

“RETAINED PROFIT” OR MAKING AN ADDITIONAL CONTRIBUTION TO THE COMPANY AND THE POSSIBILITY TO RECOGNIZE TAX DEDUCTIBLE EXPENSES ON ACCOUNT OF NOTIONAL INTEREST – INTERPRETATION DIFFICULTIES UNDER ARTICLE 15CB OF THE CORPORATE INCOME TAX ACT

Dr. Paweł Mańczyk

University of Szczecin, Poland
e-mail: pawel.manczyk@usz.edu.pl; <https://orcid.org/0000-0002-4291-5466>

Abstract. The subject of the study is CIT tax relief regulated by Article 15cb of the CIT Act (known as interest relief). This relief provides for additional tax deductible expenses, even though no expenses were incurred in the amount of multiplication result of additional capital contribution made to the company and/or profit contributed to the company’s reserve capital or supplementary capital and NBP’s reference rate applicable on the last working day of the year preceding the fiscal year increased by 1 percentage point. The author presents eleven interpretation doubts that arose during the four years of the relief being in force. Most of the doubts concerned individual tax decisions issued by the Director of the National Tax and Customs Information Office. The author subjects these interpretations to a critical assessment, presenting his own opinion, sometimes different from that of the tax authorities.

Keywords: interest relief; CIT; internal financing of the company

1. INTRODUCTORY NOTES

1 January 2019 was the day when the act of 23 October 2018 on amending the personal income tax act, the corporate income tax act and certain other acts entered into force.¹ One of the amendments introduced by it was to add Article 15cb to the Corporate Income Tax Act of 15 February 1992.² It reads: “1. In a company, tax deductible expenses³ shall also include an amount corresponding to the product of the reference rate of the National Bank of Poland⁴ applicable on the last working day of the year preceding the fiscal year

¹ Journal of Laws item 2159 [hereinafter: Amending Act].

² Journal of Laws of 2020, item 1406 as amended [hereinafter: CIT Act].

³ Hereinafter: Expenses.

⁴ Hereinafter: NBP’s Reference rate.

increased by 1 percentage point⁵ and the amount of: 1) an additional capital contribution made to the company in accordance with the procedure and the rules set out in separate regulations⁶ or 2) any profit contributed to the company's reserve capital or supplementary capital.⁷ 2. The expense referred to in paragraph 1 may be deducted in the year in which the additional contribution is made or in which the reserve or supplementary capital is increased and in the next two consecutive fiscal years. 3. The total amount of tax deductible expenses deducted in a fiscal year on the grounds listed in paragraph 1 shall not exceed the amount of PLN 250,000. 4. The provision of paragraph 1 shall not apply to additional contributions and profits allocated for covering a balance-sheet loss. 5. The provision of paragraph 1 shall apply if the additional contribution is repaid or the profit is distributed and paid not earlier than after 3 years counting from the end of the fiscal year in which that contribution was made to the company or in which the resolution on the retention of the profit in the company was adopted. 6. The fiscal year in which an additional contribution is made to a company shall be the year in which the additional contribution is credited to the company's payment account. 7. If the additional contribution referred to in paragraph 1 is repaid before the end of the period indicated in paragraph 5, then in the fiscal year in which the additional contribution is repaid, the revenue shall be a value corresponding to the tax deductible expenses deducted in accordance with paragraph 1. 8. The provision of paragraph 7 shall apply accordingly to a company's revenue corresponding proportionately to that part of the tax deductible expenses that corresponds to the repaid amount of the additional contribution – in the case of the repayment of part of the additional contribution referred to in paragraph 1. 9. If the company referred to in paragraph 1 is acquired as a result of a merger or division or is transformed into a partnership not being a legal person before the end of the period referred to in paragraph 5, revenue in an amount corresponding to the tax deductible expenses deducted in accordance with paragraph 1 shall be determined as at the date preceding the date of the acquisition or transformation. 10. The provision of paragraph 1 does not apply if the taxable person or entity affiliated therewith within the meaning of Article 11a.1 (4) performed a transaction or related transactions without justified economic reasons, mainly for the purpose of recognising an amount specified in paragraph 1 as a tax deductible expense. Justified economic reasons do not include cases where a benefit earned in a tax year or subsequent years arises from recognition as tax deductible expenses.”⁸

⁵ Hereinafter: NBP's Reference rate + 1 p.p.

