

ANNA ĆWIAKAŁA-MALYS
University of Wrocław

A TAXATION MECHANISM OF FINANCIAL INSTRUMENTS IN POLAND

INTRODUCTION

The Act of July 2nd, 2004 on Freedom of Economic Activity¹ (usdg — stands for Act on Freedom of Economic Activity), defines „business activity as commercial production, construction, trade and service [...] and also professional activity managed in an organized and continuous way” (Article 2). In Article 4(1) an entrepreneur is defined as a natural person, legal entity and as an organizational unit that is not a legal entity and possesses legal capacity, performing business activity on their own behalf. In Article 75(1) usdg it is stated that performing the activity is dependent on obtaining a permit necessary in the area of trading in financial instruments specified e.g. in acts:

- The Act of July 29th, 2005 on Trading in Financial Instruments² (uoif — stands for Act on Trading in Financial Instruments),
- The Act of July 29th, 2005 on Public Offer and Conditions of Introduction of Financial Instruments to Organized System of Transaction and on Public Companies,³
 - The Act of August 29th, 1997 — The Banking Law,
 - The Act of May 27th, 2004 on Investment Funds.⁴

On account of income from utilization of financial instruments natural persons are subject to taxation on the basis of personal income tax defined in the Act of July 26th, 1991 on Personal Income Tax⁵ (updof — stands for Act on Personal Income Tax).

¹ Journal of Law 2004 No. 173, item. 1807, as amended.

² Journal of Law No. 183, item 1538 and from 2006 No. 104, item 708 and No. 157, item 1119).

³ Journal of Law No. 184, item 1539 and from 2006 No. 157, item 1119.

⁴ Journal of Law No. 146, item 1546, as amended 18.

⁵ Journal of Law 2000 No. 14, item 176, as amended.

On the other hand, on account of income of entrepreneurs who have a permit to perform a business activity in the area of trading in financial instruments as stated in the law, are subject to taxation on the basis of provisions of the Act of February 15th, 1992 on Corporate Income Tax⁶ (updop — stands for Act on Corporate Income Tax).

Performance of financial services is free of tax on goods and services due to Article 43(1) (1) of the Act of March 11th, 2004 on Tax on Goods and Services.⁷ However, apart from the basic activity companies also perform other activities which are not free of tax. A taxpayer still benefits from exemption from tax if the sum of transactions from this accessory activity in the previous taxation year was not higher than 50,000 PLN.⁸

1. CAPITAL AND CASH INCOME IN THE ASPECT OF ACT REGULATIONS ON PERSONAL INCOME TAX

All the regulations mentioned in the introduction following from the Act on Freedom of Economic Activity and other acts enable natural persons to manage an activity in the area of transactions in securities or derivative financial instruments. However, it is allowed to participate in incomes of the companies resulting from the fact that they have companies' shares. Those incomes are taxed on the basis of general rules mentioned in the Act on Personal Income Tax.

1.1. CAPITAL AND CASH INCOME TAXATION

Personal income tax is also paid for paid transfer of securities and derivatives of financial instruments and execution of the law with the restriction that it is not done within business activity.

According to Article 17 updof, sources of income are incomes from financial capital, which are the following:

- interest on a loan,
- interest on savings deposit and cash in a bank account or any other forms of savings, storing or investing with the exception of funds related to performance of business activity,
- interest (discount) on securities,
- dividends and other income generated from share in the profits of legal entities that benefit on the basis of shares in a company with legal entity,

⁶ Journal of Law 2000 No. 54, item 654, as amended.

⁷ Journal of Law No. 54, item 535, as amended — Attachment No. 4 to the law, item financial agency services: PKWiU symbol, section J ex (65–67).

⁸ Article 113 (1) of the Act on Tax on Goods and Services.

- revenues from capital fund,
 - due, although not actually received, income from:
 1. paid transfer of shares in companies with legal entity and securities,
 2. execution of law arising from securities, as stated in Article 3 (1)(b)
- uoif,
- revenues of members of employee pension fund on account of transfer of shares placed in quantitative accounts to fund assets,
 - nominal value of shares in a company with legal entity or contribution in a cooperative taken in return for non-cash contribution,
 - revenues from paid transfer of derivative financial instruments and from execution of the resulting law.

