



Tax Alert

SAC: Goodwill is not subject to capital duty

KPMG in Poland

February 2022

On 21 February 2022, a bench of 7 judges of the Polish Supreme Administrative Court passed a resolution (case file III FPS 2/21) acknowledging that **goodwill**, representing the excess of the price of purchase of an enterprise or an organized part thereof over the fair value of the tangible and intangible assets acquired, does not constitute a property right under Article 1(1)(1)(a)) of the Tax on Civil Law Transactions Act.

> Divergent legal interpretations

This issue of subjecting goodwill to the capital duty (tax on civil law transactions, Polish: PCC) has long been subject to divergent legal interpretations. Pursuant to the Act, the capital duty (of 1 or 2 percent) is charged, inter alia, on contracts of sale of tangible property and property rights, and is borne by the purchaser. This means that in the event of a purchase of an enterprise or an organized part thereof under a sales contract, the purchaser should determine the value of individual tangible and intangible assets acquired, assign them an appropriate tax rate and, subsequently, declare and pay the tax (excluding cases where the sale agreement is concluded in the form of a notarial deed and the PCC is remitted by a notary).

The fact laying at the heart of the problem is that the aggregate market value and the purchase price of an enterprise or an organized part thereof are also influenced by the goodwill, i.e., a type of underlying economic value reflecting, inter alia, the enterprise's capacity to generate revenue or its customer relationships. Consequently, there was an urgent need to establish whether goodwill should be treated as an asset subject to a 1 percent capital duty.

In practice, the jurisprudence has been based on two contradictory lines of interpretation. According to the first approach, the goodwill cannot be treated as a company's property right and, consequently, it should not be subject to a 1 percent PCC. This line of interpretation was reinforced by the Supreme Administrative Court's rulings of 8 October 2019 (case file II FSK 3272/17), 23 May 2019 (case file II FSK 1393/17), and 28 June 2018 (case file II FSK 1932/16). In turn, a contrary approach was demonstrated by the SAC's ruling of 14 November 2018 (case file II FSK 3253/16). The viewpoint that the goodwill should be, in fact, subject to PCC was also expressed by provincial administrative courts, e.g., the Administrative Court in Warsaw in its appealable judgments dated 8 September 2020 (case file III SA/Wa 2577/19), 19 December 2019 (case file III SA/Wa 940/19), and 30 May 2019 (case file III SA/Wa 1836/18).

Given the existing interpretation discrepancies, by its decision of 19 October 2021 (case file III FSK 271/21), the SAC referred the case at hand to a bench of 7 SAC judges.

> Consequences of the resolution

As a result, a bench of 7 SAC judges passed a resolution acknowledging that goodwill, representing the excess of the price of purchase of an enterprise or an organized part thereof over the fair value of the tangible and intangible assets acquired, does not constitute a property right under Article 1(1)(1)(a)) of the Tax on Civil Law Transactions and, consequently, should not be subject to the capital duty. It should be noted that the SAC's resolutions have binding power over all administrative courts (meaning provincial administrative courts and the Supreme Administrative Court itself).

It should be emphasized that the resolution of the Supreme Administrative Court concerns, in principle, the taxation of goodwill in the event of sale (or change) of an enterprise or an organized part thereof. In practice, the list of instances where goodwill is created (e.g., for balance sheet purposes) is much more extensive and includes in-kind contributions, mergers, divisions, etc. Nevertheless, it should be kept in mind that this does not always result in the creation of goodwill for tax purposes, or the taxation of a given transaction with capital duty.

> How can we assist you?

The vast array of services provided by KPMG includes:

- verifying transactions made in terms of a possible application for a refund of the overpaid capital duty (for periods outside the statute of limitations - that is, in cases where PCC was due for 2017 or subsequent years);
- drafting statements of overpayment and providing support in proceedings before a court;
- drafting applications for individual tax rulings in this respect.

KPMG offices

Warsaw

ul. Inflancka 4a
00-189 Warszawa
T: +48 22 528 11 00
E: kpmg@kpmg.pl

Gdańsk

al. Zwycięstwa 13a
80-219 Gdańsk
T: +48 58 772 95 00
E: gdansk@kpmg.pl

Kraków

ul. Opolska 114
31-323 Kraków
T: +48 12 424 94 00
E: krakow@kpmg.pl

Katowice

ul. Francuska 36
40-028 Katowice
T: +48 32 778 88 00
E: katowice@kpmg.pl

Poznań

ul. Roosevelta 22
60-829 Poznań
T: +48 61 845 46 00
E: poznan@kpmg.pl

Łódź

ul. Składowa 35
90-127 Łódź
T: +48 42 232 77 00
E: lodz@kpmg.pl

Wrocław

ul. Szczytnicka 11
50-382 Wrocław
T: +48 71 370 49 00
F: +48 71 370 49 01
E: wroclaw@kpmg.pl



The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavour to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

The KPMG name and logo are trademarks used under license by the independent member firms of the KPMG global organization.

© 2022 KPMG Tax M. Michna sp. k., a Polish limited partnership and a member firm of the KPMG global organization of independent member firms affiliated with KPMG International Limited, a private English company limited by guarantee. All rights reserved.

kpmg.pl