December 2023

PRIVATE CLIENTS AND FAMILY BUSINESSES

OVERVIEW OF RULINGS AND INTERPRETATIONS – WINTER 2023 NEWSLETTER

Table of contents

List of abbreviations:

WSA – voivodship administrative court
NSA – Supreme Administrative Court
KIS Director – Director of National Revenue Administration Information Centre
PIT Act – Personal Income Tax Act
CIT Act – Corporate Income Tax Act
DTT – Double taxation treaty
Withholding tax/WHT – Lump-sum income tax (Personal and Corporate Income Tax)

1. The possibility of including losses from previous years in the calculation base for the solidarity levy.

"If the intention of a rational legislator were to prevent the deduction of losses from previous years in determining the base for calculating the solidarity levy, such a regulation would be explicitly indicated in the provisions" – this conclusion was drawn in the latest administrative court rulings regarding the possibility of reducing the base for the solidarity levy by the amount of losses incurred in previous years.

Solidarity Levy – a gap in the regulations

The Solidarity Levy has been a tax in the Polish legal system since 2019, and it amounts to 4% on income exceeding PLN 1,000,000. The PIT Act, regulating the principles of calculating the tax base and the catalog of possible deductions, does not address the issue of the possibility of deducting losses from previous years.

Between 2019 and 2022, tax authorities maintained the position that taxpayers, when calculating the base for the solidarity levy, cannot deduct losses incurred in previous years. According to the previous stance of the KIS Director, the Personal Income Tax Act established a closed catalog of possible deductions from the income forming the basis for taxation, which does not include losses from previous years.

The Ministry of Finance has welcomed the courts' stance

The justification provided by KIS Director has been challenged by administrative courts in the past year. The WSA in Warsaw, in a judgment dated March 7, 2023, case no. III SA/Wa 2186/22, acknowledged that the wording of the provisions suggests that the legislator did not foresee specific rules for determining income from various sources when calculating the basis for the solidarity levy. It cannot be assumed, as the tax authority contends, that the regulations governing the determination of the basis for calculating the solidarity levy constitute specific provisions specifying deductions applicable to this levy. They are considered autonomous regulations separate from the provisions regulating the principles of determining the taxable income for PIT.