1.2. RULES OF INCOME TAXATION

Due to the way of accounting for capital income we can distinguish:

- taxation on a regular basis — according to a tax scale,
- lump-sum settlement through a tax payer,
- lump-sum settlement in an additional income-tax return.

1.2.1. GENERAL RULES OF INCOME TAXATION

Income from share in companies which are not legal entities, e.g. civil law partnership, registered partnership, professional partnership, limited partnership, limited and stock partnership, with joint ownership, joint venture, joint ownership or joint use of things or property rights for every tax payer is defined proportionally to his share in profit and is combined with the remaining income from sources the income from which is not under taxation according to a tax scale.

In a situation when an investor's (a taxpayer's) who transferred such shares income from this transfer is noticed in a yearly income-tax return with the remaining income taxed under general rules then a tax is paid depending on a general level of income with the use of the appropriate tax scale.

1.2.2. LUMP-SUM SETTLEMENT OF INCOME THROUGH A TAXPAYER

A lump-sum character of tax means that while calculating, we do not take into account tax-deductible costs. The use of this tax depends on an entity (a taxpayer) who pays interest, dividends, etc. A payer is responsible for correct collection of the tax. It means that a taxpayer settles income tax with the tax office through a payer and, at the same, he does not show this income (revenues) in his yearly income-tax return.

A lump-sum income tax amounting to 19% is deducted from the following income (revenues) on the basis of Article 30a updoif:

- from loan interest, with the exception of a situation when a loan is a subject of business activity,
 - from interest and discount on securities,
 - from interest or other income from funds collected in taxpayer's account or in any other forms of saving, storing or investing, carried out by an entity entitled to this on the basis of separate regulations with the exception of funds related to performed business activity,
 - from dividends and other income on account of share in income of legal entities,
 - from income on account of share in capital funds,
 - on account of entitlement rights transfer of new issue shares by an employee pension fund on behalf of a member of a fund, etc.

1.2.3. LUMP-SUM INCOME SETTLED ON AN ADDITIONAL TAX RETURN

According to Article 30b (1)(2) updof an income tax (lump-sum) is 19% of the generated income, calculated as capital funds, decreased by tax-deductible costs. This income refers to:

- the difference between the sum of income from paid transfer of securities and tax-deductible costs specified on the basis of Article 22(1f) or (1g) or Article 23 (1) point 38, subject to Article 24 (13)(14),
 - the difference between the sum of income from exercising the rights resulting from securities, as stated in Article 3 point 1 (b) of the Act of July 29th, 2005 on Transfer of Financial Instruments and Tax-Deductible Costs, as stated on the basis of Article 23 (1) point 38a,
 - the difference between the sum of income from paid transfer of company shares with a legal personality and tax-deductible costs, as stated on the basis of Article 22 (1f) or Article 23 (1) point 38,
 - the difference between a nominal value of included shares in companies with legal personality or non-cash contributions in cooperatives in return for non-cash contribution in other form than company or its organized part and tax-deductible costs as stated in Article 22 (1e).

Income which is calculated in this way does not combine with other income of a taxpayer that is taxed on the basis of general rules according to the tax scale or a flat rate tax.⁹

These rules shall apply while determining income from transfer of securities (derivatives of financial instruments) in a situation when it is possible to identify and determine a real cost of acquisition of transferred securities.

If the aforementioned activities are impossible, a FIFO method is used — according to Article 24(10) updof. It means that the securities are consecutively transferred, starting from those which were acquired as first. Additionally, in a cal-

⁹ Articles 27 and 30c updof.

ulation we only use securities which are deposited in the investor's (taxpayer's) account and available on the day of sales order. What follows, securities which are blocked (pledged) in investment account of a taxpayer are not taken into account in determining the cost of acquisition.¹⁰ If an investor possesses accounts in several brokerage offices, the aforementioned method is used separately for each account in which the securities are deposited.

If an investment account, which was used to purchase and sale securities, is a joint ownership (including marital joint ownership), then the income is determined proportionally to its contribution in this joint ownership. In a situation of a lack of evidence to the contrary it is accepted that shares in joint ownership are equal and each owner (on the basis of provided registered information PIT-8C and having other evidence, e.g. about credit expenses or share acquisition costs) settles on PIT-8C form on appropriate part of income gained from paid transfer of securities deposited in a joint account.

