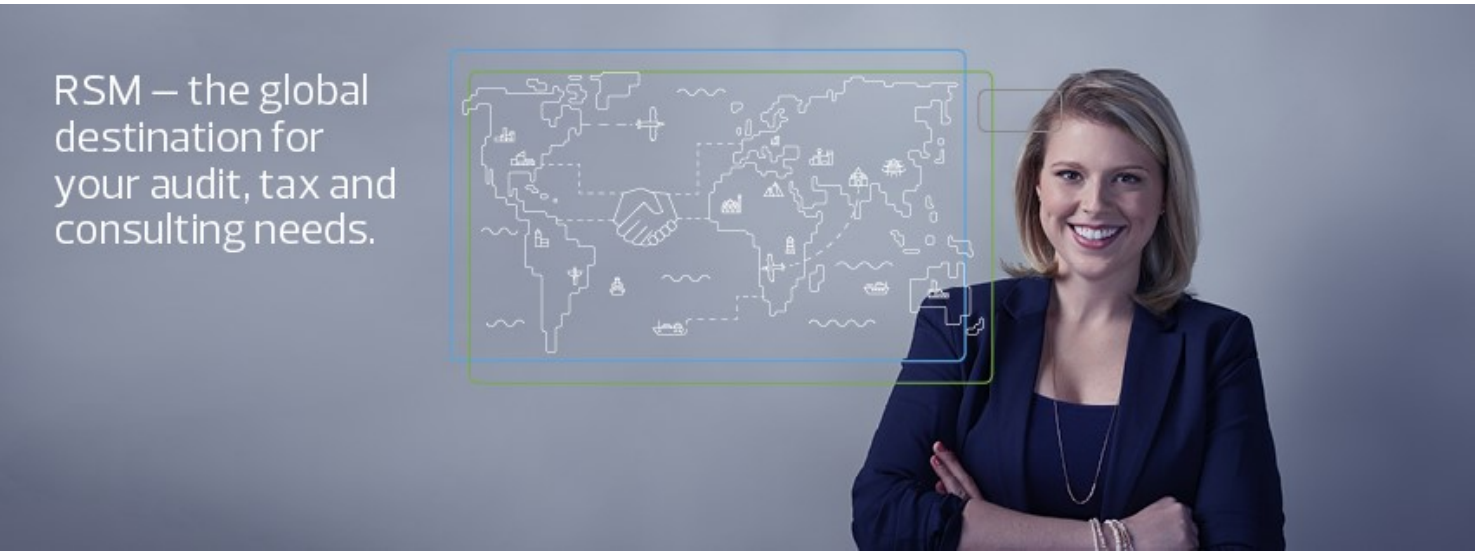

Provision of services by company CEOs

Tax Alert

Dear Readers,

On 12 December 2016, the judgement of the Supreme Administrative Court (case No. I FSK 742/15) was published setting out the tax consequences of the tax on goods and services for the provision of additional services by the CEO of the company to that company.

The case concerned a taxpayer who was employed on a full-time basis under an employment contract as the General Manager of the Company. According to this contract, his responsibilities included coordinating the work of the staff. In addition, the General Manager and the company concluded a cooperation agreement, the subject of which was the performance of commissioned works and tasks agreed between the parties. In addition, the person was also appointed as the company's CEO. During the proceedings, the company filed a declaration of invalidity of the employment contract, thereby recognising the cooperation agreement as the only effective legal document. The scope of cooperation included preparing drawings, conducting talks and consultations as well as performing other work for the company. The taxpayer believed that the services had been provided in the framework of his business activity and issued invoices to the company. The company believed that it was entitled to deduct input VAT on such invoices. However, the tax authority decided otherwise.

According to the tax authority, the company failed to adequately document the performance of the services. The documents did not allow separating the activities performed as the CEO from the technical advisory services. In the opinion of the authority, the activities performed on the basis of the cooperation agreement coincided with those for which the taxpayer was obliged as the CEO. The provision of intangible services of an advisory nature should have been documented in detail. In particular, in a situation when the same person performs various activities on different bases.

The Regional Administrative Court in Gdansk stressed that the availability of invoices for the company is only a formal condition for exercising the right to deduct tax. It, however, does not in itself represent an entitlement to deduct tax. This right arises from the performance of an actual operation resulting in the tax obligation on the part of the issuer of the invoice. According to the Court, the actions taken by the CEO cannot be considered to have been performed by him in the context of his individual business activity.

This situation must also be considered on the basis of the Personal Income Tax Act. Income received by people being members of management boards of legal persons is income from personal services. In contrast, under the Act on tax on goods and services, among other things, performance of activities in the framework of personal services is not considered economic activity. Therefore, the provision of advisory services by a member of the management board who performs these services using the infrastructure of the company and is not subject to business risk in this respect does not constitute activity subject to the tax on goods and services.

The Supreme Administrative Court upheld the judgement of the Regional Administrative Court in Gdansk. The present case once again proves the importance of proper documentation of activities performed. The mere fact of issuing an invoice for the provision of intangible services is of secondary importance if the buyer is not able to prove on what basis and whether the services were actually performed by the entrepreneur.

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

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