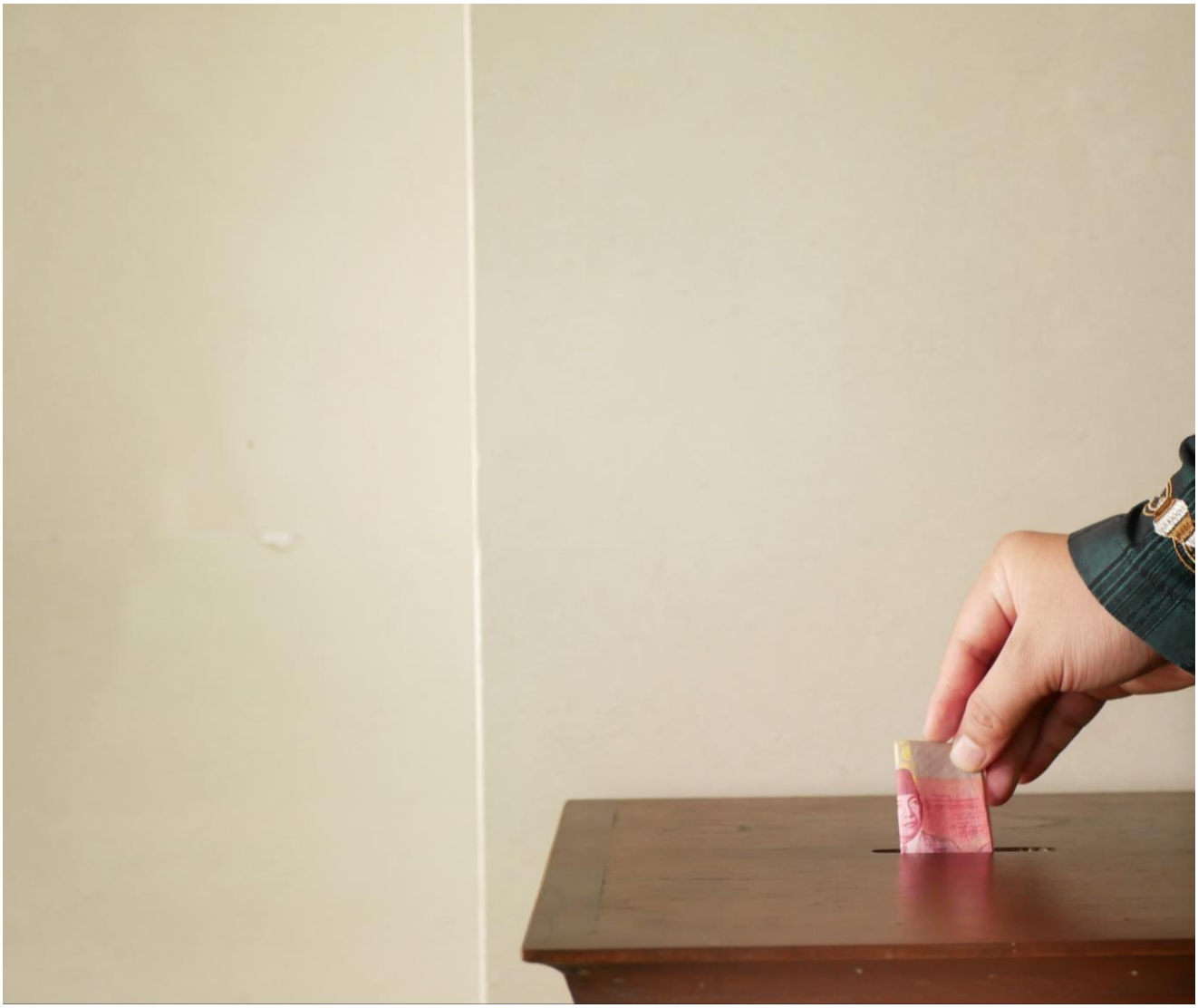
The WSA in Krakow, in a judgment dated March 8, 2023, case no. I SA/Kr 2/23, added that if the intention of a rational legislator was to prevent the deduction of losses from previous years when determining the basis for calculating the solidarity levy, such regulation would have been explicitly indicated in the PIT Act. Since the basis for calculating the solidarity levy is the surplus of specified income over a certain threshold, and not the revenue, it should be

assumed that this income is determined according to general principles allowing for the deduction of costs and reducing income by the amount of incurred losses (cf. WSA in Wroclaw, judgment dated June 22, 2023, case no. I SA/Wr 318 22).

The position presented by the court has led to a change in the stance of tax authorities. In response to a parliamentary inquiry dated July 27, 2023, reference: DD2.054.20.2023, the Ministry of Finance committed to supplement the tax explanations from 2019 regarding the solidarity levy. In these explanations, it will confirm the possibility of considering losses from previous years in the calculation basis for this levy. Taxpayers can only hope that this commitment will be fulfilled despite the political changes in the Ministry of Finance.

2. “Donates” on the ground of inheritance and gift tax

The term "donates" refers to voluntary contributions made by users to support creators, often operating on streaming platforms such as Twitch or YouTube. How should the revenues obtained in this way be accounted for?



Donations as Gifts: Navigating the Legal Landscape

In the interpretation dated November 9, 2023, reference number: 0111-KDIB2-2.4015.114.2023.3.MM, the KIS Director pointed out that donations (financial contributions) received by the taxpayer should be subject to taxation when they exceed the limits specified in the Inheritance and Gift Tax Act. It was reminded that for non-relatives (Group III), the tax-free amount is 5,733 PLN. However, it is important to note that when calculating the limit, the value of donations received from the same person in the year of the last acquisition and during the previous five years is summed up. If the total contributions from the same donor exceed the tax-free amount, the recipient will be required to file a tax return (notification is made on the SD-3 tax return form) and pay the tax.

In the discussed interpretation, the taxpayer planned to start an online business involving the posting of lectures translated from foreign languages into Polish by third parties on one of the popular platforms. These lectures would then be supplemented by the applicant with a recorded voiceover. Access to the videos provided by the taxpayer was intended to be free of charge. The taxpayer anticipated receiving voluntary contributions from users of the platform, ranging up to 3,000 PLN. He declared that the monetary contributions received from internet users would be considered donations under the Civil Code, where, through a donation agreement, the donor commits to providing free services to the recipient at the expense of their property.

