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THE PRINCIPLE OF THE ADVANTAGE OF SUBSTANCE OVER FORM IN THE TRANSACTION OF SUBMITTING A TRADEMARK

ABSTRACT

The article assesses the transaction of contributing a trademark created during business activity to a newly established company in the context of the principle of the advantage of substance over form and applicable tax law provisions. In order to build the value and structure of their assets in the balance sheet and act against the principle of substance over form, enterprises separate and contribute economic resources that do not meet the definition of assets to newly established companies. Literature studies and analysis of legal acts were used to achieve the assumed goal, and a study of a selected real case of a transaction of separating one's own trademark and its contribution to a daughter company in order to improve the property and financial situation was carried out. The analysis of the case study indicates actions against the principle of the advantage of content over form and, thus, the principle of a faithful image. In order to improve the property and financial situation, the company's management board activated a trademark created during its operations by separating it and contributing it to a daughter company and thus falsified the picture of the property and financial situation of the enterprise presented in the reports, exposing their addressees to the consequences of incorrect decisions.

Key words: the principle of superiority of substance over legal form, comparability study

JEL code: G32

Introduction

The principle that creates many problems, both in theory and in the practice of accounting, is the principle of the superiority of content over form. According to this principle, the accounting of events, including economic operations, should be adequate to their economic content and impact on the financial position of the enterprise and not only on their legal form. This principle is particularly important in a situation where enterprises, for the construction of value and the structure of their assets in the balance sheet, acting contrary to this principle, allocate and contribute economic resources that do not meet the conditions of the definition of assets to newly created companies. In order to improve the property and financial situation of the company, a simple action (in terms of form) is to separate and contribute a trademark of the company created during its business activity by separating it and contributing it to a subsidiary and thus falsifying the financial reports.

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The resulting picture of the company's property and financial situation presented in the reports exposes the addressees to the consequences of erroneous decisions.

The article was created as a result of a literature search and, above all, the interpretation of the National Tax Chamber and cases that the author examined as part of the proceedings of a court expert. The theoretical part included a critical and descriptive analysis of the literature and applicable legal provisions. The empirical research concerned a critical analysis of a selected trademark disclosure transaction. The research sample was limited to an entity that is undergoing court proceedings, as a result of which a bankruptcy petition was filed, and the disclosed trademark was a way to avoid bankruptcy. Specifically, improving liquidity ratios and covering liabilities with assets.

Trademark definition

According to the definition of “a trademark” contained in Article 120(1) of the Industrial Property Law Act of 30 June 2000 [Dz.U. 2013 r. nr 1410 ze zm., Dz.U. 2001 nr 49 poz. 508, article 120 sec. 1], in the version in force in 2014, a trademark may be any sign that can be represented geographically, if such a sign is suitable for distinguishing the goods of one enterprise from those of another enterprise. Paragraph 2 of that article provides that a trademark within the meaning of paragraph 1 may be, in particular, a word, a drawing, an ornament, a colour composition, a spatial form – including the form of goods or packaging, or a melody or other audible signal.

Registration of a trademark enables legal protection, which means the owner obtains legal protection for goods and services signed with this mark. It has the character of a monopoly, so its right is an exclusive right and belongs only to its owner. Pursuant to Article 153 of the aforementioned Act, by obtaining the right of protection, the right to the exclusive use of the trademark in a commercial or professional manner is acquired throughout the territory of the Republic of Poland (RP). The nature of trademarks means that the right of protection concerning them is the fastest and most effective tool for defending an economic operator using such a trademark on the market of goods and/or services in the case of its rights to such signs [Co zyskujesz...].

Building a strong brand is a long-term process of active brand development, the aim of which is to interest more and more people in the brand. Creating a strong company brand, i.e. treatments in the field of creating advertising, as well as marketing the company, are distinguished by innovation and implementation of standards. The brand is also called the trademark and flagship of a given company. The more recognisable the product is on the market and the better the visual identification of the brand, the company's competitive advantage increases, which in turn ensures that the company's profits also grow. The development of the company is not possible without a long-term brand-creation process. Companies that want to ensure stable profits and loyal consumers are interested in building strong brands.