⁶ Hereinafter: Contribution.

⁷ Hereinafter: Profit.

⁸ Article 15cb(10) CIT Act entered into force on 1 January 2021.

The article in question was used to introduce an interesting tax preference to the CIT Act, which involves the right to identify additional tax deductible expenses, even though no expenses were incurred, on account of retention of profit made in the company or making additional contributions to the company instead of resorting to external financing.

Nevertheless, Article 15cb CIT Act brings a few interpretation difficulties that are a springboard for this discussion. The ambiguities noticed by the author and visible in practice concern in particular: 1) the meaning of the phrase: “on the last working day of the year preceding the fiscal year” used in Article 15cb(1) CIT Act; 2) the way Expenses are calculated in a situation where the taxpayer wants to deduct them also in the next two consecutive fiscal years, pursuant to Article 15cb(2) CIT Act; 3) the procedure for calculating Expenses by the taxpayer who carries out his activity in the Special Economic Zone and/or under a Decision on Support;⁹ 4) the possibility of settling Expenses as a result of transferring the reserve capital to the position “profit from previous years” before the lapse of the deadline specified in Article 15cb(5) CIT Act; 5) the possibility to settle Expenses as a result of allocating profit for the reserve capital, and then its partial payment in the same year to shareholders as divided; 6) the possibility of settling Expenses as a result of “retention of profit in the company” other than allocating it for the company’s reserve or supplementary capital; 7) the possibility of settling Expenses as a result of making an additional contribution to the company by way of compensation (offsetting); 8) the possibility to settle Expenses as a result of a limited partnership allocating the profit earned before the company becomes a CIT taxpayer for the reserve or supplementary capital; 9) the possibility of settling Expenses as a result of allocating profits earned before 2018 for the reserve or supplementary capital; 10) the earliest date from which onwards Expenses may be settled; 11) the possibility of settling Expenses by a company subject to a flat-rate tax on company’s income (the so-called Estonian CIT).

The further part of this study will also present the author’s position on these doubts. The discussion was based on the legislation in force on 1 April 2023.

2. *RATIO LEGIS* OF ARTICLE 15CB CIT ACT AND THE AMOUNT OF THE TAX ADVANTAGE

Given the fact that capital interest on credits and loans taken out to finance taxpayer’s economic activity as a rule constitutes tax deductible expenses, from the entrepreneur’s point of view it would be more profitable

⁹ In the meaning of the Act of 10 May 2018 on supporting new investment, Journal of Laws of 2023, item 74.

to reach for external financing [Małecki and Mazurkiewicz 2019]. With regard to financing with equity capital, the provisions of the CIT Act did not allow at all to include the costs of obtaining such capital in the base of tax costs of a capital company [Jankowski 2020, 49]. The legislator decided to change this state of affairs.

Regulations included in Article 15cb CIT Act intend to encourage CIT taxpayers to retain profits instead of paying them to shareholders as dividend or financing the activity by means of additional Contributions [Gil, Obońska, Waclawczyk, et al. 2019]. This incentive allows recognizing additional tax deductible expenses if the profits are retained or additional contribution is made to the company, in the amount of notional interest that the taxpayer would have to pay if he resorted to external debt financing. The taxpayer is entitled to settle these costs irrespective of any expenses made by him [Dmoch 2020]. The measure analysed leads to the levelling off of tax entitlements related to external financing in the form of a loan and to creating self-financing capitals.¹⁰

