



Tax Alert |

SAC's positive rulings on the limit on debt financing costs

KPMG in Poland

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By its ruling of 3 March 2022 (case file II FSK 1558/19), the Polish Supreme Administrative Court once again confirmed that in situations where the surplus of debt financing costs in taxable activities does not exceed PLN 3 million in a tax year, the taxpayer has the right to include the total debt financing amount into tax-deductible costs. Should, in turn, the surplus exceed PLN 3 million, under Article 15c of the Polish CIT Act, **the cap on the excess of the debt financing costs shall be set as a total of PLN 3 million and 30 percent of tax EBITDA.**

Another positive ruling in this regard contributes to shaping uniform interpretation of the matter among administrative courts and gives hope for a change in approach displayed by tax authorities. It should be noted, however, that the ruling was issued in relation to the legal status in force until 31 December 2021.

> Controversial issue of debt financing costs

On 1 January 2018, an amended Article 15c(1) of the CIT Act, according to which the surplus on debt financing, in the part it exceeds 30 percent of tax EBITDA, shall be excluded from tax-deductible costs, came into force. At the same time, pursuant to Article 15c(14)(1) of the CIT Act, the 30 percent EBITDA limit shall not apply to the excess of debt financing expenses in the part not exceeding PLN 3,000,000 in a tax year (safe harbour).

Application of the cap set by Article 15c of the CIT Act has been a subject of controversy. Until now, tax authorities took a position unfavourable for taxpayers, according to which the limit should be set as the higher of the two values: PLN 3 million or 30 percent of tax EBITDA, and any debt financing cost surplus thereon should be excluded from tax-deductible costs.

However, administrative courts tend to adopt a different approach, stemming from the literal interpretation of the material provisions, and hold that the limit on debt financing costs should be calculated as a sum of PLN 3 million and 30 percent of tax EBITDA.

The interpretation relied on by provincial administrative courts was also adopted by the Polish Supreme Administrative Court, which in its judgment of 3 March 2022 (case file II FSK 1558/19) confirmed that since the legislator itself had excluded application of Article 15c(1) of the CIT Act to the part of the excess debt financing costs, which does not exceed PLN 3 million, Article 15c(1) of the CIT Act cannot be interpreted in a way that the set cap should also refer to the indicated amount and, consequently, contrary to the literal wording of Article 15c(14)(1) of the CIT Act.

In fact, the content of the latter provision clearly indicates that the surplus on debt financing costs up to PLN 3 million should be included into tax-deductible costs. Consequently, in situations where the surplus of debt financing costs exceeds PLN 3 million, the ratio computed based on EBITDA should be applied exclusively to the surplus on PLN 3 million.

On 1 January 2022, however, the legislator modified the formula for calculating debt financing costs, which now clearly demonstrates that the amount of PLN 3 million and 30 percent of tax EBITDA cannot be summed up.

> Consequences of the rulings

The ruling of the Supreme Administrative Court of 3 March 2022 is another SAC ruling which confirms that by the end of 2021 the literal interpretation of Article 15c of the CIT Act allowed to combine the sum of PLN 3 million and 30 percent tax EBITDA to determine the debt financing limit. A similar stance was adopted by the SAC in its rulings of 20 October 2021 (case file II FSK 390/19) and 26 October 2021 (case file II FSK 976/21).

Although the tax authorities are not bound by the interpretation presented by administrative courts, the uniform approach displayed by both provincial administrative courts and the Supreme Administrative Court gives hope for a change in approach adhered to by tax authorities. Moreover, in the event of a possible dispute with tax authorities, it seems that there is a good chance for taxpayers to obtain a positive decision in proceedings before administrative courts, for settlements made before 1 January 2022.

> How can we assist you?

The vast array of services provided by KPMG includes:

- verifying settlements made before 1 January 2022 against possibility of their correction and making a subsequent request for a refund of overpayment,
- drafting statements of overpayment and providing support in proceedings before a court,
- drafting applications for individual tax rulings in this respect.

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