A brand is, but is not limited to, a name or graphic symbol (trademark) placed on products or points of sale in order to protect against imitation, counterfeiting, impersonation, or attribution of authorship. In a market economy, a brand has a price, and a "good brand" is the foundation of business success. A brand consists not only of a name or logo, but also of communicative, behavioural and visual elements which define an enterprise or product.

Well-known brands are an important element of every company's assets. A brand is not a fleeting marketing fad; it is a set of material and intangible features centred around a symbol, generating value and enabling influence on the recipient. As the experience of recent years shows, a strong brand is the most valuable capital that a company can accumulate.

The terms brand and trademark, although they are not identical, are often used interchangeably. As mentioned, a trademark is subject to registration, so it is the part of the brand that enjoys legal protection.

Trademarks, commonly referred to as "commercial mark", "brand mark", "company name", "logo" or "brand" are important assets of the company, thanks to which it is possible to achieve economic benefits. Among the areas that can determine the brand's strength to reflect its economic potential, we can indicate, among others: market position, customer loyalty, audience reach, adaptation and setting trends, positioning and dissemination of the brand, legal protection and industry perspectives.

A brand that consists of a name alone has no *raison d'être*. First, one needs to choose a brand name, and then one needs to create its identity by encapsulating its name with different meanings and promises. When choosing a brand name, the position designated for the product according to its value must be considered. A brand is strong when its name is associated with positive qualities, benefits, company values, personality and users. The task of the brand builder is to create a brand identity based on these dimensions.

A well-known brand on the market is the owner's greatest treasure; it is often worth more than all the owner's wealth. A recognisable brand causes greater interest among buyers and thus ensures growing profits. A brand has its own value, which can be expressed in money; the value of a brand is evidenced primarily by its reputation, i.e. social acceptance, popularity, consumer loyalty, i.e. whether a given brand is able to acquire and maintain a group of consumers. From a financial point of view, the value of a brand is the specific amount for which that brand can be sold.

Based on a trademark that is part of the company's brand, the entrepreneur's reputation is built. It can be assumed that it is the trademark that constitutes the most valuable asset of the company. The most expensive trademarks in the world are often valued at billions of dollars, which is why they can be called reputable marks. The owner of a reputable mark has a considerable market and procedural advantage. However, they should remember that reputation is not given once and for all and requires monitoring of the activities of competitors and decisive protective measures. A trademark is not only a designation of a good, service or enterprise, but also an important element of a company's marketing strategy seeking to promote its key products [Januszcyk 2017].

Rules for inclusion in the accounting books

According to applicable law, the acquired brand or the trademark identified with it may constitute an element of goodwill, which can then be disclosed among the assets in the acquiring company's balance sheet. Therefore, if it is possible to separate it, then it can be presented in the position of intangible assets as a trademark.

Pursuant to Article 3(1)(14) of the Accounting Act [Dz.U. 1994 nr 121 poz. 591], intangible assets are property rights acquired by an entity, classified as fixed assets,

suitable for economic use, with an expected economic useful life of more than one year, intended for the entity's needs. In particular, these are:

- author's economic rights, related rights, licenses, concessions,
- rights to inventions, patents, trademarks, utility models and ornamental models,
- know-how.

Intangible assets also include acquired goodwill and costs of completed development works.

Intangible assets generally include acquired intangible assets (the exception is the costs of completed development works). The acquisition of ownership of an asset may take place by way of purchase, exchange, in-kind contribution, donation, or inheritance on the basis of another agreement obliging to transfer the ownership of the item marked as an identity. Self-generated rights are not intangible assets. Thus, if the trademark was not acquired by the entity, but produced in-house, it cannot be counted as an intangible asset. However, if the entity has incurred costs for the production of the trademark (e.g. fees collected by the Polish Patent Office or other costs directly and indirectly related to the establishment of the protection right to the mark), they should be recorded as costs of a given period. Depending on the adopted layout of cost accounts, posting can be carried out in various ways. However, the classic notation looks like this:

- the WN side of the relevant team IV account, e.g. "External services",
- the MA side of the settlement account or "Cashier" or "Bank Account".