The essence of the tax preference regulated in Article 15cb CIT Act¹¹ is the possibility to deduct from the CIT tax base of the sum of notional interest, whose value is computed as the product of the amount of Contribution or¹² Profit and the NBP's Reference rate + 1 p.p., where the total amount of costs deducted must not exceed PLN 250,000 in a given fiscal year [Malinowski 2022, 4]. Pursuant to Article 10(1) of the Amending Act, costs may be deducted for the first time in the fiscal year that began after 31 December 2019. Moreover, pursuant to Article 10(2) of the Amending Act, when calculating the costs, the additional contribution and the profit made after 31 December 2018 are taken into consideration, for which legal fiction is assumed that they were made in a fiscal year that began after 31 December 2019. Costs are due in the year of making the additional contribution or profit and in the next two consecutive fiscal years. The year of making the additional contribution is understood as the year in which the additional contribution was credited to the company's bank account.

NBP's reference rate on the last working day in 2019 was 1.5%,¹³ and thus NBP's reference rate + 1 p.p. adequate for 2020 is 2.5%, which in turn

¹⁰ The Sejm Document no. 2854 of 25 September 2018, <http://orka.sejm.gov.pl/Druki8ka.nsf/0/00EF5C8EC167E3CEC1258313005E70BC/%24File/2854.pdf> [accessed: 01.10.2020], p. 44.

¹¹ Hereinafter: Interest relief.

¹² "Or" is used as a linking word in the function of an inclusive disjunction, therefore the basis for calculating Costs may include the amount of the Additional Contribution, the amount of the Profit or the sum of those. The "or" used further in the text must also be understood as an expression of inclusive disjunction in the context of Additional Contribution or Profit.

¹³ NBP's basic interest rates for 1998-2020, <https://nbp.pl/en/historic-interest-rates/> [accessed: 01.04.2023].

means that the fully effective use of the interest relief requires involvement of an Contribution or Profit of at least PLN 10,000,000.

The reference rate valid as at last working day of 2022 (30 December 2022) is 6.75%, which, means that the full use of the interest relief in 2023 will require involvement of Contribution or Profit of PLN 3,225,806.45.

Despite NBP’s relatively high reference rate, we must agree with the postulate put forward by the American Chamber of Commerce in Poland, the Polish Chamber of Real Estate, the Polish Chamber of Insurance and the Polish Bank Association during the public consultation of the draft of the Amending Act. This postulate calls for removing the threshold of the interest relief or for raising it significantly (e.g. to PLN 1,000,000) or, alternatively, for making the threshold dependent on the amount of e.g. capitals or the gross financial result, and thus for taking into account the scale of the taxpayer’s activity.¹⁴ Effective use of the interest relief is difficult with the current NBP’s reference rate, especially for small taxpayers. We must also note that the amount of the interest relief in reference to the CIT amount is quite low because when the full limit of costs (PLN 250,000) is used, it is PLN 47,500 per year for a 19% tax rate and PLN 22,500 for a 9% tax rate (which gives the taxpayer a maximum of PLN 142,500 (19%) and PLN 67,500 (9%) of tax advantage in the three-year period of using the Interest relief). This poses a serious question of whether the negligent amount of the nominal tax preference in relation¹⁵ to the amount of the additional contribution or profit that must be engaged to obtain this preference will constitute a real incentive to generate the additional contributions¹⁶ or profit.

It is worth noting that Poland is not the only EU country that has adopted a similar solution. Notional interest deduction (NID) mechanism functions in Belgium for several years, a little shorter in Portugal, Italy and Cyprus, and was recently implemented into tax law also in Malta [Małecki and Mazurkiewicz 2022, 210].

¹⁴ Report on public consultation and opinion-giving included in the Sejm Document no. 2854 of 25 September 2018, p. 8 (p. 72 of the document).

¹⁵ The amount of a tax saving is a mere 1.47% of engaged funds in each of three years of tax relief application: $(\text{PLN } 47,500 \div \text{PLN } 3,225,806.45) \times 100\% \approx 1.47\%$.