1.3. TAX-DEDUCTIBLE COSTS ON INCOME FROM SECURITIES

The basic rule of determining tax-deductible costs is defined in Article 22 (1) updo. According to this article, tax-deductible costs are all costs incurred in order to gain income, with the exception of those specified in Article 23 of the Act. However, according to Article 23 (1) point 38 updo, tax-deductible costs are defined as, e.g. expenses for taking up, acquiring shares or contribution in a cooperative, shares in a company with legal personality, other securities and expenses for acquisition of participation units in capital funds.

The aforementioned expenses constitute tax-deductible cost in determining income from paid transfer of those shares, contribution and other securities, including income from acquisition of securities and also amortization of participation units in capital funds.

According to the explanation of the Ministry of Finance,¹¹ these costs can be divided into two groups:

1. Directly assigned to a particular transaction — e.g. costs of acquisition of securities which are sold against payment (unit price of sold security x number),
2. Taxpayer costs from a tax year connected with e.g. account servicing by brokerage office in order to gain income (costs: commission, including commission on purchase and sale, costs connected with keeping and opening an account, costs of transfer and deposit of securities, etc.).

¹⁰ Note of an Under-secretary of State with respect to taxation on paid transfer of securities and derivatives of financial instruments directed to all revenue offices, tax chambers and offices of fiscal control No. PB 5/RD-033-2-106/04 on 28.12.2005.

¹¹ Information brochure for PIT-38 form on the amount of gained income (incurred loss) in 2008, www.mf.gov.pl.

In the case of securities transfer from one brokerage office to another — only information about the time and price of securities purchased is passed on. The information about costs of commission and other expenses is not released. Expenses connected with commission and other fees would constitute cost of gaining income paid by a taxpayer and that would be noted in PIT-8C by a brokerage office responsible for a transfer.

In the situation when a taxpayer purchases securities on the basis of civil law agreements (e.g. legacy or donation), a brokerage office does not have documents confirming the price of purchase of securities and a price of securities cannot be derived from a document confirming ownership right to securities — a brokerage office assumes the price of purchase of transferred securities amounting to 0 PLN. In this case a taxpayer shows incurred (registered) costs of securities purchase in an income-tax return (PIT-8C). On the other hand, according to Article 21(1) point 105 updo, income from share transfer acquired as a legacy or donation — partially reflecting the sum of an inheritance tax paid — is free of tax.

1.4. THE MOMENT OF INCOME GAIN FROM PAID TRANSFER
OF SECURITIES AND DERIVATIVE OF FINANCIAL INSTRUMENTS
IN TAX TERMS AND ACCORDING TO THE ACT
ON TRADING IN FINANCIAL INSTRUMENTS

According to Article 17(1) point 6 updo, income from financial capital is considered due, although it is not actually received, when the income comes from:

- paid transfer of shares in companies with legal personality and securities,
- execution of law resulting from securities, as stated in Article 3 point 1(b) uoif.

It means that determining the date of income from a paid transfer of securities we use accrual method instead of cash method.

At the same time Article 7(2) uoif states that an agreement undertaking to transfer dematerialized securities transfers these securities from the moment of a proper record in securities account. It means that income from a paid transfer of securities takes place at the moment of ownership assignment to a purchaser, even if the actual payment occurs on the next day, which is at the moment of making a record in a securities account. On the other hand, income from paid transfer of derivative financial instruments and execution of resulting law, is generated at the moment of execution of law resulting from derivatives of financial instrument.¹²

¹² Article 17 (1b) updo.

1.4.1. TAXATION ON SECURITIES PURCHASED BEFORE 1ST JANUARY, 2001
— TEMPORARY SUBJECT EXEMPTION

According to Article 19 of the Act of November 12th, 2003 on Amendment of the Act on Income Tax and some other acts¹³ and regulations updo, income generated from January 1st, 2001 to December 31st, 2003 from paid transfer of securities which are admitted to public trading in securities, purchased on the basis of a public offer or on the stock exchange or on a secondary public regulated OTC or on the basis of permission granted in accordance with Article 92 or 93 of regulations — The Act on Public Trading in Securities is subject to tax exemption.¹⁴ Similarly, exemption refers to income generated:

- from paid transfer of securities of the State treasury issued after January 1st, 1989 and securities issued by units of territorial self-government after January 1st, 1997, purchased before January 1st, 2003,
- from execution of law resulting from securities which are mentioned in Article 3(3) of the Act of August 21st, 1997 — on Public Trading in Securities.

