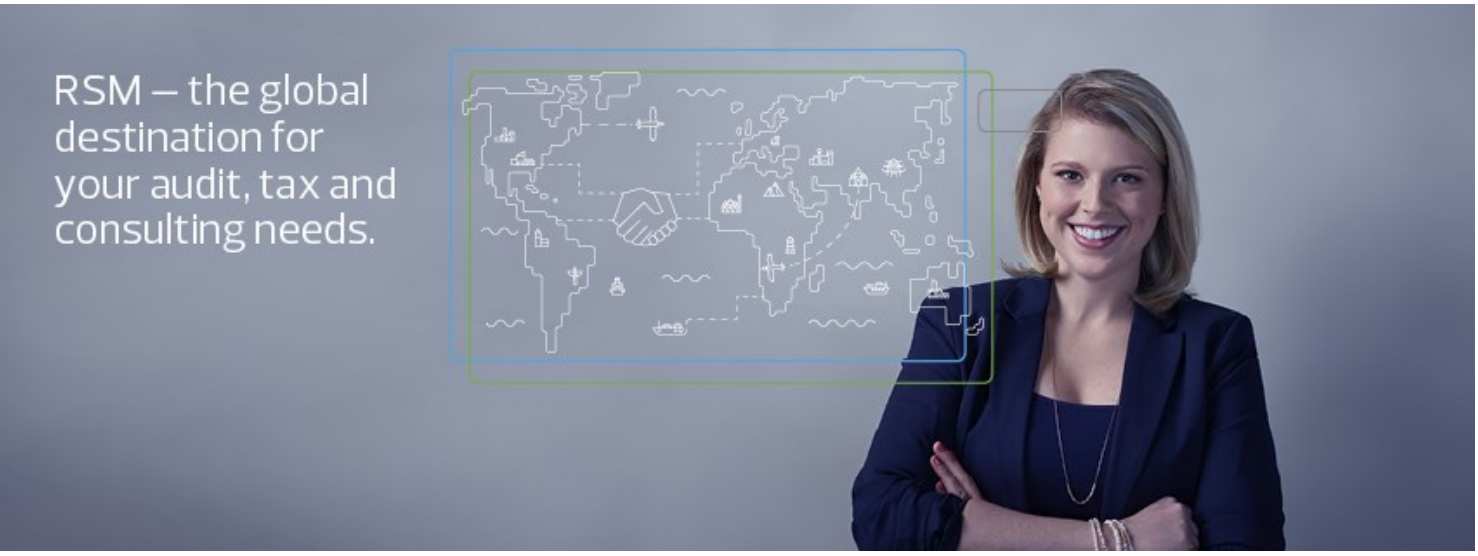

Withholding tax on intangible services performed outside of Poland should have also been collected before 2017

Tax Alert

Dear Readers,

On 15 May 2017, the SAC, in an extended composition of 7 judges, stated that in the legal state before 1 January 2017 the payers should have charged the withholding tax on the remuneration paid to foreign entities providing intangible services referred to in Art. 21.1 of the Corporate Income Tax Act (CITA) outside the territory of Poland. Undoubtedly, it is a disadvantageous and controversial judgement that will give the tax authorities an additional argument to question the correctness of the settlements submitted so far by Polish taxpayers.

UNCLEAR REGULATIONS

Doubts about the existence of the obligation to collect the withholding tax resulted from the imprecise wording of Art. 21.1 of the CITA, in which it is specified that the income tax related to the revenues earned in the territory of the Republic of Poland by non-residents, e.g.

- from interest, copyright or related rights, for the use or the right to use an industrial device, including a means of transport, a commercial or scientific device, for information associated with acquired experience in the industrial, commercial or scientific field (know-how),
- from payments for the services rendered in the field of exhibition, entertainment or sports activities,
- by virtue of advisory, accounting, market research, legal, advertising, management and inspection services, data processing, employee recruitment and acquisition services, guarantees and sureties as well as services of a similar nature

– shall be equal to 20% of the revenue;

- obtained in the territory of the Republic of Poland by foreign air navigation companies – shall be equal to 10% of the revenue.

By the end of 2016, there were no regulations on how to understand the term *revenue earned in the territory of Poland.* In order to resolve the doubts, as of 1 January 2017, the legislator defined the term, also including in this category all payments made by Polish taxpayers to foreign residents regardless of the place of concluding a given contract and performing the service.

Still, according to taxpayers, in the legal state before 2017 the very fact of making a payment for royalties or services to a foreign contractor did not automatically mean that the entity achieved revenue in Poland. Previous judicial decisions in this area had not, however, made the situation clear, and thus the SAC decided to ask a legal question to the Composition of the Seven Judges before issuing the judgment in question.

SAC JUDGEMENT AND ITS EFFECTS

The seven judges, in the SAC's judgment dated 15 May 2017, file ref. No. II FSK 3587/14, stated that when a Polish taxpayer has purchased intangible services from foreign contractors (non-residents) and the effect of those services has been used by the service recipient in Poland, the obligation of charging the withholding tax might have also arisen, since the payments of that kind constituted the revenues earned in the territory of Poland. Admittedly, in that respect the SAC refrained from adopting a resolution that would be binding on other arbitrators, but that ruling will undoubtedly affect the unification of the judicial decisions unfavourable to taxpayers and will provide additional arguments for the tax authorities in ongoing inspections or tax proceedings concerning taxpayers that have not charged the withholding tax. As a consequence, when the taxpayers do not have a certificate of foreign residence of the service provider to whom the remuneration for the services referred to in Art. 21.1 of the CITA has been paid, there is a risk that in the case of an inspection, the taxpayers will be required to pay the tax in the amount equal to 20% of the value of the remuneration along with interest for late payment.

Considering the very extensive portfolio of intangible services indicated in Art. 21.1 of the CITA, which have been acquired by Polish entities from their foreign contractors, as well as frequently encountered difficulties in obtaining the certificates of residence in the case of certain types of services (e.g., air tickets, one-time transactions carried out entirely outside Poland, car rental, advertising services), surely the risk applies to a very large group of payers who are not always aware of the obligation in question.

Therefore, we strongly encourage you to verify your previous transactions carried out with foreign service providers and the certificates of residence possessed in respect of your obligations concerning the charging of the withholding tax, and the scope of the potential risk associated with your failure to comply with it. This will enable you to decide whether or not to make a possible correction concerning the withholding tax settlements for the period of the last five years. If you have additional questions regarding this area, we encourage you to contact us to clarify any doubts you may have.

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

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