¹⁶ The additional contribution is, one way or another, a very rarely used method of financing the activity of companies in Poland. The poor polarity of this legal institution results primarily from essential limitations on its amount and return.

3. INTERPRETATION DOUBTS RELATING TO ARTICLE 15CB CIT ACT

3.1. The understanding of the “last working day of the year preceding the fiscal year”

The phrase used by the legislator, “last working day of the year preceding the fiscal year”, is ambiguous. Given that precise determination what day is meant is the core of the issue from the point of view adopting a correct NBP’s reference rate, we must conclude that such a situation is highly undesirable. Interpretation doubts arise around the question of whether the legislator understands “year” in the phrase “last working day of the year preceding [...]” as a calendar year or as a fiscal year for a given taxpayer. This differentiation gains importance for CIT taxpayers for whom a tax year is changed under Article 8(1) CIT Act.

The author believes that the correct day to establish the value of NBP’s reference rate will each time be the last working day of the tax year preceding the tax year of a given taxpayer. For example, for a taxpayer for whom the fiscal year begins on 1 April 2023, the value of NBP’s reference rate should be calculated according to the state of affairs as at 31 March 2023 (Friday). The argument that advocates such an interpretation is to avoid a situation in which there is a break longer than 11 months between the period in which the interest relief is applied and the day for which the NBP’s reference rate was read. This would be the case if we adopted NBP’s reference rate from the last working day of December 202X for taxpayers whose tax year begins on 1 December 202X+1. This time difference, with today’s unstable interest rates, could result in unjustified dissonance between the value of NBP’s reference rate + 1 p.p. taken to calculate the interest relief at the market interest rate for credits and loans in the same time. The Director of the National Tax and Customs Information Office (hereinafter: Director) expressed the same opinion in his individual tax ruling of 8 December 2022 (ref. no. 0114-KDIP2-2.4010.147.2022.1.SP).

3.2. Procedure for calculating the amount of costs for subsequent tax years

The interpretation doubt that the company wanted to clarify by requesting a tax interpretation concerned the issue of whether, for the needs of calculating the cost in the year of allocating profit for the reserve capital and in two subsequent years, NBP’s reference rate known on the day that the resolution on allocating profit for 2022 was passed specifies the amount of costs in all 3 years in which the preference was applied (2020-2022). The company believes that NBP’s reference rate known on the date of taking

this resolution is a basis to calculate costs for the entire 3-year period of application of the preference.

Director did not agree with this stance in his individual tax ruling of 1 September 2021 (ref. no. 0111-KDIB1-3.4010.262.2021.1.JKT), stating that the value of costs on account of notional interest should be determined by employing NBP's reference rate effective on the last working day of the year preceding the tax year (the year of recognizing a tax cost). It is because Article 15cb(1) CIT Act does not stipulate that the set value of the interest (that is based on the reference rate in effect on the last working day of the year preceding the year of allocating profit for a suitable capital) should be applied in the entire calculation period.

The author shares the Director's view. Admittedly, in Article 15cb(2) CIT Act, the legislator does give the taxpayer the right to calculate the cost also in two subsequent tax years that follow the year of making an additional contribution or increasing the reserve or supplementary capital, yet he does not prescribe its amount for this period. This provision only allows taking into account the retained profit or the additional contribution in calculating the interest relief also in two subsequent years (as long as the amount of the profit or additional contribution still allows it). Therefore, it seems valid to set the value of the interest relief each year on the basis of NBP's reference rate applicable for a given tax year (as stipulated in Article 15cb(1) CIT Act) and limiting it to the amount of PLN 250,000 (pursuant to Article 15cb(3) CIT Act). A drawback of such an approach lies in the uncertainty as to the value of the interest relief in subsequent years on the basis of additional contributions made already or profits retained in the company. On the other hand, an undoubted advantage of such an approach would be a stronger adjustment of the amount of the interest relief to the current interest rate for credits and loans (which is based on the NBP's reference rate).