January 1st, 2004 is a border day for an acquisition of rights according to Article 19 of the Act on the Amendment of the Act on Personal Income Tax and some other acts. It means that to claim exemption of subject income from tax, it is necessary to have purchased the shares before January 1st, 2004, which means to transfer ownership rights.

Apart from the fact that transfer of securities is exempted from tax, a brokerage office prepares information about the income on PIT-8C (part F). In the situation of a lack of information whether given securities comply with prerequisites stated in the regulation mentioned above, a brokerage office shows income from the transfer as the one liable to tax. However, when a taxpayer has evidence that the income from securities transfer is tax free — he does not show this income in his income-tax return.

1.5. BROKERAGE OFFICES' OBLIGATIONS RESULTING
FROM THE ACT ON PERSONAL INCOME TAX

With the end of tax year an investor (taxpayer) is obliged to show in a tax return income from paid transfer of securities, including income that is mentioned in Article 24 (14) updo (e.g. income from paid transfer of borrowed securities), and income from paid transfer of derivatives of financial instruments, and also from execution of law resulting from them, and is obliged to settle due tax from a tax year.

¹³ Journal of Law No. 202, item 1956 and No. 222, item 2201.

¹⁴ Journal of Law No. 118, item 754 and No. 141, item 945, from 1998, No. 107, item 669 and No. 113, item 715 from 2000, No. 22, item 270, No. 60, item 702 and 703, No. 94, item 1037 and No. 103, item 1099.

According to Article 39(3) updog, natural persons pursuing business activity, legal entities and their organizational units and organizational units without legal personality are obliged to, by the end of February following a tax year, send an individual information about the amount of income which is mentioned in Article 30b(2), prepared according to fixed format (PIT-8C) specified by the Minister of Finance.¹⁵

The above-mentioned information is passed on by brokerage offices to taxpayers and to the Head of the Revenue Office competent for a place of residence of a taxpayer and in case of a foreign investor, mentioned in Article 3(2a) to the Head of Revenue Office competent for foreign taxation.

If in a tax year an investor possessed investment in some brokerage offices accounts and showed turnover, then each brokerage office submits to an investor PIT-8C form. Brokerage offices are not income taxpayers and are not entitled to remuneration, which is mentioned in Article 28(1) of the Act of August 29th, 1997 on Tax Law,¹⁶ because taxpayers and collectors of payment are entitled to lump-sum remuneration due to punctual payment of taxes collected to the benefit of state budget. This information does not constitute legal basis for payment of remuneration.¹⁷

1.6. TAX OBLIGATIONS OF AN INVERSTOR (TAXPAYER)

According to Article 45 (1a) point 1 updog, taxpayers are obliged by 30th of April the following year to submit to the Revenue Office a tax return PIT-38 on the amount of generated income (incurred loss) from capitals taxed on the basis of Article 30b updog. Taxpayers using PIT-38 form are not obliged to pay any advance payment for an income tax during a year. In PIT-38 a taxpayer is obliged to show all taxed income from paid transfer of e.g. securities, regardless of the way in which they were obtained (purchase, legacy, exchange, donation), and whether a taxpayer receives PIT-8C information with respect to this. Some of the transactions, e.g. between natural persons, are not confirmed by PIT-8C information. In this case a taxpayer on the basis of appropriate documents is obliged to settle the income and tax-deductible costs. The settled due lump-sum tax amounting to 19% is to be paid by 30th of April the following tax year.

An investor that has capital income abroad is obliged to settle it in Poland. According to Article 30b(3) updog, the amount of lump-sum tax from income gained

¹⁵ *The rules of taxation on paid transfer of securities*, “Przegląd Podatku Dochodowego” 22 (190)/2006, p. 44.

¹⁶ A uniform text — Journal of Law 2005 No. 8, item 60, as amended.