Similarly, the tax authority addressed the activities of another taxpayer who conducts live broadcasts (so-called streams) and includes a unique link for making monetary contributions in the stream description. The authority additionally indicated that, to prove the amounts of received donations, the taxpayer, as the recipient, should have a personalized list of donors and the amounts donated by them.

Life creates various scenarios

It is worth noting that interpretations always relate to the specific factual situation presented by a given taxpayer – hence caution should be exercised, especially considering the diverse ways in which online creators operate, utilizing various platforms. In some cases, the donations received by them may not qualify as gifts.

3. Holiday Gifts for Employees and Contractors

As the holiday season unfolds, many employers choose to express gratitude to their employees and contractors through small tangible gifts. These gestures not only convey appreciation and maintain positive relationships but also contribute to the employer's positive image. The tax classification of such gifts has often been a subject of inquiries in applications for individual tax interpretations.

Can expenses on gifts for contractors be considered as tax deductible expenses in income acquisition?

One should ask whether a particular expense was incurred for purposes related to the representation of the entrepreneur (which is not a cost) or for other purposes, including those related to advertising (which constitutes a cost of income acquisition).

According to the assessment of the NSA, expenses for small gifts (such as pens, calendars, coffee sets, keychains, cases, silk ties with cufflinks, MP4 players, multitools, flashlights with a tool set, USB drives, wallets, digital photo frames, weather stations, wall clocks, thermal mugs, and other gadgets) given to contractors or potential contractors, provided that the gifts are branded with the company's logo, should be considered advertising expenses and consequently, constitute a cost of income acquisition (judgment of the NSA dated November 9, 2016, file ref. II FSK 2293/16).

The situation is different when we want to give a contractor a bottle of wine or a box of chocolates as a gift – tax authorities take the position that such gifts should be considered representation costs as mentioned in Article 16(1)(28) of the CIT Act (interpretation of the Director of the National Revenue Administration dated April 5, 2023, file ref. 0114-KDIP2-1.4010.103.2023.2.KW).

Presents for Contractors. Taxation

According to Article 21(1)(68a) of the PIT Act, the value of non-cash benefits received from the provider in connection with their promotion or advertising is exempt from tax if the one-time value of these benefits does not exceed PLN 200 (the exemption does not apply if the benefit is provided to an employee of the provider or a person in a civil law relationship with the provider).

Therefore, we can take advantage of the exemption only when the value of the gift for the contractor is within the PLN 200 limit and it also has a promotional or advertising character (see above). If the gift does not meet any of the exemption criteria, the recipient must declare its value as income and pay tax on it.

Significant for tax settlement is also whether the recipient is a legal person, individual entrepreneur, or an individual not engaged in business activity (e.g., an employee of a collaborating company). A legal person or an individual conducting business activity should independently settle the tax. If, however, the gift goes to an employee of the contractor, the obligation to obtain personal data from them arises to complete the PIT-11 information return on the amount of income received. The information should be directed both to the recipient and to the tax office.

Gifts for Employees. What is the Source of Financing for Purchasing Presents?

This is a crucial question. In-kind and monetary benefits financed entirely from the company's social benefits fund or trade union funds are exempt from personal income tax under the conditions specified in Article 21(1)(67) of the Personal Income Tax Act. The exemption amount is limited to PLN 1,000. Importantly, the exemption limit was increased during the

COVID-19 pandemic to PLN 2,000, and this higher amount applies until the end of 2023 – thus, only until the end of this year can one take advantage of the higher tax-exempt benefit.

It should be noted that the limit includes all benefits received by an employee during a given year. The value of benefits exceeding the exemption amount is subject to taxation. According to the PIT Act, vouchers, coupons, and other instruments entitling their holders to exchange them for goods or services are not considered benefits.

Additionally, an employer wishing to gift employees with benefits from the Social Benefits Fund must consider factors such as the individual financial status of each employee. The employer should specify in the fund's regulations how they will differentiate the value of packages, depending on the life, family, and financial situation of the individuals entitled to use the Social Benefits Fund.

What if a company doesn't have a Social Benefits Fund (ZFŚS)?

When there is no such fund in a given company, the above exemption will not apply. However, this does not necessarily mean that giving a holiday gift will always be associated with the employee's tax obligation. A gift is usually given without payment, not constituting payment for goods or services. Therefore, it qualifies as a donation and is subject to taxation under the inheritance and gift tax.

