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THE PROBLEM OF THE TAX-LEGAL UNIFICATION OF THE EFFECTS OF EMPLOYEE'S CREATIVE ACTIVITY

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Abstract. Provision of work covers various activities of an employee, the performance of which may lead to a result that is subject to copyright protection. This applies both to the performance of work under the classic employment relationship and the "academic employment contract," containing elements characteristic for the performance of duties in the sphere of higher education and science. In both cases, the issues related to the creation and acquisition of economic copyrights to employee works are regulated by the provisions of the Act on copyright and related rights. In practice, however, a far-reaching (and incomprehensible) differentiation of tax-legal consequences can be observed in this respect, which becomes the source of numerous controversies in the context of law application. Problems are particularly visible in the area of calculating 50% (the so-called lump-sum) tax deductible costs. It should be emphasized at the same time that emerging interpretation difficulties result not only from the content of tax regulations. Their source is the provisions of the Law on higher education and science. The general (long-awaited) interpretation of the Minister of Finance sustained the legal dualism in the scope of the issue. The duality of the presented interpretation results from different treatment of employment contracts of academic teachers. It is pointed out that in order for the remuneration of academic teachers to be regarded as a royalty, a work must be created within the meaning of copyright law, but at the same time arguments are presented referring to non-statutory premises, which do not have normative overtones in the analysed case (e.g. prestige of the profession of academic teacher, which has features characteristic for liberal professions). The aim of the article is to outline the tax-legal consequences of the divergences and views persisting for a long time with regard to the treatment of employee's works arising within the framework of employment relationship and to propose an appropriate interpretation direction supported by the Authors. For this purpose the dogmatic and historical-legal methods was used.

Keywords: academic employment contract, academic staff, employment contract, flat rate deductible costs

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INTRODUCTION

The relationship of employment is a bond of special social and economic significance. It is characterised not only by specific (statutorily defined) features, but it also determines the establishment of a defined set of rights and obligations between the employee and the employer. The relationship of employment arises regardless of the name given to the contract entered into.[1] The provision of work includes various activities on part of the employee, the performance of which may lead to a result covered by copyright protection. This applies both to the performance of work as part of a classic employment relationship and an "academic employment contract," containing elements typical of the performance of duties in the sphere of higher education and science. In both cases, the issues related to the creation and acquisition of economic copyrights to employee works are regulated by the provisions of the Act on copyright and related rights.[2] In practice, however, a far-reaching differentiation of tax-legal consequences can be observed in this respect.

As a rule, taxation through personal income tax covers any income understood as a surplus of the sum of revenues over the costs of earning them in a given tax year.[3] Of course, the law defines various methods of determining costs, which unfortunately give rise to numerous disputes between taxpayers and taxation authorities. This also applies to the rules relating to academic teachers performing their duties under an employment relationship. Problems concern both to the manner and scope of application of 50% of the so-called lump-sum costs. It should be noted at the same time that interpretation difficulties stem not only from the content of tax regulations. They are also rooted in the reform of higher education and the introduction of new regulations under the so-called Act 2.0.[4]

[1] See e.g. judgment of the Supreme Court of 7 April 1999, ref. no. I PKN 642/98, Lex no. 40166; judgment of the Regional Court in Rzeszów of 4 February 2020, ref. no. IV U 1548/19, Lex no. 2781453; judgment of the Appellate Court in Warsaw of 12 December 2017, ref. no. III AUa 696/16, Lex no. 2658583.

[2] Article 12 of the Act of 4 February 1994 on copyright and related rights, Journal of Laws of 2018, items 1191 and 1293 [hereinafter: the Act on copyright and related rights].

[3] Article 9 and Article 22 of the Act of 26 July 1991 on personal income tax, Journal of Laws of 2018, item 1426 as amended [hereinafter: APIT].

[4] Act of 20 July 2018, the Law on Higher Education and Science, Journal of Laws item 1668 [hereinafter: LHES]; Act of 3 July 2018, the Introductory provisions for the Law on Higher Education and Science, Journal of Laws item 1668.