¹⁷ Note of an Under-secretary of State with respect to taxation on paid transfer of securities and derivatives of financial instruments directed to all revenue offices, tax chambers and offices of fiscal control No. PB 5/RD-033-2-106/04 on 28.12.2005.

outside the Republic of Poland and amount of tax paid abroad should be shown in income-tax return.

According to income settled on the basis of lump-sum in an additional tax return, defined in detail in the Act, provisions shall apply of agreements on avoiding double taxation, in which one of the party is the Republic of Poland. The application of a lower rate of tax resulting from a proper agreement on avoiding double taxation or resignation from taxation according to this agreement is possible provided that a taxpayer submits a certificate of residence.

The register of agreements on avoiding double taxation, in which one of the party is the Republic of Poland can be found on the website of the Ministry of Finance (www.mf.gov.pl).

1.7. SETTLEMENT OF LOSSES FROM PAID TRANSFER OF FINANCIAL INSTRUMENTS — TAXPAYER'S RIGHT

According to Article 9(6) updog about the loss from paid transfer of securities, including paid transfer of borrowed securities (shorting) and paid transfer of derivative of financial instruments and from execution of law resulting from them, it is possible to reduce the income gained from the same source in the five following tax years, taking into account that the amount of the reduction cannot exceed 50% of the loss sum.

2. INCOME AND GAINS FROM FINANCIAL INSTRUMENTS TAXATION IN THE ASPECT OF ACT REGULATIONS ON CORPORATE INCOME TAX

A taxable income, according to Article 12 of the Act of February 15th, 1992 on Corporate Income Tax (updop),¹⁸ is not only the money received but also other values, e.g. exchange rate differences, value of things, rights or other benefits which were received free of charge or partially free. Income connected with business activity (including e.g. brokerage offices, banks which pursue a brokerage activity or any investment companies) is also considered a form of due income which was not actually received, after exclusion of the value of returned goods, given bonuses and allowances. When defining a date of income gain, we take as a general rule that due income will be gained on a day of releasing the items, transfer of rights in property or servicing, including partial service but not later than on the day of issuing an invoice or payment of liabilities.

¹⁸ Journal of Law 2000, No. 54, item 654, as amended.

2.1. THE RULES OF DETERMINING TAX BASIS

Income is understood as excess of a sum of revenue over the costs, gained in a tax year. If the costs exceed the sum of revenue then a difference is a loss.¹⁹ In a situation when a taxpayer incurred losses in a tax year, he/she can reduce the income amounting to the loss in the following five tax years, provided that the amount of the reduction in any of the following years does not exceed 50% of the loss sum. According to Article 15 updop, tax costs (tax-deductible costs) are understood as costs incurred in order to gain income or to keep or secure a source of income, with the exception of those stated in Article 16(1). On the basis of the explanation of the Ministry of Finance, as tax deductible costs we can understand different kinds of expenses related to functioning of a company, in particular the ones connected with gained income indirectly, e.g. liquidated damages.²⁰

Costs which are directly related to income are settled in a year during which the income related is gained. Other costs are settled in a year of incurring them. As the date of incurring the cost we recognize the date of registering costs in accounting records on the basis of an invoice or any other accounting voucher.

Updop does not include detailed information with respect to the rules of settlement of derivative instruments. Article 16(1) point 8b specifies the moment of recognizing costs related to the purchase of derivative of financial instruments as a tax deductible costs. They reduce income of a taxpayer at the moment of one of the following events, e.g.:

- execution of law resulting from purchased derivative instruments, or
- resignation from execution of law resulting from these instruments, or
- their paid transfer.²¹

According to Article 19 updop, the rate of corporate income tax amounts to 19% of the tax basis.

During a tax year taxpayers do not submit tax returns, however, they are obliged to pay advance. At the end of a tax year, according to Article 27 updop, taxpayers have to submit a tax return on income (loss) gained in a tax year by the end of the third month of the following year and in this time they are obliged to pay due tax or a difference between due tax and the sum of due advances for the period starting from the beginning of a year.

¹⁹ Article 7(2) updop.

²⁰ *CIT guide*, the Ministry of Finance (www.mf.gov.pl).