In a situation where the trademark right acquired by the entity meets the conditions set out in the Accounting Act for intangible assets, it is entered into the accounting books, entering:

- Wn account 02 "Intangible assets",
- Ma account of 30 "Settlement of purchase" or 24 "Other settlements".

All rights included in the accounting books – including the right to a trademark – classified as intangible assets, are subject to depreciation or redemption write-offs based on Article 33 of the Accounting Act (in conjunction with Article 32(1)-(4) and (6) of that Act). These write-offs are therefore made by systematic, planned distribution of the initial value over a fixed depreciation period (Wn account 40-0, Ma account 07-2).

Intangible assets – including acquired trademark rights – are valued at least at the balance sheet date at the purchase price, less depreciation or write-offs, as well as impairment losses [Dz.U. 1994 nr 121 poz. 591, art. 28, sec. 1, p. 1]. During the inventory, by means of verification of intangible assets, the real value of these components is examined, i.e. it checks whether there has been a permanent impairment of their value. It consists of the fact that there is a high probability that these values will not bring the expected economic benefits in the future. If such impairment has occurred, an impairment loss should be made for the remaining operating expenses.

In the balance sheet, intangible assets should be presented in their net value. Depending on the balance sheet formula an entity uses, the amount of intangible assets is presented on the assets side under:

- A.I "Intangible assets" – with a further division into costs of completed development works, goodwill, other intangible assets, advances on intangible assets – when the entity prepares financial statements in accordance with Annex 1 of the Accounting Act,
- "Non-current assets" – when preparing the report in accordance with Annex 4,
- A.I "Intangible assets" – when the report is prepared in accordance with Annex 5.

It follows from the above that an own brand developed during its operations cannot be included in the company's balance sheet assets. On the other hand, in the valuation of the enterprise and the measurement of the increase in value for the owner, the brand identified with the trademark is an operating asset, the value of which will significantly affect the value of the enterprise and, ultimately, the assessment of the company's situation.

Brand recognition as an asset may be based on the fulfilment of certain criteria that are intended to prevent manipulation of reporting volumes, as well as to limit the freedom of managers and accountants in this regard. Therefore, the developed brands of enterprises are very often an underestimated resource of the enterprise and not disclosed at all in the financial report. In practical terms, it happens that the management boards of companies take action to show the brand in the balance sheet. In order to promote the logo and brand on the market, a separate entity is created, selling only the products of the entity that created it, and after achieving the intended goal, it is purchased by the founder's company [Grzybek 2015, za: Szczepankiewicz 2012]. In addition, the business practice found another way to disclose the brand through the shares of a subsidiary to which the company's mark valued at market value was contributed as an in-kind contribution.

The principle of the predominance of content over form

Balance sheet law is a set of legal norms regulating the basic principles of accounting by enterprises. The most important act in this respect in Poland is the Accounting Act of 29 September 1994, in force since 1 January 1995, whose provisions are modelled on the European Union Directives and International Accounting Standards (IFRS). Along with the progressive globalisation of the economy, and thus the need for changes in accounting, the Polish balance sheet law underwent modifications aimed at approximating national regulations to international solutions, which was reflected in subsequent amendments to the Accounting Act.

The above Act does not regulate in detail all accounting issues. By allowing alternative solutions to the same problem and thus leaving economic units a certain freedom in shaping the image of the enterprise, it gives the opportunity to conduct accounting policy. With the adoption of the Accounting Act, there were opportunities to influence the presented results in accordance with the adopted policy of the enterprise. As a result of the amendment to the balance sheet law, the scope of this freedom has been further expanded, which many entities use to create their own desired image.

The Accounting Act, amended on 1 January 2002, raised the profile of the accounting policy and defined this policy for the first time. It defines in Article 3(1)(11) [Dz.U. 1994 nr 121 poz. 591] the principles (accounting policy) as selected and applied

by the entity, appropriate solutions for its activities permitted by the provisions of the Act and ensuring the required quality of financial statements.

