

New approach to social security contributions on management fees

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Introduction

On June 17 2015 the Supreme Court ruled that if a manager who is registered as self-employed has executed a management contract with a company in which he or she is a board member, it is the contract and not the self-employment status that is the legal title for calculation of social security contributions, rather than his or her employment status (III UZP 2/15). The decision establishes a legal principle under which members of management boards cannot enjoy the favourable social security benefits available to self-employed persons.

Self-employed persons (ie, registered entrepreneurs) pay their own social security contributions, in contrast to unregistered freelancers, civil contractors and employees, for whom the employer or recipient of services pays the applicable contribution.

Registered entrepreneurs can voluntarily declare the amounts on which their social security contributions are calculated, which need not correspond to their income. A minimum amount is prescribed by law, which is usually declared. In practice, therefore, registered entrepreneurs pay substantially lower social security contributions than similarly remunerated employees or freelancers, who must pay contributions based on their income. As a result, managers have tended to structure their appointment so that they are self-employed.

The Social Security Agency has strongly opposed such practices for the last 11 years, arguing that even if management activities are performed by a person who is formally registered as an entrepreneur, social security contributions should be based on overall income and be paid by the employing company.

Case law

The Social Security Agency's argument has been seen as unconvincing and generally rejected by the courts. The Supreme Court emphasised in its rulings that if a manager executes a management contract with a company as a registered entrepreneur, his or her employment status as self-employed provides the legal basis for calculating social security contributions. These rulings underlined that:

- Article 20 of the Constitution sets out a principle of freedom for business activity, which can be limited only by statute; and
- regulations on the freedom of business activity do not prevent the execution of management contracts by self-employed persons.

Thus, in general, the self-employment status rather than the management contract constitutes the

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legal basis for calculating social security contributions (Supreme Court Decision, I UK 103/14, November 4 2014).

However, the Supreme Court recently presented the view that the above reasoning cannot be applied to management contracts executed with management board members. In that context, managers act as members of a corporate body and perform no business activity in their own name or at their own risk (Supreme Court Decision, I UK 126/14, November 12 2014). Consequently, management board members cannot be regarded as self-employed, even if they are formally registered as entrepreneurs. The legal basis for being subject to obligatory social security contributions in that case is the management contract rather than the self-employment status. This means that management board members must pay social security contributions based on their income and the employing company should pay these charges.

Facts

A joint stock company hired management board members who were registered as self-employed under civil law management contracts. The company applied to the Social Security Agency for a ruling to confirm that the board members could pay their own social security contributions as self-employed persons and were not subject to pay contributions under Article 6(1)(4) of the Social Security System Act 1998.

The Social Security Agency issued a negative decision. On appeal, the regional court overturned the decision and ruled in favour of the company. The Social Security Agency's subsequent appeal against the regional court decision resulted in another change of ruling, which was again unfavourable to the company. The company filed a cassation to the Supreme Court, which agreed to examine the case and referred it to an enlarged panel of seven judges to address the discrepancies in case law in this context.

Decision

The Supreme Court ruled that the legal basis for determining the social security contributions that the management board members must pay was their management contracts rather than their employment status as self-employed entrepreneurs.

The rights and obligations of management board members stem primarily from their appointment, which is governed by company law and the articles of association. The Supreme Court found that these rights and obligations do not stem from the self-employment status or the type of employment contract and, as a result, do not fall under the mandatory social security system. However, such persons must be subject to social security contributions on some legal basis; it is unacceptable to exclude managers from the social security system altogether. The Supreme Court concluded that the legal basis for calculating social security contributions is the management contract rather than the employment status, as it cannot be said that members of management boards are performing their services in their own name, which disqualifies them as self-employed entrepreneurs.

Comment

The Supreme Court decision is significant for the recruitment of managers in Poland and will have considerable impact on the amount of social security contributions that the Social Security Agency will receive.

Companies are advised not to employ managers as self-employed entrepreneurs and to review how social security contributions are calculated. Although the Supreme Court has stated that its decision sets a legal principle, companies should consider resolving prior social security settlements, as the Social Security Agency is not bound by the Supreme Court decision and may try to claim outstanding amounts.

Finally, following the Supreme Court decision, companies and managers must pay social security contributions.

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