1. ESSENCE AND LEGAL NATURE OF EMPLOYMENT RELATIONSHIP

To illustrate the numerous doubts that arise with regard to issues related to the tax-law assessment of the creative effects of providing work under employment contracts, it is necessary to refer to such essential issues as the nature and normative limits of the construct of employment relationship. As defined in the provisions of the Labour Code, the employment relationship is of a bilateral and reciprocal nature, except that the latter feature is modified by asymmetrical distribution of the business risk burden (it is primarily the responsibility of the employer and it concerns, *inter alia*, personal, technical, economic and social aspects) [Tomaszewska 2020; Jackowiak 2009, 28; Goździewicz and Zieliński 2017].

The employment relationship is part of a broader concept of employment, which also applies to performance of work for a consideration (e.g. under civil-law contracts). To be able to speak strictly about hiring under an employment relationship, the catalogue of all statutory features should be met [Tomaszewska 2020].[5] When referring to the essential content of the relationship between the employee and the employer, it should be noted that by entering into an employment relationship, the employee agrees to perform work of a specific type for the employer and under employer's supervision and at the place and time designated by the employer, while the employer agrees to employ the employee for a consideration. The concluded contract should specify the type of work to be performed by the employee under the employer's management.[6] This means that the employer is entitled to issue binding instructions to the employee (as long as they are lawful and the valid contract between the parties), in particular as to the manner, place and time of

[5] See judgment of the Supreme Court of 11 September 2013, ref. no. II PK 372/12, Lex no. 1474905; judgment of the Supreme Court of 10 May 2018, ref. no. I PK 60/17, Lex no. 2486218; judgment of the Supreme Court of 19 March 2013, ref. no. I PK 223/12, Lex no. 1415490.

[6] The type (or types) of work means a set of activities to be the responsibility of the employee. Where several types of subordinated work are performed for the same employer, it must be presumed that the parties are linked with one employment relationship (judgment of the Supreme Court of 14 February 2002, ref. no. I PKN 876/00, Lex no. 82595). Sometimes, however, the agreement concluded by the parties is of a mixed nature. The case-law states that a predominant set of characteristics must then be established (judgment of the Supreme Court of 14 September 1998, ref. no. I PKN 334/98, Lex no. 37685) and, if they are equal in terms of intensity, account must be taken of the parties' mutual intention and goal, the manner in which the obligation is to be fulfilled and, as an auxiliary question, its name (judgment of the Supreme Court of 18 June 1998, ref. no. I PKN 191/98, Lex no. 36702, judgment of the Supreme Court of 2 September 1998, ref. no. I PKN 293/98, Lex no. 37269).

personal performance of work[7] by the employee [Jaśkowski 2021].[8] A parallel (in relation to the obligation to perform work by an employee) obligation of the employer is the obligation to employ the employee for a consideration. In this way, the employee's obligation to perform work for the employer also becomes his/her right [ibid.] (thus a claim to allow him/her to perform work arises).[9]

However, the Labour Code is not the only regulation which governs the entirety of employee relations in a universal manner. There is a number of internal official regulations which, while maintaining the application (either *mutatis mutandis* or directly) of the provisions of the labour law, modify the content of the employment relationship to a different extent. Regulations of this nature undoubtedly include provisions of the LHES [Baran 2020]. The Law on Higher Education and Science refers, in matters not regulated therein, to direct application of the provisions of the Labour Code both in relation to academic teachers and employees who are not academic teachers (Article 147 LHES). This applies when the matter concerning the employment relationship is not regulated in the LHES, or the regulation is not sufficiently detailed [ibid.]. The intended scope of this study prevents a detailed, comprehensive analysis of all the derogations introduced by the LHES (especially with regard to termination of the employment relationship). Nevertheless, in order to show the essence of the "academic" employment relationship, it is necessary to juxtapose the structural features of the "classic" employment contract regulated by the provisions of the Labour Code and the "academic" employment contract.