The principle that creates many problems, both in theory and in the practice of accounting, is the principle of the superiority of content over form. According to this principle, the accounting of events, including economic operations, should be adequate to their economic content and impact on the financial position of the enterprise, and not only to their legal form. The statutory permission to apply this principle in practice depends on many factors, including the level of economic and legal culture of the society of a given country, as well as the role and importance of auditing financial statements. The application of this principle in accounting practice may give rise to the risk of its use to comply with applicable law. Assuming that such a risk does not exist or is small, the application of the principle of the superiority of content over form contributes greatly to making the financial statements of an enterprise a true and fair view of its assets, financial position and profit or loss. Strict adherence to the rules – usually delayed in relation to economic development – of the law, often distorts this picture.

The aforementioned amendment to the Accounting Act Introduced the principle of the predominance of economic content over legal form. According to this principle, events, including business operations, are recognised in the accounting books and reported in the financial statements in accordance with their economic content, which is reflected in Article 4(2) of the Accounting Act [Tuszyński 2001]. As Jankowska rightly observes, “In the event of a discrepancy between the economic substance of transactions and economic events (primarily their economic effects) and their legal form, balance sheet law determines the superiority of the economic content” [Jankowska 2005, p. 137-150].

The direct inclusion in the Accounting Act of the principle of the superiority of content over form is proof of the legislator’s recognition of a phenomenon commonly occurring in practice, when the legal form of a transaction deviates from its economic realities. A practical example would be a contract to sell securities with the obligation to repurchase the same securities on predetermined terms. From a legal point of view, the sale and purchase of securities are separate sale and purchase transactions, while from an economic point of view, the transaction is a loan.

Apart from the very definition of a principle in the Accounting Act, it is difficult to look for other regulations defining the application of the principle in records, valuation and presentation. The lack of its application results in incorrect recognition of economic transactions, a false picture of the property and financial situation in the financial statements and incorrect inference of the addressees of the financial statements appears.

The subject of the study

In the examined case, the General Meeting of Shareholders of MR Sp. z o.o. owned by R S.A., which adopted a resolution to increase the core capital from PLN 50,00.00 to PLN 248,000,000.00 by making a contribution in kind in the form of an organised part of the enterprise of R S.A., consisting of a set of tangible and intangible assets constituting the Marketing Branch of R S.A. including: all rights and obligations arising from transferred contracts, movable property, intangible assets, financial resources, and employees. At the same time, on 07.11.2011, R S.A. concluded a license agreement with MR Sp. z o.o. for the use of Trademarks in its business activity for profit-making

purposes. As a result of the concluded agreement, the Licensor grants the Licensee a non-exclusive license to use the copyrights of all trademarks. From the license agreement for the use of Trademarks in the conducted business activity for profit-making purposes of 07.11.2011 R S.A. and MR Sp. z o.o. it follows that:

1. The license fee payable to the licensor for the granting of a license to use the Trademarks shall be determined on the basis of the revenues generated by the Licensee using the Trademarks.
2. The revenue generated by the licensee using the Trademarks is the net revenues from the sale of products, goods and materials recognised in the Licensee's income statement, less the revenues from sales to the partner network (press) and other recipients (FMCG) recognised in the Profit and Loss Account of the Licensee, and the revenue from the rental of real estate.
3. The license fee due to the Licensor shall be determined as the product of the revenues generated by the Licensee using the Trademarks determined in accordance with paragraph 3 above in a given settlement period and the rate of 1%.

Despite granting a non-exclusive trademark license, MR Sp. z o.o. could not freely dispose of them and license them to other entities, while the Licensee, i.e. R S.A. could do so. The right of MR Sp. z o.o. to the trademark was also limited by the provision of § 6 point 3 of the above-mentioned License Agreement of 07.11.2011, according to which MR Sp. z o.o. as the Licensor was obliged not to engage in any behaviour that could result in the expiration of the protection right for any of the Trademarks.

