

EVOLUTION OF PRIVATE LAW – NEW CHALLENGES

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(Eds.)



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Piotr Pinior, Wojciech Wyrzykowski, Mateusz Żaba

Abstract
General Aspect of Registration Obligations of Trading Companies in the Slovak Republic
Registration of Companies in the Slovak Republic
Agreement Terminated in Terms of Business
Corporate Creditors
Katowice 2020

Reviewer
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can be clearly seen, the quoted provision regulates a similar but not identical situation. For this reason, there is a justification that in the event that several entities acquire all the rights and obligations of a partner in a partnership, these persons indicate one person to exercise joint rights²⁰.

5. Summary

Overall, the following conclusions should be indicated. First, it should be assumed that the sale of all rights and obligations of a partner in a partnership does not constitute an amendment to the articles of association. Therefore, it does not require keeping the form identical to the one required by the legislator to amend the articles of association. This implies that in the event of sale of a “partnership share” a notification of a new composition of shareholders and not of an amendment to the articles of association should be made to the registry court. Second, the sale of membership in a partnership can be made to several entities. However, these persons do not obtain the status of separate partners. Due to the fact that it is not possible to split partnership rights adopted in Art. 10 CCC, buyers become collective partners following the sale of all rights and obligations. The conducted considerations justify the assumption that despite some doubts in that respect, the consent given by the other partners pursuant to Art. 10 § 2 CCC is the consent of a third party referred to in Art. 63 of the Civil Code.

²⁰ See Dunkiewicz M., *Kodeks...*, comment to Art. 10 CCC; Rodzyńkiewicz M., *Kodeks...*, comment to Art. 10 CCC.

15.

Liubomyr Zinych

Implementation of IP Box Regime in the Republic of Poland: Adaptation of Experience for Ukraine¹

1. Preliminary Remarks

The Ministry of Digital Transformation of Ukraine announced the introduction of an IP box regime in Ukraine in order to create a favorable tax environment for foreign entities that create and use intellectual property. That preferential tax regime was established in 19 European countries, including Poland where it came into force on 1 January 2019. In Poland, the IP box regime is part of public policy that focuses on innovation in the economy. For Ukraine, the experience of Poland in the conditions of “struggle” for innovative companies among European countries is quite valuable. It is also worth noting that Poland has one of the lowest tax rates under the IP box in Europe – 5%. In this context, research into the experience of the implementation of the IP box regime in the Republic of Poland seems to be relevant and necessary.

The preferential taxation of innovative companies is always at the center of legal and economic science. The introduction of the IP box regime in Poland and the adaptation of that experience for Ukraine were considered by such scholars as G. Androshchuk, O.O. Drugov, Z.M.

¹ This publication was written in the framework of Jean Monnet Module “Commercial Law of the European Union” and financed with the support of the European Union (the Erasmus+ Programme of the European Union).

Rudenko and others. However, the issues regarding the implementation and effectiveness of the IP box regime need further thorough research.

The purpose of this publication is to investigate the conditions and legal features of the establishment of the IP box regime in Poland and the possibility of using that experience in Ukraine. Undoubtedly, the regime has many economic and legal aspects and depends on the national characteristics of Poland, so the study is based on the general conditions for the implementation and operation of the IP box regime.

2. Terms of Use of the IP Box Regime in Poland

2.1. General Characteristics of the IP Box Regime

In order to stimulate innovation, the tax legislation of the Polish Republic contains provisions on the preferential tax regime for intellectual property, the main elements of which are: 1) a list of taxable objects and income from them; 2) effective tax rate; 3) the procedure for determining the tax base; 4) conditions for applying the preferential treatment.

An analysis of similar preferential taxation regimes in European countries shows that Poland paves a broad way for the regime covering intellectual property. At the same time, the legislation of the Republic of Poland involves not only the promotion of the use of intellectual property, but also the creation of R&D. The Polish legislator ensures that support elements are put in place at all stages of research and development in order to stimulate the creation of scientific research and development works.

The R&D tax relief makes it possible to recover 19% of expenses incurred with regard to Research and Development activity, in particular salaries, raw materials and other materials. Such expenses are after all incurred during the normal business activity. Regardless of the fact that the expenses are tax deductible costs, they can be additionally treated as eligible costs that give entitlement to benefit from a R&D tax relief, which in practice means the right to benefit from an additional deduction and thus reduce the amount of tax due².

² Tax incentives in Poland. [Electronic Resource] <https://granthornton.pl/en/article/tax-incentives-in-poland/> (as of 2.11.2020).

2.2. List of Taxable Assets and Income from Them

The Polish legislation lays down that the main objects subject to the preferential taxation must meet the following criteria: 1) scientific and technical output created or improved by the taxpayer; 2) the object is defined in the legislation on intellectual property; 3) such object enjoys legal protection under applicable law.