3.3. Settling of the interest relief by the taxpayer who operates an activity in a Special Economic Zone (SEZ) and/or under a Decision on Support (DoS)

The interpretation doubt that the company wanted to clarify by requesting a tax interpretation concerned the question of whether, since the company is carrying out a zone-related activity or a taxable activity, the company should calculate the costs in full as tax deductible expenses of the activity carried out outside the SEZ. The company believes that it is entitled to such full deduction of costs.

The director of the National Tax and Customs Information Office did not agree with the company's stance in his individual tax ruling of 19 November 2021 (ref. no. 0111-KDIB1-3.4010.443.2021.1.BM). The Director claimed

that the specific tax deductible expenses referred to in Article 15cb CIT Act cannot be assigned solely to the taxable activity or solely to the exempted activity, and the CIT Act does not provide any detailed regulations in this regard. The Authority believes that an income key referred to in Article 15(2) and (2a) CIT Act must be applied. Pursuant to Article 15(2) CIT Act, where a taxpayer incurs tax deductible expenses from sources generating income subject to income taxation and expenses related to revenue from sources generating income not subject to income taxation or exempt from income tax and, where it is not possible to classify given expenses under their respective revenue sources, these expenses shall be determined in the same ratio as the ratio of the revenue earned from those sources in a given fiscal year to the total amount of revenue.

The author believes that the taxpayer is in the right here, but one must agree with the tax authority that costs cannot be classified to a particular kind of taxpayer's activity (still though, the tax authority draws wrong conclusions from this circumstance). That costs cannot be assigned results from the fact that they are hypothetical (notional) – the taxpayer does not incur them in fact. As a consequence, we cannot by default classify them to any source of incomes. Given the above, the income key cannot be applied to calculate the interest relief because it only applies to costs “incurred”. Thus, taking into account the *ratio legis* of the interest relief, we must assume that the taxpayer who earns revenues that are subject to taxation and revenues that are not (e.g. from an activity in SEZ/under a DoS) has the right to deduct the full amount of the interest relief from revenues that are subject to tax.

3.4. Transferring reserve capital to profit from previous years before the lapse of 3 years

The interpretation doubt that the taxpayer wanted to clarify by requesting a tax interpretation concerned a situation in which the taxpayer, before the lapse of a 3-year deadline stipulated in Article 15cb(5) CIT Act, transferred funds gathered in the reserve capital to the position “profits from previous years” and passed a resolution of dividing them, where these profits will not be paid out of the company before the lapse of 3 years counting from the end of the tax year in which the resolution on retaining profit in the company was passed. The company believes that in these circumstances it has retained the right to apply the interest relief towards the aforementioned profits.

The Director of the National Tax and Customs Information Office agreed with this stance in his individual tax ruling of 12 December 2022 (ref. no. 0111-KDIB1-1.4010.571.2022.2.AW), claiming that the loss of the right to the interest relief only appears after both premises referred to in Article

15cb(5) CIT Act are met cumulatively, that is division and payment of profit from the company. Since the company will not pay the divided profit before the lapse of the 3-year deadline, it will not lose the right to the interest relief in this regard.

The Director’s position should be approved of in the context of the linguistic interpretation of Article 15cb(5) CIT Act, pursuant to which the legislator indeed makes the loss of the right to the interest relief dependent on the conjunction of two circumstances when it comes to “retained profit” – its division and then payment.

3.5. Partial payment of the reserve capital on account of the dividend and the right to the interest relief for the remainder of the reserve capital

The interpretation doubt that the company wanted to solve by obtaining a tax interpretation concerned a situation in which in 2020 the company allocated profit for 2019 to the reserve capital and then, in the same year, it paid part of this profit to its shareholders as dividend. The company had to make sure that in such circumstances it will not lose the right to employ the interest relief for the amount that was left in the reserve capital. The company believed that an earlier payment of the reserve capital does not affect the opportunity to exercise the interest relief for the remainder of the profit gathered in the reserve capital.