²¹ K. Kaczmarek, N. Ostrowska, *Opcje i forwardy rozlicz w przychodach i kosztach*, "Rzeczpospolita. Dobra Firma" 09.03.2009 (www.rp.pl).

2.2. SAMPLE FORMS OF TAX SETTLEMENT ON INCOME AND GAINS FROM FINANCIAL INSTRUMENTS ACCORDING TO THE ACT ON CORPORATE INCOME TAX

2.2.1. INCOME FROM SALE OF SECURITIES GAINED BY CORPORATE INCOME TAXPAYERS WITH A REGISTERED OFFICE OR A MANAGING BOARD WITHIN THE TERRITORY OF THE REPUBLIC OF POLAND

Income of corporate taxpayers having a registered office or a managing board within the territory of the Republic of Poland, from paid transfer of securities, e.g. shares and also rights to shares are subject to taxation in Poland under general rules. Income from paid transfer of securities is understood as a difference between the revenue, e.g. its value expressed in a price in a sale agreement and the cost of its acquisition, e.g. expenses borne for the acquisition of securities, but when their price is significantly different from the market value, income from paid transfer is defined by a tax office as amounting to its market value. Income from paid transfer of securities increases a tax basis. According to Article 19(1) updog, corporate income tax amounts to 10% of tax basis.

2.2.2. TAXATION OF INCOME ON DIVIDENDS OBTAINED BY TAXPAYERS OF CORPORATE INCOME TAX WHO HAVE A REGISTERED OFFICE OR A MANAGING BOARD WITHIN THE TERRITORY OF THE REPUBLIC OF POLAND

According to Article 22(1) updog, taxation on income from dividends and other income on shares in profit of legal person with a registered office or a management board within the territory of the Republic of Poland is agreed to be (of lump-sum tax) 19% of obtained income.

2.2.3. SPECIAL RULES OF INCOME TAXATION ON SECURITIES AND DIVIDENDS OBTAINED BY TAXPAYERS OF CORPORATE INCOME TAX WHO DO NOT HAVE A REGISTERED OFFICE OR A MANAGING BOARD WITHIN THE TERRITORY OF THE REPUBLIC OF POLAND

In accordance with Article 3(32) uoif, a foreign investment company is understood as a legal entity or an organizational unit without legal personality with a registered office within the territory of a Member State and in case of a situation when regulations of a particular country do not require establishment of a registered office — with a head office within the territory of another Member State or natural person with a place of residence within the territory of another Member State, managing brokerage activity on the basis of a permission of a supervising organ competent within the territory of another Member State and also foreign credit institution.

On the other hand, in accordance with Article 3 point 33 uoif, an investment company is understood as a brokerage office, a bank managing brokerage activity, a foreign investment company managing brokerage activity within the territory of the Republic of Poland and a foreign legal entity with a registered office within the territory of a country belonging to OECD or WTO, managing brokerage activity within the territory of the Republic of Poland.

In case of corporate taxpayers who do not possess a registered office or a managing board within the territory of the Republic of Poland or any natural persons without a place of residence within the territory of the Republic of Poland, the amount of income taxation from dividends and transfer of shares can be affected by regulations between countries on double taxation.

However, according to Article 26(1) updop, the application, in relation to the aforementioned claims, of tax rates resulting from agreements on avoiding double taxation or tax exemption according to the agreement is possible only when a taxpayer submits documents stating registered office (a certificate of residence) issued by tax authorities of his/her country.

According to Article 22(4) updop, income from dividends and other income from shares in profits of legal person are exempted from income tax under the following conditions:

1. a company which is an income taxpayer with a registered office or a managing board within the territory of the Republic of Poland is also the one that pays a dividend or other income on share in profits of legal person,

2. the one that receives income on dividends and other income on shares in profits of legal persons, as stated in point 1, is a company subordinate to Member States other than the Republic of Poland or other country belonging to European Economic Area, and is due to income taxation from a total amount of income no matter what the place of obtaining is,

3. a company has indirectly less than 10% of shares in a capital of a company that pays dividend,

4. an income receiver from dividends and other income on shares in profits of legal person is:

- a company as stated in point 2, or
- a foreign company as stated in point 2.

The above-mentioned exemption applies to a situation when a company that obtains income has had shares for two years continuously.