In general, it can be stated that the basic (dominant) form of performing work under the employment relationship, which is also provided for in the LHES, is the employment contract (Article 25 of the Labour Code and Article 117 LHES). The regulation of the LHES (as provisions of *lex specialis*) formulate specific peculiarities as compared with the Labour Code. Firstly, the LHES does not provide for the possibility to conclude with academic staff a contract for a trial period, stating explicitly that only a contract for a definite or indefinite period may be concluded. Secondly, as far as academic staff are concerned, among various additional categories of fixed-term employment contracts regulated by the Labour Code, only an employment contract for replacing an employee during his/her justified absence from work may be used (Article 251(4)(1) the Labour Code). Thirdly, the LHES introduces modifications (with provisions of a *ius cogens* nature) to the permissible duration of fixed-term contracts. It has been pointed out that if the first employment

[7] Judgement of the Supreme Court of 28 October 1998, ref. no. I PKN 416/98, Lex no. 35429

[8] Judgment of the Appellate Court in Łódź of 7 May 2019, ref. no. III AUa 851/18, Lex no. 2701123.

[9] Article 22(1) of the Labour Code in conjunction with Article 471 of the Civil Code.

contract with an academic staff member in a given higher education institution is concluded for a definite period, it may be for a period of up to four years. Therefore, the restrictions from the Labour Code on the total duration of fixed-term contracts do not apply (Article 117(2)(2) and (4) in conjunction with Article 251(1–3) of the Labour Code). Similarly, the regulations referred to above will not apply to academic staff employed for a definite period, for whom the higher education institution is not the place of primary employment, or who are paid retirement benefits (Article 117(4) LHES).

Despite these distinctions, the LHES does not, however, regulate the form and essential nature of the content of the employment contract with an academic teacher. The rules of the Polish Labour Code will apply directly in this matter. The "academic" employment contract should therefore specify the parties to the legal relationship, the type of contract, the date of its conclusion, working conditions and pay, in particular the type of work, the place of work, the remuneration for work corresponding to the type of work, with an indication of the components of remuneration, the work time length, the date of commencement of work (Article 29(1) of the Labour Code in conjunction with Article 117 LHES). For full-time employment, it should also indicate whether the institution is the employee's primary place of work (Article 120 LHES). As regards the form of the legal act, there is a requirement to make the contract in writing (Article 29(2) of the Labour Code in conjunction with Article 147(1) LHES). In the event of failure to keep a written form, the institution, before allowing the employee to work, confirms to the employee in writing the arrangements concerning the parties to the contract, the type of contract and terms thereof. Furthermore, the institution should inform the employee in writing, not later than seven days after the conclusion of the contract, about the terms and conditions of employment and about the rights and obligations of the employee (Article 29(3) of the Labour Code in conjunction with Article 147 LHES).

It can be therefore observed that generally the essence of the employment relationship (both "classical" and "academic" one) remains unchanged. This conclusion is reinforced by the fact that the provisions of the Labour Code directly apply to the general framework of the construction of employment relationship. The above finding therefore also applies to the outline of the *essentialia negotii* of the "academic" employment contract.

2. RESULT OF CREATIVE WORK OF THE EMPLOYEE AND COPYRIGHT REGULATIONS

Unless otherwise provided for in law or the employment contract, the employer whose employee created a work as a result of the performance of his/her duties in the employment relationship, acquires, upon acceptance of the

work, the copyright to the extent as outlined by the purpose of the employment contract and the mutual intention of the parties. Unless otherwise provided for in the employment contract, upon acceptance of the work, the employer also acquires ownership of the object on which the work is fixed/recorded (Article 12(1–3) of the Act on copyright and related rights). In the absence of a different definition of the words: employee, employer or employment relationship, the meaning given to them by the legislature in the provisions of the Labour Code is adopted [Ożegalska-Trybalska 2021].

For the employee's work to be created, the activities leading to its creation should take place at the employer's cost, within employer's organisational structure, and with the use of employer's technical equipment and personnel. Moreover, it is essential that the creation of the work is within the scope of the employee's responsibilities (duties) under the existing employment relationship.[10] Regardless of the strong relationship between the creation of a specific creative work and the performance of services under the employment relationship, the result of creative activity should, first of all, meet the conditions that allow it to be considered a work within the meaning of copyright law. A copyrightable work is considered to be any manifestation of creative activity of an individual nature, established in any form, regardless of its value, purpose and manner of expression (Article 1(1) of the Act on copyright and related rights). Only the manner of expression may be protected. Discoveries, ideas, procedures, methods and principles of operation and mathematical concepts are not protected (Article 1(21) of the Act on copyright and related rights). To recognize a work as the object of copyright, it is necessary to establish the work – even if it has an incomplete form (Article 1(3) of the Act on copyright and related rights). A work is a result of the intellectual activity of the author, so the effect of the creativity of the person (creator) should be externalized.[11] Summing up, it is therefore necessary to cumulatively meet the following conditions. First, the result of the activity should have a creative nature. Second, it should be of an individual nature.[12] Above all, however, it must be established (regardless of the form).