The case documentation shows that the valuation of the organised part of the enterprise consisting of a set of tangible and intangible assets constituting the Marketing Branch of R S.A. (the organised part of the enterprise, hereinafter referred to as ZCP), including the trademark R S.A. The estimated fair market value of ZCP, in the absence of profitability and limited liquidity of R S.A. and the restructuring process starting, was set as of 31 March 2011 in the range of: from PLN 239.0 million to PLN 259.0 million. On the other hand, the estimated fair market value of Trademark R (including accompanying marks) as of 31 March 2011 ranged from PLN 209.0 million to PLN 239.0 million (Table 1).

Table 1. The fair value of the shares over the book value of the net assets transferred recognised in financial income

Description	Amount [PLN thousand]
The fair value of the shares subscribed in R Marketing	248 000
Net assets in book values transferred	905
Intangible Assets	566
Fixed assets	10
Receivables	4
Cash	346
Liabilities	-21
The fair value of the shares over the book value of the net assets transferred recognised in financial income	247 095

Source: own study.

As a consequence, the trademark created during its activity and transferred to the assets of the daughter company was included in the assets of R S.A. as shares from related entities.

The economic benefit of contributing an organised part of R S.A. to MR Sp. z o.o., as shown in Table 2, was to increase the value of R S.A.'s assets by creating long-term financial investments, which improved financial ratios and assessment of the condition of R S.A., while remaining neutral for the assessment of the financial situation of the capital group. The second positive category built on the basis of the in-kind contribution and its valuation were financial revenues disclosed in the amount of PLN 247 million and ultimately a positive financial result of 2011, which allowed the Management Board to plan the payment of dividends to Shareholders.

Table 2. R S.A. Income Statement for the years 2009-2012 [thousand PLN]

Sing.	Content	2009	2010	2011	2012
		[thousand PLN]	[thousand PLN]	[thousand PLN]	[thousand PLN]
A.	Net revenues from sales and equals. with them, including	3 969 119	3 603 894	3 481 992	2 212 634
	– from affiliated undertakings				
I.	Net revenue from the sale of products	101 866	104 541	92 655	59 145
II.	Net revenues from the sale of goods and materials	3 867 253	3 499 353	3 389 337	2 153 489
B.	Costs of products, goods and materials sold, including:	3 421 938	3 105 809	2 999 607	1 835 132
	– related parties				
I.	Costs of production of sold products	42 319	41 683	29 961	9 522
II.	Value of goods and materials sold	3 379 619	3 064 126	2 969 646	1 825 610
C.	Profit (loss) on gross sales (A-B)	547 181	498 085	482 385	377 502
D.	Selling costs	472 562	411 281	437 999	412 647
E.	General management expenses	131 728	127 209	144 588	104 033
F.	Profit (loss) on sales (C-D-E)	-57 109	-40 405	-100 202	-139 178
G.	Other operating income	41 856	51 009	224 602	106 071
H.	Other operating expenses	64 222	104 411	105 742	104 753
I.	Operating profit (loss) (F+G-H)	-79 475	-93 807	18 658	-137 860
J.	Financial income	7 788	3 422	254 735	16 353
K.	Financial costs	2 446	1 001	4 409	15 721
L.	Profit (loss) on business activities (I+J-K)	-74 133	-91 386	268 984	-137 228
M.	Result of extraordinary events (M.I. - M.II.)	0	0	0	0
N.	Gross profit (loss) (L+/-M)	-74 133	-91 386	268 984	-137 228
O.	Income tax	-905	-9 727	-53 249	-19 152
P.	Other mandatory profit reductions (loss increases)	0	0	0	0
Q.	Net profit (loss) (N-O-P)	-73 228	-81 659	215 735	-156 380

Source: own study.

The basis for estimating the fair market value of ZCP was financial forecasts presented by the Management Board of R S.A. covering the years 2011-2016. Based on the same financial forecasts regarding the operating revenues of R S.A., a calculation of free cash flows generated by Znak Towarowy R S.A. and, consequently, ZCP was prepared. Thus, the financial position disclosed in the forecasts for R S.A. was the basis for future cash flows (forecasts) for ZCP, and its value was determined using the discounted cash flow method. Subsequently, ZCP measures operating profit (EBIT), adjusted for the following elements: reductions in income tax and capital expenditures, increases due to depreciation and changes in the required level of working capital. The cash flow for ZCP calculated in this way was discounted with a weighted average cost of capital (WACC) of 14.2%.