The taxpayer receiving a holiday gift in the form of a donation is generally obliged to pay tax on the received benefit. However, the inheritance and gift tax law provides an exemption that the recipient can take advantage of.

If the recipient belongs to the third tax group (meaning they are not related to the employer), the tax-free amount is 5,733 PLN. This limit applies to the value received from one donor and covers the tax year in which the taxpayer received the donation, as well as the preceding five years. In case of exceeding this limit, the taxpayer will only pay tax on the excess value beyond the specified amount. Employers, on the other hand, must remember that gifts to employees cannot be considered as deductible business expenses.

4. Reservation of the PESEL Number – Is It Worthwhile?

From November 17, 2023, there is the possibility to use a new service for reserving a PESEL number. According to information provided to the business editorial team of tvn24.pl by the Ministry of Digitalization, as of December 14, 2023, 906,800 people have already used this service.

What does reserving the PESEL number entail?

The reservation of the PESEL number will be recorded in a registry maintained by the Ministry of Digitalization. The registry will include registration numbers only for adults, including foreigners who have been assigned a PESEL. The registry of PESEL number reservations will collect the following data:

- PESEL number;
- information about the reservation;
- information about the moment of reservation (date, time);
- information about the withdrawal of the reservation (if it occurred);
- information about the moment of withdrawal of the reservation;
- indication of the entity that registered the reservation/withdrawal event.

Important deadline

From June 1, 2024, banks, notaries, and telecommunications operators, among others, will verify before taking any action whether a given PESEL number is listed in the reservation registry. In case it is reserved, they will refuse:

- conclusion of a credit, loan, or leasing agreement;
- conclusion of a contract for maintaining a bank account;

cash withdrawal from a bank account, which individually or cumulatively exceeds three times the minimum wage specified in the Act of October 10, 2002, on the minimum wage (approximately PLN 12,700 in 2024);

- notarial acquisition or disposal of real estate;
- issuance of a copy or duplicate of a SIM card or its virtual equivalent (e-SIM).

What benefits does reserving the PESEL number provide?

Limiting some consequences of identity theft. In the case of fraudulent use of our PESEL number, despite reservation, resulting in, for example, the conclusion of a credit agreement, the bank will not be able to demand repayment of such an obligation from us. There will also be no possibility of selling such a claim to a debt collection company.

There are certain exceptions to this rule (conclusion of an online consumer credit agreement when the consumer has been authenticated using individual authentication data or conclusion of an agreement during a period of more than 15 minutes of unavailability of the teleinformatics system where the PESEL number reservation register is kept, assuming due diligence in verifying the consumer's identity and documenting this verification), which does not change the opinion that this is a significant step towards enhancing the cybersecurity of our data.

Is the reservation irreversible?

No, the reservation of the PESEL number can be canceled at any time. The system currently offers two options: unlimited cancellation and cancellation with specifying the date and time of re-reservation (earliest 30 minutes after cancellation) – the system will automatically restore the reservation of the PESEL number after, for example, obtaining a duplicate SIM card.

How to reserve PESEL?

Reserving the PESEL number is a simple and free process – you can use this service online through the obywatel.gov.pl platform or use the “mObywatel” application (to reserve or cancel the reservation of the PESEL number online, you will need: a trusted profile, qualified signature, e-ID or login details for online banking). Alternatively, you can go to any municipal office and submit such an application in person or authorize someone to do it on your behalf.

For whom?

This solution is for everyone, but we particularly recommend offering assistance in using this service to seniors to protect them from individuals who often use deception and manipulation to steal their life savings. It is important to note that this system will not affect everyday administrative matters, such as registering with a doctor or filling a prescription.

Contact our team

Aldona Leszczyńska-Mikulska

Attorney-at-law, partner at GWW

Aldona.Leszczynska-Mikulska@gww.pl

Tomasz Piejak

Attorney-at-law, senior associate at GWW

Tomasz.Piejak @gww.pl

Natalia Uchmanowicz

Attorney-at-law, associate at GWW

Natalia.Uchmanowicz @gww.pl

Michał Zieliński

Attorney-at-law trainee, associate at GWW

Michal.Zielinski @gww.pl

Kacper Skałkowski

lawyer at GWW

Kacper.Skalkowski @gww.pl

Jakub Dziadur

lawyer at GWW

Jakub.Dziadur @gww.pl