpretation present contradictory views.



Should you wish to discuss the above mentioned amendments in detail, feel free to contact us:

Piotr LISS

Tax Partner

Tax advisor (10240)

E: piotr.liss@rsmpland.pl

M: + 48 696 488 369

RSM Poland

Droga Dębińska 3b
61-555 Poznań, Poland

www.rsmpland.pl

office@rsmpland.pl

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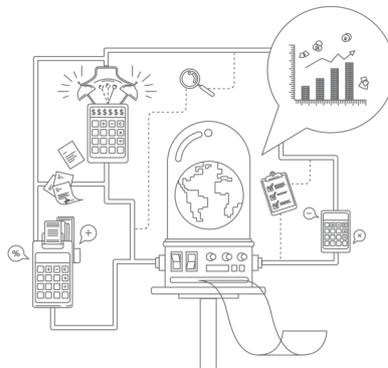
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09.09.2016



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