It follows that the assumptions for the future results (flows) of R S.A., the historical expenses of the Marketing Department, the ZCP Budget for 2011, and the P&L of ZCP were the basis for estimating free flows for ZCP; therefore, the assumptions of these forecasts were analysed. The forecasts for R S.A. and ZCP presented in the Valuation Report were compared in Table 3.

Table 3. Comparison of forecasts for R S.A. and ZCP in 2011-2016

Assumptions [amounts in PLN thousand]	9th 2011	2012	2013	2014	2015	2016
Net revenues of R S.A. from the sale of products, goods and materials	3 255 000	4 869 000	5 540 000	6 141 000	6 634 000	7 259 000
<i>change in revenue</i>	<i>Bd</i>	<i>18,80%</i>	<i>13,80%</i>	<i>10,80%</i>	<i>8,00%</i>	<i>9,40%</i>
Increase in revenues from sales of ZCP	17 629	26 234	30 741	34 200	38 536	44 513
<i>change in revenue</i>		<i>48,81%</i>	<i>17,20%</i>	<i>11,30%</i>	<i>12,70%</i>	<i>12,60%</i>
Revenue from trademark licenses R	16 033	23 970	28 327	31 516	35 661	41 460
Percentage of 1% on revenues of R S.A. (Expert's calculations)	32 550	48 690	55 400	61 410	66 340	72 590

Source: own study.

The ZCP revenue forecasts do not include any revenues other than those achieved in transactions with R S.A. Table 3 shows that the forecasted revenues of ZCP do not change adequately to changes in the forecasted revenues of R S.A.

The total revenues of 2012 of R S.A. between 2011 and 2012 increased by 18.8%, and for ZCP, by as much as 48.81%. At the same time, it should be noted that the historical data contained in the financial statements of R S.A. indicate a 10% decrease in revenues between 2009 and 2010 and 6% between the average quarter for 2010 and the first quarter of 2011. Despite such historical data, valuations assumed revenue increases for subsequent years.

In this respect, a research problem arises: In the scope of the recording and presentation of shares in RM sp. z o.o. to which the trademark created during the R S.A. brand's activity was applied, has the principle of the predominance of content over form been preserved? How to verify the rules of content advantage over forms that have been or are not preserved?

A test of the advantage of content over form

The person examining or reading the financial statements should be able to verify whether a particularly significant item has been recognised and presented in the financial statements in accordance with its economic content and not its legal form. The notes on the financial statements could include a test of the content of new operations that are relevant to the entity's property and financial position. In this respect, it is necessary to use already known and practised methods of estimating transfer pricing and informing about their application.

The provisions of § 19, sections 1 and 2 of the Regulation of the Minister of Finance of 10 September 2009 [Dz.U. 2009 nr 160 poz. 1268] helped understand the essence of the principle of the predominance of content over form in the context of transactions between related parties within the scope of the examined case. The method and procedure for determining the income of legal persons by means of estimation and the method and procedure for eliminating double taxation of legal persons in the case of adjustment of profits of related entities' tax authorities are required to examine whether reasonable independent entities would enter into such a transaction on terms agreed by related parties. In cases where the reasonably expected benefits of the entity concluding such a transaction are clearly less than the expenses incurred in connection with this transaction and the entity does not indicate reasonable reasons justifying their incurrence in a certain amount, the tax authority examines the correctness of the expenses incurred, while the examination also takes into account other costs conditioning the use of a given good or service. The tax authority is, therefore, competent to examine whether the existing links have not influenced the determination of such terms of transactions that independent entities would never have concluded, and, consequently, the entity does not show income that would reasonably be expected if those links did not exist. Thus, the formal possession of an intangible asset for transfer pricing purposes does not in itself constitute a right to remuneration, which an independent owner would have. In the case of related parties, priority for determining the right to remuneration for the management of trademark protection rights will be given to the functions performed, the assets involved and the risks incurred. Only the entity that plays key roles in creating/maintaining the value of an asset in the form of an intangible asset is entitled both to obtain a super-current profit, but at the same time, is also exposed to achieving losses.