The director of the National Tax and Customs Information Office agreed with this stance in his individual tax ruling of 21 January 2022 (ref. no. 0111-KDIB1-1.4010.575.2021.1.AW). The authority thus concluded that the payment of the dividend in the same year in which the profit was transferred for the reserve capital only affects the amount of profit that is the basis to calculate notional interest.

The author thinks that the opinion of the taxpayer and of the tax authority in this regard is correct. The structure of the interest relief means that it should be taken into account only in the annual CIT-8 tax return form and its basis should be the reserve and supplementary capital on the last day of the tax year for the taxpayer, where transfers of funds gathered in these capitals are irrelevant for the interest relief.

3.6. “Retention of profit in the company” other than to allocate it for the reserve or supplementary capital

In this case the interpretation doubt results from editorial inconsistencies which became apparent in comparison to Article 15cb(1)(2) and Article 15cb(3) of the CIT Act. On the one hand, the legislator specifies that

the basis for calculating costs are profits allocated for the reserve or supplementary capital (Article 15(1)(2)), on the other it makes a general reference to “taking a resolution on retaining profit in the company” (Article 15(5)). A doubt arises in this context of whether retention of profit in the company in a way other than allocating it for the reserve or supplementary capital gives the taxpayer the right to the interest relief. This issue was resolved by the Director of the National Tax and Customs Information Office in the tax interpretation (individual tax ruling) of 7 May 2020 (ref. no. 0111-KDIB1-1.4010.24.2020.3.ŚS), who concluded that “the condition to exercise the preference identified in this provision is to allocate the profit for the company’s reserve or supplementary capital, not only for this profit to play the same role as the reserve capital, like the Applicant claimed”. The Director thus deemed the taxpayer’s position as incorrect because the taxpayer passed a resolution on retaining profit from the previous year in the company by excluding it from division.

The author believes that the position of the Director is correct given the clear indication that the profit should be allocated for the reserve or supplementary capital. However, the phrase “resolution on retention of the profit in the company” must be read in relation to the allocation of profits only for these two types of the company’s capitals which, since they do not have a definition in the CIT Act, must be given a special meaning pursuant to the Commercial Companies Code.

3.7. Making a contribution to the company by setting off claims

The interpretation doubt here was resolved by means of Article 15cb(6) CIT Act, pursuant to which: “The fiscal year in which an additional contribution is made to a company shall be the year in which the additional contribution is credited to the company’s payment account”. A dispute arose in this context between the taxpayer and the tax authority, which has now been resolved by the judgement of the Voivodship Administrative Court in Szczecin of 30 November 2022 (ref. no. I SA/Sz 438/22; the judgement is not final). The court, similar to the tax authority, claimed that “Additional contributions identified in the Application were not credited to the Company’s bank account but were deducted by means of compensation for the Company’s commitments on account of loans granted to the Company by its shareholders. [...] Article 15cb(6) CIT Act requires that additional contributions physically appear on the Company’s account, which did not happen in this case. This regulation, in the case of additional contributions, undoubtedly requires an actual movement of property (transfer of funds) from the shareholders to the Company. Therefore, the only possibility to enjoy the benefits of Article 15cb CIT Act is to make additional contributions by their actual

payment to the Company. Performing this commitment in a different form ruins the taxpayer’s right to enjoy the deduction.”

In this case too, the author agrees with the resolution of the tax authority and the court. We must note here that they even if shareholders indeed made additional contributions to the company pursuant to Article 15cb(6) CIT Act then the Company’s possible settling of amounts due on their account could be deemed as paying them back if it happened before the lapse of 3 years counting from the tax year in which these additional contributions were made to the company and the company would lose its right to the interest relief on these additional contributions – pursuant to Article 15cb(7) CIT Act.