In case of failure to comply with the condition of possessing the shares amounting to as mentioned above for two years, a company is obliged to pay tax with default interest rates amounting to 19% of income, taking into account agreement on avoiding double taxation, with the Republic of Poland as one of the party.

3. FINANCIAL INSTRUMENTS TRADING IN THE ASPECT OF TAX ON CIVIL LAW TRANSACTIONS

Sale of brokerage financial instruments to investment companies or through them or sale of these instruments within the framework of organized transfer — as understood by uoif and according to Article 9 point 9 of the Act of September

9th, 2000 on Civil Law Transactions Tax (upocc — stands for Act on Civil Law Transactions Tax)²² is exempted from this tax.

Uoif allows for a possibility of entering agreements that transfer ownership of securities without an entity managing brokerage office. These agreements (sales agreements) on the basis of regulation are charged, according to Article 7(2) point 1(b) upocc, with a tax amounting to 1% of the market value of sold property rights. According to Article 10(1) upocc, taxpayers are obliged to, without tax office call, submit a tax return on civil law transactions, according to established format and settle and pay a tax within 14 days from the day when a tax obligation emerged, with an exclusion of cases when tax is taken by a taxpayer. A notary is a payer if it is done in the form of notarial deed. At the same time, according to Article 2 point 4 upocc, the civil law transactions are not subject to taxation, if at least one of the parties, due to this activity, is obliged to pay goods and services tax or is exempted from it. Additionally, payers are obliged to make this civil law transaction contingent upon previous payment of tax.

3.1. TRADING IN FINANCIAL INSTRUMENTS

Sale of securities, financial instruments and property rights connected with them is covered by subject exemption. This exemption refers to treasury securities of a creditor kind (treasury bonds, cash bonds of the National Bank of Poland and brokerage financial instruments).

3.1.1. TREASURY SECURITIES

Treasury securities are also a subject of trading on secondary market. Exempted from tax are only civil law transactions such as sale on primary and secondary market. The National Bank of Poland is authorized to issue and sell cash bonds.²³ Sale on both markets can benefit from tax exemption. On the other hand, securities issued and sold by commercial banks do not benefit from this exemption.²⁴

3.1.2. ACT ARRANGEMENTS ACCORDING TO BROKERAGE FINANCIAL INSTRUMENTS

Uoif introduced the concept of brokerage financial instruments. According to Article 2 point 2 of the Act, we can distinguish: 1) securities, 2) financial instruments which are not securities (titles of participation in institutions of collective investment, instruments of money market, fixed-term financial contracts and other equivalent financial instruments settled in cash, forward rate agreement regarding rate interest, share swaps, interest rate swaps, currency swap and options

²² Journal of Law 2000 No. 86, item 959, as amended.

²³ A uniform text — Journal of Law 2005 No. 1, item 2, as amended.

²⁴ M. Goettel, A. Goettel, *Podatek od czynności cywilnoprawnych — Komentarz*, Warszawa 2008, pp. 266–268.

of purchase and sale of financial instruments, interest rates options, currency options and other equivalent financial instruments settled in cash).

Sale of brokerage financial instruments is also exempted from tax in a situation when: it is conducted directly to investment companies (e.g. brokerage offices, banks managing brokerage activity, foreign investment companies managing brokerage activity within the territory of the Republic of Poland and foreign legal entities with a registered office within the territory of a country belonging to OECD or WTO, managing brokerage activity within the territory of the Republic of Poland²⁵), or by their services or within the framework of organized trading.²⁶

According to the aforementioned exemption, it is also applicable to sale of financial instruments purchased (independently) by brokerage offices (other entities managing brokerage activity) and sale conducted within the framework of purchasing or selling by brokerage offices (other entities) of these instruments on somebody's account (within brokerage services).

It is vital to mention that sale transactions in financial instruments will be very often treated as financial brokerage services, which means that goods and services tax shall apply.