Currently, a similar approach results from the Regulation of the Minister of Finance of 21 December 2018 on transfer pricing in the field of corporate income tax [Dz.U. 2018 poz. 2491], which obliges to assess the compliance of the conditions set by related entities with the conditions that would be set between unrelated entities, hereinafter referred to as the "comparability test", including the comparability criteria of these conditions.

The conduct of the comparability analysis shall consist in particular of the following steps:

- the determination of the period to be covered by the investigation;
- analysis of information on the related entity and its economic environment;
- analysis of all the circumstances of the audited controlled transaction that may have a material impact on the level of transfer pricing, taking into account the functions performed, assets involved and risks incurred, and, where required by the most appropriate method, the selection of the audited entity;

- verification that there are internal comparative data that can be used for the comparability test;
- identification of available external sources of comparative data;
- the choice of the most appropriate method and financial ratio, where the analysis of the financial ratio is necessary for the correct application of the most appropriate method;
- analysis of available comparative data, in particular in terms of their comparability with the transaction under examination;
- making comparability adjustments if they are necessary to obtain a higher degree of comparability of comparative data to the audited controlled transaction;
- calculation of the results of the comparability test and their interpretation.

Identification of the circumstances of the transaction under examination is important for its correct recognition in the accounting books and in the statements, including its valuation.

The comparability test shall take into account, in particular, the following comparability criteria:

- characteristics of goods, services or other benefits,
- the course of the transaction, including the functions performed by the entities in the compared transactions, the assets they engage and the risks incurred, taking into account the ability of the parties to the transaction to perform a given function and bear a given risk,
- the terms of the transaction specified in the contract, agreement or other evidence documenting these conditions,
- the economic conditions occurring at the time and place in which the transaction was carried out,
- economic strategy;
- to the extent that those criteria have or may have a material effect on the conditions established or imposed between affiliated parties.

For controlled transactions involving intangible assets, the comparability test shall also include an assessment of the ability of the parties to the transaction to perform the function and to bear the risk in relation to:

- having legal title to intangible assets, its protection and maintenance;
- the creation of intangible assets, including their development;
- development of intangible assets, including their improvement;
- use of intangible assets.

In this respect, the risk assessment is particularly important from the point of view of the impact on the profit potential, and the allocation of risk assumed between the parties to the transaction affects the profits or losses resulting from the transaction, which should be allocated in accordance with the market principles of transaction valuation.

Therefore, the analysis of transactions concluded between related parties, i.e. R S.A. and RM Sp. z o.o. was carried out taking into account the type of risks, functions performed related to specific risks and the method of allocating individual risks. From

the point of view of transfer pricing, the following types of risks can be distinguished in particular:

- strategic or market risk,
- operational risk,
- financial risk,
- transaction risk,
- force majeure (this risk can often be mitigated by entering into insurance, but sometimes the insurance may not cover all potential losses, especially in the context of the impact on the operations carried out or the reputation of the entity).

The following issues have been taken into account in the process of analysing the risks incurred by the parties to the transaction in accordance with the OECD Guidelines:

- the nature and source of the risk,
- the materiality of risks in the context of the transaction,
- contractual arrangements relating to risk sharing, taking into account the actual allocation of risk,
- operational activities to which specific risks are assigned,
- risk management process,
- the impact of individual risks on the executed transaction,
- assessment of risk sharing in functional analysis.

Also, the assessment of the level of capital employed should not be the sole factor influencing the conclusions of the analysis carried out.

The mere commitment of capital does not automatically result in the right to allocate above-average profits where the involvement of capital is not closely linked to the realisation of risks and functions relevant to the transaction.

Functions performed by the parties to the transaction

Entities participating in the transaction perform specific functions, which consist in taking actions and carrying out activities. These features typically translate into revenue and profits made by the parties to the transaction. Functions may be performed directly by entities involved in the execution of transactions or indirectly by commissioning them to other entities.