Considering the copyright-law context presented, it was inevitable that ambiguities would arise regarding the legal nature of the products of activity

[10] As in: judgment of the Appellate Court in Warsaw of 20 June 2018, ref. no. V ACa 18/17, Lex no. 2519434 and judgment of the Appellate Court in Poznań of 11 July 2013, ref. no. I ACa 600/13, Lex no. 1375828.

[11] This feature of a copyrightable work is also referred to as "novelty," "originality" (as in: judgment of the Supreme Court of 15 November 2002, ref. no. II CKN 1289/00, Lex no. 78613; judgment of the Supreme Court of 22 June 2010, ref. no. IV CSK 359/09, Lex no. 694269; judgment of the Supreme Court of 25 January 2006, ref. no. I CK 281/05, Lex no. 181263).

[12] As in e.g. judgment of the Appellate Court in Warsaw of 18 February 2009, ref. no. I ACa 809/08, Lex no. 1120180; judgment of the Supreme Administrative Court in Warsaw of 11 July 2018, ref. no. II FSK 1845/16, Lex no. 2528581.

undertaken as part of the "academic" employment relationship. According to the LHES, university staff members are divided into a group of academic teachers and employees who are not academic teachers [Zieliński 2019].[13] Academic teachers may be employed in the following staff groups: teaching, research, research and teaching staff. Basic duties of academic teachers include conducting scientific activity and educating and raising students. However, this list does not cover all the tasks of an academic teacher. Moreover, the academic teacher is required to participate in organisational work for the university and to continuously improve their professional competence (Articles 112–115 LHES). The provisions of the Act on copyright and related rights provide that the performance of duties of academic teacher constitutes creative activity of an individual character, as referred to in the Act on copyright and related rights (Article 116(7) LHES). Using linguistic interpretation, it should therefore be understood that the performance (process of activities being undertaken) of all duties of an academic teacher is an individual creative activity within the meaning of the copyright regulations. However, it does not follow from the normative whole of the regulations that a *sui generis* creative product is made (which would be subject to copyright protection, regardless of whether the requirement of meeting the constitutive features of a copyrightable work is met or not). There is no regulation which would indicate the legislature's departure from the legal definition to which the LHES directly refers, i.e. the definition of "work" contained in legal regulations on copyright. Therefore, it would be correct to accept the use in the process of interpretation of the legal definition included in the provisions of copyright law. According to the rules of correct legislation, the legislature, wishing to depart from this principle, should have given a different meaning of this concept (creative work of an academic teacher) and define its scope of reference,[14] or directly introduce a separate category of works created under the "academic" employment relationship.

3. TAXATION OF REVENUE EARNED UNDER AN EMPLOYMENT CONTRACT

According to the Act on personal income tax, the tax deductible costs are expenses incurred to generate income or preserve or secure the source of revenue.[15] For taxpayers hired under an employment relationship (or related relationships), cost limits were generally provided, the amount of which depended

[13] Similarly in the Law of Higher Education of 2005.

[14] See para. 147(1)(4) of the Regulation of the Council of Ministers of 20 June 2002 on the "Rules of legislative technique," Journal of Laws of 2016, item 283.

[15] See Article 22(1) APIT. This rule does not cover the costs listed in Article 23 APIT.

on two criteria: the number of employers and the conditions of access to the workplace (the taxpayer's place of residence). Four cost categories were established on the basis of these two factors [Pomorski 2019, 382]. This does not exclude that, in certain cases, workers employed under a contract of employment will be able to benefit from the increased 50% of tax-deductible cost.