BIBLIOGRAPHY

POLISH LAW ACTS

- Ustawa z dnia 26 lipca 1991 r. o podatku dochodowym od osób fizycznych (Dz.U. z 2000 r. Nr 14, poz. 176, z późn. zm.).
- Ustawa z dnia 15 lutego 1992 r. o podatku dochodowym od osób prawnych (Dz.U. z 2000 r. Nr 54, poz. 654, z późn. zm.).
- Ustawa z dnia 21 sierpnia 1997 r. — Prawo o publicznym obrocie papierami wartościowymi (Dz.U. z 2002 r. Nr 49, poz. 447, z późn. zm.).
- Ustawa z dnia 29 sierpnia 1997 r. o Narodowym Banku Polskim (tekst jednolity — Dz.U. z 2005 r. Nr 1, poz. 2 z późn. zm.).
- Ustawa z dnia 29 sierpnia 1997 r. Ordynacja podatkowa (tekst jednolity — Dz.U. z 2005 r. Nr 6, poz. 80, z późn. zm.).
- Ustawa z dnia 9 września 2000 r. o podatku od czynności cywilnoprawnych (Dz.U. 2000 Nr 86 poz. 959, z późn. zm.).
- Ustawa z dnia 15 września 2000 r. — Kodeks spółek handlowych (Dz.U. Nr 94, poz. 1037 ze zm.).
- Ustawa z dnia 12 listopada 2003 r. o zmianie ustawy o podatku dochodowym od osób fizycznych oraz niektórych innych ustaw (Dz.U. Nr 202, poz. 1956 i Nr 222, poz. 2201).
- Ustawa z dnia 11 marca 2004 r. o podatku od towarów i usług (Dz.U. Nr 54, poz. 535 z późn. zm.).
- Ustawa z dnia 29 lipca 2005 r. o obrocie instrumentami finansowymi (Dz.U. Nr 183, poz. 1538, z późn. zm.).

²⁵ Article 33, upoc.

²⁶ Article 33 point 9, upoc.

- Ustawa z dnia 4 września 2008 r. o zmianie ustawy o obrocie instrumentami finansowymi oraz niektórych innych ustaw (Dz.U. z 2009 r. Nr 165, poz. 1316).
- Ustawa z dnia 6 listopada 2008 r. o zmianie ustawy o podatku dochodowym od osób fizycznych, ustawy o podatku dochodowym od osób prawnych oraz niektórych innych ustaw (Dz.U. Nr 209, poz. 1316).

LITERATURE AND OTHER SOURCES

- Broszura informacyjna do zeznania PIT-38 o wysokości osiągniętego dochodu (poniesionej straty) w roku 2008 [Information brochure for PIT-38 form on the amount of gained income (incurred loss) in 2008], www.mf.gov.pl.
- Dochody z tytułu sprzedaży krótkiej*, "Przegląd Podatku Dochodowego" 15 (159), 2005, Wydawnictwo Gofin.
- Goettel M., Goettel A., *Podatek od czynności cywilnoprawnych — Komentarz*, Wydawnictwo Wolters Kluwer Polska, Warszawa 2008.
- Informator CIT*, Ministerstwo Finansów, www.mf.gov.pl.
- Instrumenty finansowe*, "Zeszyty Metodyczne Rachunkowości" 14 (86), 2002, Wydawnictwo Gofin.
- Kaczmarek K., Ostrowska N., *Opcje i forwardy rozlicz w przychodach i kosztach*, "Rzeczpospolita. Dobra Firma" 09.03.2009 (www.rp.pl).
- Opodatkowanie niektórych rodzajów dochodów osób fizycznych uzyskiwanych z instrumentów finansowych notowanych na GPW — według stanu prawnego na dzień 1 stycznia 2009 r. (w zarysie), www.gpw.pl.
- Pismo Podsekretarza Stanu w sprawie opodatkowania dochodów z odpłatnego zbycia papierów wartościowych i pochodnych instrumentów finansowych, skierowane do wszystkich urzędów skarbowych, izb skarbowych oraz urzędów kontroli skarbowej nr PB 5/RD-033-2-106/04 z dnia 28.12.2005 r. [Note of an Under-secretary of State with respect to taxation on paid transfer of securities and derivatives of financial instruments directed to all revenue offices, tax chambers and offices of fiscal control No. PB 5/RD-033-2-106/04 on 28.12.2005].
- Zasady opodatkowania dochodów uzyskanych z odpłatnego zbycia papierów wartościowych*, "Przegląd Podatku Dochodowego" 22 (190), 2006, Wydawnictwo Gofin.