For controlled transactions involving intangible assets that are difficult to measure, the comparability test shall also take into account the assessment of:

- whether unrelated parties in comparable circumstances:
 - recalculate the amount of the price originally fixed on the basis of a contractual clause for price change,
 - renegotiate the originally agreed terms, including the price of the subject of the transaction,
 - accept contingent payments for the settlement of a comparable transaction;
- whether the transfer pricing forecast as of the date of the transaction took into account all circumstances foreseeable by the related party, affecting the amount of the transfer price.

Intangible assets that are difficult to measure are understood as intangible assets, as well as rights to those values for which, at the time of their transfer between related parties, there were no reliable comparative data and forecasts regarding future cash flows or expected revenues from these values or assumptions used in the valuation of these values were burdened with a high degree of uncertainty, which causes that the final economic result from the transfer of these values was difficult to determine.

The analysis of the transaction shows that for the correct identification of the content of the event, it would be reasonable to include similar data and information in the additional information as in the transfer pricing documentation. It would be especially necessary to place:

- a description of the object of the contribution,
- a description of the purpose of the transaction,
- a description of the valuation method,
- a description of the valuation assumptions, with an indication of historical and forecast data of the assumed values,
- the terms of the transaction specified in the contract, agreement or other evidence documenting those terms, including:
 - indication of whether the transferred right will be used on the basis of lending, rental or licensing agreements by the applicant,
 - indication of whether there are restrictions on the disposal of rights by the company holding the contribution,
 - indication of the type of risks, functions performed related to specific risks and the method of allocation of individual risks.

Conclusions

The principle of the predominance of content over form is a fundamental principle that determines the faithful reproduction of reality in financial statements. It is particularly important in terms of the recognition of resources generated in-house and redistributed within related entities. The freedom of creation resulting from the balance sheet policy, combined with data from the organisation, may result in the presentation of transactions in order to influence the addressee of the reports, but contrary to its economic content.

The examined case of transferring a self-generated trademark to a daughter company with a simultaneous increase in equity resulted in an individual increase in the value of long-term investments and financial results in the report. As a result, financial indicators and the assessment of the property and financial situation have improved. In this respect, the transaction was identified as contrary to the principle of the advantage of content over form. The obligation to disclose data in the additional information similar to those in the field of transfer pricing policy would allow for realistic identification of the transaction and its significance for the property and financial situation. Supplementing the information with a description of the subject of the transaction, its purpose, valuation method and valuation assumptions, with an indication of historical and prognostic data of assumed amounts and terms of transactions specified in the contract, agreement or other documentary evidence, gives reporting stakeholders the basis for a correct assessment of the economic content of the transaction and the correct inference about the property and financial situation.

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Zasada przewagi treści nad formą w transakcji zgłoszenia znaku towarowego

STRESZCZENIE

W artykule dokonano oceny transakcji wniesienia wytworzonego w toku prowadzenia działalności gospodarczej znaku towarowego do nowoutworzonej spółki, w kontekście zasady przewagi treści nad formą i obowiązujących w zakresie przepisów prawa podatkowego. Przedsiębiorstwa dla budowy wartości i struktury swojego majątku w bilansie, działając wbrew zasadzie przewagi treści nad formą, wydzielają i wnoszą zasoby gospodarcze nie spełniające warunków definicji aktywów do nowoutworzonych spółek. Do realizacji założonego celu zastosowano studia literaturowe, analizę aktów prawnych oraz przeprowadzono badanie wybranego rzeczywistego przypadku transakcji wydzielenia własnego znaku towarowego i jego wniesienia do spółki córki celem poprawy sytuacji majątkowo-finansowej. Analiza badanego przypadku wskazuje na działania wbrew zasadzie przewagi treści nad formą i tym samym zasadzie wiernego obrazu. Zarząd spółki dla poprawy sytuacji majątkowo-finansowej znak wytworzony w toku prowadzonej działalności aktywował poprzez wydzielenie i wniesienie do spółki córki i tym samym zafałszował obraz sytuacji majątkowo-finansowej przedsiębiorstwa przedstawiony w sprawozdaniach, co naraziło ich adresatów na konsekwencje błędnych decyzji.

Słowa kluczowe: zasada przewagi treści nad formą, badanie porównywalności