For persons who earn revenues from the performance of services under contract work agreements and specific-task contracts, the tax-deductible costs of earning certain revenues are usually set at 20% of the revenue generated.[16] These costs are calculated from the revenue less pension and sickness insurance contributions deducted by the payer in a given month.[17]

For certain revenues, the Act allows for the setting of flat-rate costs. Where authors use or dispose of copyright and related rights within the meaning of separate legislation, 50% of the tax deductible cost of the revenue generated shall apply. This applies to the revenue from the exercise by authors of copyright and by performing artists of related rights "within the meaning of separate legislation" or from disposing them (Article 22(9)(3) APIT). The total tax-deductible costs for a given tax year may not exceed the upper limit of the first range of the tax scale (Article 22(9a) APIT). This rule also applies to revenues generated by creative activities (Article 22(9a) APIT).

Under the Act, 50% of the tax-deductible costs of generating certain revenues from the exercise by authors of copyright and performing artists of related rights concern the revenues generated by: (1) creative activities in the fields of architecture, interior design, landscape architecture, civil engineering, urban planning, literature, fine arts, industrial design, music, photography, audio and audiovisual creation, computer software, computer games, theatre, costume design, scenic design, directing, choreography, art of lutherie, folk art and journalism; (2) artistic activities in the fields of acting, stage, dance and circus art and in conducting, vocal and instrumental arts; (3) audio and audiovisual production; (4) opinion journalism activities; (5) museum activities in the fields of exhibition, science, popularization, education and publishing; (6) conservation and restoration of cultural property activities; (7) derivative right to produce a derivative work in the form of translation;[18] (8) research-and-development, scientific, scientific-and-didactic, research, research-and-didactic activities and didactic activities carried out in a university.

Undoubtedly, this broad catalogue of activities can be implemented in various legal forms, which determine the exercise of a specific activity. At the same time, within the meaning of the Tax Act (Article 22(9)(3) APIT), the provisions of the Act of 4 February 1994 on copyright and related rights are "separate provisions." As previously stated, the object of copyright is any

[16] From the titles listed in Article 13(2), (4), (6), and (8) APIT.
[17] According to Article 22(9)(4) APIT.
[18] Referred to in Article 2(2) of the Act on copyright and related rights.

expression of creative activity of an individual nature, established in any form, regardless of value, purpose and method of expression. In particular, these include works expressed in words, graphic characters (e. literary, journalistic, scientific, cartographic), artwork, photographic, lutherie, industrial design, architectural, architectural-urban and urban-planning, musical and verbal-musical, stage, stage-musical, choreographic and pantomime, or audiovisual works.

In view of the above, questions arise as to the category and manner of applying tax deductible costs in a situation where the revenue related to a copyrightable work was generated under an employment relationship (contract of employment). In such a situation it becomes necessary to clearly demonstrate the circumstances justifying the application of 50% tax deductible costs. It seems that this includes confirmation of the fact of creation of a specific work, transfer of copyright (or granting a licence) and the amount of remuneration generated. The content of the concluded employment contract is important here. In the judicial-administrative case-law an opinion is presented that where creative work is provided under an employment relationship, it is necessary to prove the link between the consideration (royalty) and the work of creative character performed and to document that the job was actually performed – i.e. that a copyrightable work was created.[19] In this respect, it becomes necessary to keep appropriate records of creative work, which will also be controlled and accepted by the employer.

Thus, in order to benefit from the increased 50% of tax-deductible costs, it is necessary to clearly separate that part of the remuneration which is due for the disposal of author's copyright to the work. The employer pays the due remuneration as a result of acceptance of the work and associated economic rights, and therefore the amount of this royalty payment must be clearly specified in the documents regulating the content of the employment relationship. This means that a clear distinction should be made between the part of the remuneration related to the transfer of copyright to the employer or the use of these rights (royalty) and the part of the remuneration being an equivalent for performing other duties of the employee. Such a sequence of provisions should be contained in the employment contract or in documents closely related to it. After all, they directly shape the content of the legal relationship between the employer and the employee who is the author of a specific work.[20]

In that regard it cannot be considered sufficient any calculations or *post factum* certificates if it cannot be established from the employment contract whether and what copyrightable works resulted from the work done and the

[19] See judgement of the Regional Administrative Court of Białystok of 19 August 2020, ref. no. I SA/Bk 158/20, Lex no. 3048856.

