Preferential tax-deductible costs for transfer of intellectual property rights in IT sector

Tax Update

20 SEP 2016

Polish tax law allows employees to increase their tax-deductible costs with respect to the transfer of copyrights to works that they have created. In general, if a work produced by an employee is of a creative nature and thus subject to copyright protection (e.g. an opinion, presentation, strategy, policy, procedure etc.), the employee's tax deductible costs may amount to 50% of the income earned from the transfer of that work (up to an annual limit of PLN 42,764 per employee). This solution is widely used in the IT sector and very often results in significant tax savings. However, based on our experience, due to the specifics of the IT sector, it is often implemented incorrectly, which results in certain tax risks for employers.

Special requirements for preferential copyright tax planning

In order to apply the 50% deduction, revenues must be earned from the creation and transfer of a copyright to a 'work' as understood under Polish copyright law. Therefore, it is necessary to analyse whether something created by an employee may be considered as a 'work' subject to copyright protection (utwór) and whether the copyrights to that work are transferred from the employee to the employer.

In practical terms, in order to take advantage of the increased tax deductible costs scheme, the employee's salary should be divided into two separate parts: the part for transferring the copyrights and the remaining part. Some formal obligations must also be fulfilled (e.g. keeping specific evidence of the creation of the work(s).

Problematic assignment of copyrights in IT Sector

Employees from the IT sector (developers, testers, etc.) very often benefit from the increased tax deductible costs scheme.

Increased tax deductible costs may be recognized if an employee transfers his/her copyrights to an employer for consideration. As a rule, an employer whose employee has created a work within the scope of his/her duties automatically acquires the copyrights to the created work. However, in the case of computer programs (or parts thereof), unless otherwise provided for in the employment contract, the rights to works created by an employee during his/her employment belong to the employer by operation of law, which means that these rights are not transferred to the employer but actually belong to the employer from the moment of their creation. The employer and employee may decide to modify this mechanism; however, based on our experience, IT companies rarely make any modifications regarding the moment of the transfer of copyrights.

Taking into consideration the above, an employment contract should include special provisions modifying the general rule in order to be able to safely implement the 50% tax deductible costs scheme for employees in the IT sector. In our experience, many IT companies that use the scheme are not aware of the above issue and therefore run the risk of their
tax settlements - as tax remitters - being questioned by the tax authorities. Any irregularities in this respect could result in outstanding tax liabilities of the employer, penalty interest imposed on the employer, and personal sanctions imposed on its representatives.

The scheme allowing for increased tax deductible costs is an attractive solution and IT companies should certainly consider implementing it. However, even if it has already been implemented, the verification of employment contracts is strongly recommended.