3.8. The option to settle costs by means of a limited partnership’s allocating profit made before the company became a CIT taxpayer to the reserve or supplementary capital

Under the amendment of the CIT Act (Journal of Laws of 2020, item 2123), limited partnerships became CIT taxpayers on 1 January 2021 (or under the company’s individual decision since 1 May 2021). For this reason, a doubt appeared of whether a limited partnership may enjoy the interest relief as a result of partners’ passing a resolution on creating a reserve capital and on allocating to it undivided profits of the limited partnership made before the company gained the status of a CIT taxpayer. The resolution would be made after the partnership gains such a status (in the case analysed – after 30 April 2021). For balance sheet reasons, the undivided profits would be visible in the reserve capital rubric. The company does not envisage division and payment of profit allocated for the reserve capital before the end of 2024, nor does it plan to use this profit to cover losses from previous years. In the request for an individual tax ruling the company believed that in such circumstances it has the right to exercise the interest relief. The Director of the Information Office believed to the contrary and in his individual tax ruling of 25 May 2021 (ref. no. 0111-KDIB1-1.4010.145.2021.1.BS), he deemed the company’s stance as wrong and concluded that: “The possibility referred to in Article 15cb CIT Act for including in taxable costs a specific amount of profit allocated for the supplementary capital concerns only profit made by the Applicant in the period when he will operate as a corporate income tax taxpayer already.”

One cannot disagree with the Director’s position in this matter. First of all, such a position ruins the aim for which the interest relief was introduced, that is to promote actions aiming to create self-financing capitals in companies. Second of all, the legislator did not reserve anywhere that the profit allocated to the reserve or supplementary capital must result from

taxable revenues. It seems that if the legislator had intended the interest relief to accommodate profits of limited partnerships that have just been taxed with CIT, then the lawmaker would have laid down appropriate interim regulations when introducing provisions that extended CIT's personal scope to cover limited partnerships from January/May 2021.

3.9. The possibility to settle costs by allocating profits made before 2018 to the reserve or supplementary capital

The interpretation doubts that the company wanted to solve by obtaining a tax interpretation concerned the question of whether undivided profits earned before 2018 and allocated for the reserve capital in 2022 may be used to calculate the interest relief.

The Director of the National Tax and Customs Information Office did not agree with this stance in, for example, his individual tax ruling of 5 January 2023 (ref. no. 0111-KDIB1-3.4010.824.2022.1.PC) and of 23 March 2023 (ref no. 0111-KDIB2-1.4010.39.2023.1.BJ), concluding that the opportunity to apply the interest relief depends on, for example, the period in which the profit was earned and which was then allocated to the reserve or supplementary capital, because this preference may be enjoyed only by measures that emerged in the period indicated in Article 15cb(1) CIT Act in conjunction with Article 10(1) of the Amending Act, that is since 2018.

We must firmly advocate the position expressed by the taxpayer. Contrary to what the tax authority claims, no provision lays down a time in which profits must be earned whose transfer to the supplementary or reserve capital would allow exercising the interest relief. Article 10 of the Amending act, to which the Director refers, only talks about the date on which the additional contribution should be made or on which the profit should be allocated for relevant capitals. Therefore, allocating undivided profits from any previous year for the newly-created reserve capital should not rule out the application of the interest relief.

3.10. The earliest date from which the interest relief may be settled

Even though the Amending Act as a rule entered into force on 1 January 2019, pursuant to its Article 10(1) the interest relief is first applied to the fiscal year that began after 31 December 2019, where, still though, under Article 10(2) the interest rate is applied also to additional contributions made and profit allocated for the reserve or supplementary capital after 31 December 2018. In such a case, the year of making the additional contribution or allocating profit shall be assumed to be the fiscal year that began after 31 December 2019. The above shows that the right to settle the interest relief is

effective as of 1 January 2020 for companies whose fiscal year overlaps with the calendar year or from the first fiscal year beginning after 31 December 2019 for companies with a changed fiscal year. However, profits and additional contributions adequately allocated and made in 2019 may be included in the calculation of the interest relief in 2020 and 2021. This interpretation is confirmed by the Director in his individual tax rulings (e.g. individual tax ruling of 1 June 2021, ref. no. 0111-KDIB1-1.4010.155.2021.1.BS and of 25 September 2019, ref. no. 0111-KDIB1-1.4010.356.2019.1.BS).