[20] Judgement of the Supreme Administrative Court of 12 November 2020, ref. no. II FSK 2082/20, Lex no. 3082251.

specific value of the total amount of remuneration for the work in that part to be considered as remuneration for creative work. In practice, employers quite often make a percentage-defined separation of the royalty from the total value of the remuneration. The employer defines them as a percentage of the employee's total working time.

Such certificates (calculations) can only illustrate the proportion of the working time allocated to creative work and the working time to be spent on other employee's duties. The tax statute requires revenue to be linked to the acquisition and disposal of copyright, not to the working time allocated to acquiring those rights. It is therefore clear that the remuneration to which the 50% tax-deductible cost may be applied must be payable to the employee not only for the performance of his/her creative work, but also for the transfer to the employer of the copyright in the work created by the employee.[21] Therefore, the records kept must make it possible to determine what copyrightable works have been created and what royalty is to be paid for it.[22]

Such a position appears to be well established in the case-law of administrative courts. A quite uniform view is presented that in order to apply the increased tax-deductible costs, it is necessary to divide the remuneration into the part relating to the performance of employee duties and the part determining the royalty for the use of copyright. It is firmly stressed that it is not sufficient merely to distinguish the part of the working time allocated to creative work, since this does not make it possible to determine whether the copyrightable work was created at all and whether the royalty was paid for its exploitation. This value (or the manner of its calculation) should be clearly and precisely specified in the documents governing the content of the employment relationship.[23]

As a side note it may be mentioned that in judicial-administrative case-law one can come across the view that in the case of a work contract there is no legal justification for the requirement to distinguish the royalty for the transfer of copyright and for the drawing up detailed documentation (records) of the works created.[24] This seems to be too far-reaching. Although it is rightly pointed out that this is not required by the Act on personal income tax, and

[21] Judgement of the Administrative Supreme Court of 17 April 2019, ref. no. II FSK 1339/17, Lex no. 2676390.

[22] Judgement of the Administrative Supreme Court of 24 February 2021, ref. no. II FSK 2933/20, Lex no. 3156609.

[23] See e.g. judgement of the Administrative Supreme Court of 7 February 2019, ref. no. II FSK 422/17, Lex no. 2642709; judgement of the Administrative Supreme Court of 11 March 2015, ref. no. II FSK 459/13, Lex no. 1675471; judgement of the Administrative Supreme Court of 12 March 2010, ref. no. II FSK 1791/08, Lex no. 595971 and judgement of the Administrative Supreme Court of 16 September 2010, ref. no. II FSK 839/09, Lex no. 745894.

[24] See judgement of the Regional Administrative Court of Białystok of 19 August 2020, ref. no. I SA/Bk 158/20, Lex no. 3048856.

the same objection can indeed be raised against the employment contract and, above all, this contradicts the content of copyright law and the arguments referred to above.

4. FISCAL EFFECTS OF THE EMPLOYMENT CONTRACT IN THE LIGHT OF THE ACT ON PERSONAL INCOME TAX

The practical doubts arising from the taxation of the creative activity of academic teachers stem from the fact that the copyright regulations do not correspond, in the systemic terms, to the solutions adopted in the regulations on the organisation of higher education. As already mentioned, in the light of the LHES, research and teaching staff members are classified as academic teachers (Article 112 in conjunction with Article 114 in conjunction with Article 115(1)(3) and Article 115(2) LHES). Their basic duties include conducting research activities, educating students or participation in the training of doctoral students. In addition, an academic teacher is obliged to participate in organisational work for the university and to improve his/her professional competence on a regular basis (Article 115(1) LHES). Even in this respect there is an obvious difficulty in the effective application of the rule expressed in the LHES, according to which the performance of the duties of an academic teacher as a whole is a creative activity of an individual nature, as referred to in the copyright law.