Pursuant to the provisions on the Polish IP BOX [Art.24dof the CIT(A)], the qualified IP rights are as follows:

- patent;
- protection right for utility model;
- rights in registration of industrial design;
- rights in registration of the integrated circuit topography;
- supplementary protection certificate for patent for a medicinal product or plant protection product;
- right in registration of the medicinal and veterinary product admitted to trading;
- the exclusive right set out in the Act on legal protection of plant varieties;
- copyright to a computer program.

Qualifying taxpayers are those taxpayers who create, develop or improve the subject of protection of qualified intellectual property rights as a part of their R&D activity and whose income from qualified IP rights is liable to taxation in Poland.

2.3. The procedure of the Tax Base Determination

An analysis of the Polish legislation on the rules for determining income and tax base entails consideration of two indicators: 1) income from qualified intellectual property received for the tax period; 2) the linkage metric is calculated using a special formula. These indicators determine the dependence on income and the actual costs incurred to obtain it.

In order to determine the IP box tax base, Polish law provides a mandatory condition for the taxpayer to carry out research and development work related to the main activity of that entity. It is important to note that the use or improvement of intellectual property is possible, and when there is a pat-

ent for an invention and a utility model, the revenue is calculated separately for each object. The taxpayer must indicate in the tax return the income received from that intellectual property, which is subject to 5% preferential taxation. The rest of the taxpayer's income is taxed on a general basis.

The IP Box tax credit is an annual credit, meaning that the tax benefit is obtained only after the end of the tax year upon submission of the tax return in which the amount subject to preferential taxation with a 5% rate is shown. That amount is then reimbursed in the form of a difference between the total tax advances paid during the tax year calculated using the standard 19% rate and the actually payable tax after the application of the 5% tax rate. This means that the use of the IP Box relief necessitates, in addition to a number of formal conditions, an attachment to the annual tax return, which will result in part of the income being subject to a 5% tax rate³.

2.4. Conditions for the Application of the Preferential Tax Regime

To use the IP Box, several basic requirements must be met, including:

- R&D and entrepreneurial activity directly related to the creation, development or improvement of intellectual property;
- coverage of the results of research works on the protection of intellectual property rights in one of the forms defined in the closed catalog of intellectual property objects;
- receipt of taxable income from intellectual property assets by a proper calculation of the cost of qualifying income based on the so-called connection indicator.

The legislation of the Republic of Poland provides that the main purposes of the Polish IP BOX regime are:

- retaining and increasing the attractiveness of conducting R&D activity by Polish and foreign entrepreneurs,
- encouraging new/potential entrepreneurs to undertake R&D activity in Poland,
- changing the economic model into a knowledge-based economy, and
- creating high-quality jobs in innovative/R&D sectors³.

³ Poland's IP regime (PL012). [Electronic Resource] <https://data.consilium.europa.eu/doc/document/ST-9652-2019-ADD-5/en/pdf> (as of 2.11.2020).

The benefits under the Polish IP BOX regime are granted by providing preferential taxation with a reduced 5% corporate income tax rate with reference to income derived from the qualified intellectual property rights.

It should be emphasized that the IP Box as a completely new solution in the Polish tax system does not yet have sufficiently developed practice or fully defined rules of implementation. Moreover, the formulation of provisions raises doubts as to the interpretation of taxpayers, which require further clarification. In case of doubt, one of the sources that can be accessed and on which the provisions of the Polish IP Box legislation are created is the OECD leadership as part of the BEPS initiative (Action Report # 5)⁴.

3. Comparison of the Polish IP Box Regime with the Draft of the Ukrainian IP Box

The Ministry of Digital Transformation of Ukraine has developed the concept of introduction of a special tax regime for innovative companies in Ukraine. The concept provides the necessary conditions for applying a preferential tax regime, a formula for calculating the portion of profit to which a reduced rate applies, the main industries interested in the IP box mode and the benefit to the economy.

The preferential terms of service are R&D at domestic level (or at least the final stage), revenue generated from the use of intellectual property, the relationship between the costs and the revenue from intellectual property. One of the most important prerequisites relates to the formulas for calculating the part of the profit to which the flat reduced rate, the reduced rate relative to part of the profit and additional tax incentives apply. In essence, the patent activity and application of the IP box regime depend on that element. Of course, the formulas proposed today are rather conditional, since the final version will be enshrined in legislation.

⁴ Innovation Box (IPBox) w Polsce Mechanizm działania w Polsce Przegląd aktualnych rozwiązań w Europie Warszawa, August 2019, 2nd ed., extended, p. 19. [Electronic Resource] <https://koalicjainnowacji.pl/wp-content/uploads/2019/10/Raport-IP-BOX-aktualizacja-2019.pdf> (as of 2.11.2020).