3.11. The possibility to apply the interest relief by a company subject to a flat-rate tax on corporate income (Estonian CIT)

The interpretation doubt that the company wanted to solve by obtaining a tax interpretation concerned the question of whether a company taxed with a flat-rate tax on company revenues pursuant to Article 28c-28t (so-called Estonian CIT) is entitled to the interest relief. The company believes that taxpayers of the Estonian CIT do have the right to the interest relief. The Director of the National Tax and Customs Information Office did not agree with this stance in his individual tax ruling of 17 February 2023 (ref. no. 0111-KDIB2-1.4010.760.2022.1.DD), in which he claimed that the flat-rate tax on revenues of companies is an alternative way to tax legal persons with an income tax in place of the classical CIT. Article 28h CIT Act points out that no other provisions of the CIT Act that regulate analogical issues are applied in determining the tax basis in the flat-rate tax. These issues include, for example establishing income, tax base, tax rate and also tax on revenues from buildings or the minimum tax, settlement of which is directly related with basic (classic) principles of settling the CIT. Therefore, when choosing the flat-rate tax as a form of taxation, the company has no option to classify the notional value of the interest referred to in Article 15cb CIT Act as costs of its operation. Both the stance taken by the Director and its reasoning deserve utmost approval.

CONCLUSIONS

In the 4 years of application of the interest relief, there have surfaced many issues that have triggered interpretation doubts in the practice of its application, which have been collected in this study. Most of these doubts have been subject to tax interpretations issued by the Director of the National Tax and Customs Information Office. The author's analysis of positions expressed by the Director in individual cases has revealed multi-faceted differences in views presented by taxpayers and the Director. In most disputes the author felt much closer to the argumentation presented by the taxpayers.

Undoubtedly, we may have a valid expectation for increased decision-issuing activity of administrative courts soon that would address the interest relief – activity that is a consequence of complaints brought against tax interpretations in which the Director negates the taxpayer’s position. This will be a very interesting judicial material that will lend itself to author’s further research on the interest relief and may be the basis for formulating *de lege ferenda* conclusions.

REFERENCES

- Dmoch, Wojciech. 2019. “Komentarz do art. 15cb.” In *Podatek dochodowy od osób prawnych. Komentarz*. Warszawa: C.H. Beck. Legalis el.
- Gil, Krzysztof, Aleksandra Obońska, Adam Waclawczyk, et al. 2019. “Komentarz do art. 15cb.” In *Podatek dochodowy od osób prawnych. Komentarz*. Warszawa: C.H. Beck. Legalis el.
- Jankowski, Jakub. 2020. “Koncepcja allowance for corporate equity w polskim CIT na tle innych europejskich jurysdykcji podatkowych.” *Przegląd Podatkowy* 3:49-53.
- Malinowski, Dariusz. 2022. “Podwyższenie kapitału zakładowego w spółce z ograniczoną odpowiedzialnością finansowane ze środków spółki.” *Przegląd Podatkowy* 8:3-5.
- Małecki, Paweł, and Małgorzata Mazurkiewicz. 2019. “Komentarz do art. 15cb.” In *CIT. Komentarz. Podatki i rachunkowość*. Warszawa: Wolters Kluwer. LEX el.
- Małecki, Paweł, and Małgorzata Mazurkiewicz. 2022. “Komentarz do art. 15cb.” In *CIT. Komentarz. Podatki i rachunkowość*. Warszawa: Wolters Kluwer. Lex el.