Regardless of the above, it should be noted that the character of academic teacher's work means that the structure of his/her remuneration may take a relatively complex legal form. In the context of copyright and the aforementioned rule of the LHES, there may be different types of consideration paid, related to the scope of professional duties. Academic teachers employed by a university may earn the following revenue: 1) base pay, 2) supplementary base pay, 3) pro-quality base pay, 4) overtime pay, 5) additional responsibility allowance, 6) seniority allowances, 7) additional pay for the function of thesis supervisor, 8) remuneration associated with the issuance of an opinion on the academic degree, 9) remuneration for work in selection committees, 10) other types of allowance, 11) severance payments, 12) reimbursements of travel expenses for business purposes, 13) remuneration for the period of justified absence from work, 14) allowance for unused annual leave, 15) holiday allowance, 16) awards.

The contradiction between the rules of copyright law and the LHES makes the legal classification of these elements of remuneration, and thus the proper application of tax solutions regarding the tax-deductible costs, extremely difficult. Despite the LHES being effective for quite a short period of time, the competent tax authorities has already received quite a number of requests for interpretation. In the light of the individual tax interpretations issued, in the

cases referred to above, it is possible to apply 50% of deductible costs of generation of revenue paid to academic teachers employed under contracts of employment.[25]

At the same time, it should be noted that in the opinion of the taxation authorities which issued the individual interpretations, the 50% tax-deductible costs are not applicable to all revenue due for the period of excused absence from work. It should be pointed out that pursuant to the LHES, a full-time employed academic teacher who is under 65 years of age is entitled to a paid health leave (Article 131(1) to (5) LHES). The leave is granted to carry out prescribed medical treatment in a situation where the employee's state of health requires refraining from work. No gainful employment may be undertaken during the leave. The health leave shall be granted on the basis of a medical certificate attesting that the state of patient's health requires refraining from work, and specifying the prescribed treatment and the period needed for it. This means that the academic staff member's state of health requires abstaining from work. Consequently, the employee is paid remuneration for the period during which he/she does not perform duties as an academic staff member. He/she refrains from work and thus does not perform creative activity of an individual character as referred to in the Act on copyright and related rights. Therefore, there are no grounds for applying the 50% tax-deductible costs when the academic teacher is on health leave.

It should be noted that the aforementioned exclusion does not apply to other forms of leave, such as sabbatical leave or annual leave. In these cases, the university, when calculating and paying personal income tax, will be able to apply the 50% tax deductible costs to remuneration components paid to academic staff.

In view of the controversy which arose in practice, the Minister of Finance decided to issue a general interpretation.[26] He pointed out that with respect to the analysis of application of the 50% tax-deductible costs, the LHES constitutes a *lex specialis*. In view of the above, the conclusion was formulated that in accordance with the APIT, the 50% tax-deductible costs apply to the entire remuneration of the academic teacher.

The Minister listed the prerequisites that are necessary to treat remuneration as a royalty and to apply the 50% tax-deductible costs to it: (1) the creation

[25] See individual interpretation, Director of the National Revenue Administration, of 13 July 2020, ref. no. 0113-KDWPT.4011.20.2020.3.MG, Lex no. 548424; individual interpretation, Director of the National Revenue Administration, of 8 July 2020, ref. no. 0112-KDIL2-1.4011.373.2020.2.KF, Lex no. 547949; and individual interpretation, Director of the National Revenue Administration, of 10 July 2020, ref. no. 0114-KDIP3-2.4011.359.2020.1.JK3, Lex no. 548325.

[26] General Interpretation of the Minister of Finance No. DD3.8201.1.2018 of 15 September 2020 on application of the 50% tax-deductible costs to author's remuneration, Official Journal of the Minister of Finance of 2020, item 107.

of a copyrightable work, allowing the author's enjoyment of copyright and enabling property rights to the work to be disposed of, (2) the existence of objective evidence proving the creation of the copyrightable work.

Importantly, the interpretation states that the requirement that the royalty be clearly separated does not apply to works created by academic teachers. This is in clear contradiction with the wording of the copyright law and the previous line of judicial-administrative case-law.

As regards documenting the creation of works, it was pointed out that the employer and the employee may keep a record of works created, including works for which an advance payment of royalties is applied and separately for works already created by the employee. In these records, the employer may also confirm the acceptance of the work concerned, or any other moment that determines the transfer of copyright to the employer. The employer and the employee may also document the creation of the work in the form of a declaration. The obligation to make such declarations may arise from the employment contract or other internal regulations of the institution. The declaration should indicate what specific work has been created (or is being created) because a declaration about the mere performance of creative work will be considered insufficient.