An analysis of the scientific literature on the subject suggests that the amount of support offered by research works in Poland is one of the most attractive in the region. The amount of tax privilege puts Poland in the third place, while the amount of support that can be obtained in the form of state aid and IP Box benefits is more favorable than those of its neighbors. Therefore, factors that are not directly related to fiscal stimulus will be key to further attracting investors, including those interested in research and development. An obstacle may be the lack of adequate number of skilled workers, the lack of proper quality of investment directions or an assessment of the general business conditions.

The introduction of the Innovation Box regime comes at a time when Poland is trying to stimulate business interest and investment from both domestic and foreign sources – in particular from organizations operating in the technology sector. A recent report identified Poland, along with Ukraine, Belarus, and Romania, as a hotspot for tech talent – with a combined export of \$13 billion in the software development market in 2018. Furthermore, the report suggested that the R&D market in those countries is growing at up to 25% per year – much faster than the global average of 5%⁵.

It is worth noting that the practice of European countries shows that the IP Box has become a popular tax planning tool, which in some cases has been aggressive and goes beyond the purpose of creating that regime. In that context, it should be mentioned that the Organization for Economic Co-operation and Development has developed measures to counteract companies that did not participate in the creation of intellectual property objects and use the IP Box solely for the purpose of tax „economy” and further transfer of such object to third parties for use⁶.

This fact shows that the practice of using the IP box has both positive and negative aspects even in economically developed countries and there is a need to minimize risks by detailed legal regulation and establishing responsibility for such actions.

⁵ The Innovation Box: Rewarding Innovation in Poland. [Electronic Resource] <https://www.activpolicy.com/news-articles/the-innovation-box-rewarding-innovation-in-poland> (as of 2.11.2020).

⁶ Духон О.О., Вагнер І.М., Руденко З.М., Особливості оподаткування роялті в контексті діяльності та міжнародного доповідь. [Electronic Resource] http://dspace.ubs.edu.ua/jspui/bitstream/123456789/2128/1/Rudenko_royalti.pdf (as of 2.11.2020).

IP Box regimes can result in large reductions in effective average tax rates. That effect stems not only from the low IP Box rates but also from the treatment of related expenses. Policies that do not require the recapture of previous R&D expenses are particularly generous. Such regimes result in a reduction in the tax liability of a marginal project. They may even be associated with negative effective average tax rates. There is not a clear justification for that effective subsidy, which may arise from an accidental design policy rather than from an active design decision.

IP Boxes work to incentivize investment in innovative activities and make countries more attractive locations for the financial returns of intellectual property. The designs of the policies vary in many ways and are likely to be important for the precise effects of the policy. Overall, the likely effect on real activities is uncertain because firms have substantial scope to separate income from underlying activities⁷.

4. Conclusion

On the whole, it should be noted that the introduction of the IP box regime in Ukraine is promising, however, as the experience of the Republic of Poland shows, it is a rather complicated and long-lasting process that requires a number of measures to be taken:

- provide a detailed procedure for the application of the IP box so that it conforms to other tax benefits;
- the effective functioning of the regime depends on government support for small and medium-sized businesses at all stages of the development and use of intellectual property;
- a detailed regulation of the procedure for the determination of the tax base is necessary;
- selection of the most optimal tax rate (from 2.5% to 5%, as experience shows) and other conditions for the implementation of the regime.

⁷ Intellectual Property Box Regimes: Effective Tax Rates and Tax Policy Considerations. [Electronic Resource] https://www.researchgate.net/publication/271739634_Intellectual_Property_Box_Regimes_Effective_Tax_Rates_and_Tax_Policy_Considerations (as of 2.11.2020).

Thus, Ukraine's openness to innovative companies necessitates taking into account the experience of other countries in implementing the IP box regime in order to minimize risks, create favorable conditions and address other factors. Only this way will Ukraine be able to make full use of its intellectual potential and guarantee a safe business environment for foreign companies.

16.

Matysz Żaba

On the Creditor Protection in Cross-border Division of Companies in the Light of Directive (EU) 2017/1132¹

1. Preliminary Remarks

Following the entry into force of Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019², a significant number of amendments have been made to the provisions of Directive (EU) 2017/1132 relating to certain aspects of company law³. The current field of possible and acceptable ways of company transformation was extended to include cross-border division as well as cross-border conversion. The European regulation has thereby met the actual needs of the market halfway. It is relevant because some discussions on conducting new – and different to mergers and acquisitions – cross-border

¹ The paper was funded by the research project APVV-19-0424 “Inovatívna obchodná spoločnosť: vnitrokorporatívne premeny, digitálne výzvy a nástup umelej inteligencie”.

² Directive (EU) 2019/2121 of the European Parliament and of the Council of 27.11.2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (Official Journal of the European Union 2019.321.1), hereinafter abbreviated as Directive (EU) 2019/2121.

³ Directive (EU) 2017/1132 of the European Parliament and of the Council of 14.6.2017 relating to certain aspects of company law (Official Journal of the European Union 2017.169.46), hereinafter abbreviated as Directive (EU) 2017/1132.