The interpretation has stressed that the provision of the LHES constitutes a separate regulation, taking into account the realities of the operation of a higher education institution as the basic entity of the system of higher education and science, and the specific nature of work of academic teachers. The Minister of Finance indicated that the profession of academic teacher, despite its legal framework, is a profession similar to so-called liberal professions. A notable part of responsibilities typical for academic teachers and also taken into account in evaluation of their work performance is a result of creative invention and freely conducted research and publication activities. However, it has not been substantiated which regulations are the basis for the limitation of the basic principles of employment relationship with regard to academic teachers. Neither the LHES nor the Labour Code contain such regulations. No further justification is provided for the presented legal concept of the position of the academic teacher as an individual practising a liberal profession. Moreover, the interpretation implicitly equates creating an author's publication with a lecture or seminar. The Minister of Finance has pointed out that the statutory scope of duties of academic teachers requires them to take independent actions to create copyrightable works in all areas of their professional activities, and in this regard he listed: teaching materials, syllabuses, lectures, seminars, articles, monographs, etc. It seems that such an approach may be misleading and may lead to conclusions contradictory to the copyright law and the LHES.

Referring to the provisions concerning various forms of leave of an academic employee, the interpretation indicates that during the period when an academic teacher does not perform the academic teacher's duties and does not carry out creative activity of an individual character (a health leave), the 50% tax-deductible costs may not be applied.

5. FINAL REMARKS

Basing on the copyright law rules and the views expressed in the decisions of administrative courts referred to herein (issued in the context of applying the 50% tax-deductible costs), one may attempt to formulate a catalogue of conditions for applying employee's copyright-related costs. For the purposes of this study, the following conditions may be listed:

1) the result of work performed by the employee is copyrightable, and thus meets the prerequisites of a coprightable work specified in the Act on copyright and related rights,

2) the employee is an author within the meaning of the aforementioned act and the revenue is generated by the employee as a result of the author's exercise or disposal of such rights,

3) the legal relationship between the employee and the employer involves a differentiation of the remuneration due to the employee for the part related to the exploitation of the copyright and the part related to the performance of typical employee duties and the employer keeps relevant documentation in this respect, e.g. keeps detailed records of the transferred copyrightable works,

4) the determination of the value of the royalty or the procedures for its calculation should be clearly and precisely specified in the documents which govern the content of the employment relationship during its validity,

5) for the 50% tax-deductible costs to be applied, the revenue must be obtained from the types of activity specified in the APIT.

However, this catalogue refers only to "classic" employment contracts. The entry into force of the LHES has introduced a specific legal dualism. It results from different treatment of employment contracts of academic teachers. This situation is perpetuated by interpretations of taxation authorities. Of particular importance is the general interpretation of the Minister of Finance. Although it states that for the remuneration of an academic teacher to be recognised as an royalty a work must have been created, the comparison of the profession of academic teacher with the so-called liberal professions may raise questions. What is the significance of the mentioned prerequisites – i.e. working conditions of academic teachers and specificity of liberal professions – in the light of copyright law or tax law regulations? In fact, the general interpretation appears to be inconsistent. On the one hand, it correctly refers to the constitutive features of the result (a work) that should arise as a result of the activities

undertaken by an academic teacher. On the other hand, reference is made to extra-statutory premises, which do not have normative overtones in the case under analysis. The adopted course of thought is not only misleading for the addressees of the interpretation, but it seems to be based to a large extent on assumptions that are wrong from the factual point of view. From the perspective of the content of the copyright law, the quoted tax interpretations directly lead to different fiscal consequences of concluded employment contracts, actually creating in this respect legal dualism. In the current state of affairs, a kind of "stalemate" situation has arisen. This is due to the fact that alongside generally outlined legal norms, a systemically inconsistent tax interpretation appeared. Unfortunately, due to the fact that it was issued by a superior of tax authorities, it will be widely applied in practice, clearly conflicting with the letter of copyright law.

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