

INTELLECTUAL PROPERTY LEASING AS AN INSTRUMENT OF TAX ADVANTAGE

Jolanta GAŁUSZKA¹, Michał CWIĄKAŁA², Romana ANTCZAK-JARZĄBSKA³,
Piotr MRZYGLÓD⁴, Piotr RĘCZAJSKI⁵, Maciej FRASUNKIEWICZ⁶,
Akerke AKBERDIYEVA^{7*}, Jan PIWNIK⁸

¹ University of Economics in Katowice; jolanta.galuszka@ue.katowice.pl, ORCID: 0000-0001-7423-7922

² IM Brand Institute sp. z o.o.; m.cwiakala@imbrandinstitute.pl, ORCID: 0000-0001-9706-864X

³ WSB Merito University in Gdansk, Faculty of Computer Science and New Technologies;
romana.antczak-jarzabska@gdansk.merito.pl, ORCID: 0000-0002-6853-2041

⁴ Piotr Mrzyglód Sprzedaż-Marketing-Consulting; piotr@marketing-sprzedaz.pl, ORCID: 0009-0006-5269-0359

⁵ MAMASTUDIO Pawlik, Ręczajski, sp.j.; piotr@mamastudio.pl, ORCID: 0009-0000-4745-5940

⁶ F3-TFS sp. z o.o., Poznań; m.frasunkiewicz@imbrandinstitute.pl, ORCID: 0009-0006-6079-4924

⁷ WSB Merito University in Gdansk, Faculty of Computer Science and New Technologies;
akerke.akberdiyeva@gdansk.merito.pl, ORCID: 0000-0001-7520-2828

Eurasian Technological University, Faculty of Information Technology; a.akberdiyeva@etu.edu.kz

⁸ WSB Merito University in Gdansk, Faculty of Computer Science and New Technologies;
jan.piwnik@gdansk.merito.pl, ORCID: 0000-0001-9436-7142

* Correspondence author

Purpose: The purpose of the article is to indicate Polish legislation regarding the possibility of using intellectual property leasing as a business management tool. In addition to the use of this instrument, as well as the possibility of obtaining financial benefits, special attention is paid to tax issues.

Design/methodology/approach: Empirical research and comparative analysis using Polish and European act were used.

Findings: This article examines the practical aspects of the use of operational and financial leasing in the case of intellectual property on the basis of current Polish and European legislation. The advantages and disadvantages of various types of leasing of intangible property are revealed.

Practical implications: The topic is worthy of discussion, since for companies leasing is still the first choice among the methods of financing fixed assets used for the development of enterprises; the possibilities of this instrument are much wider.

Originality/value: The article is mainly dedicated to entrepreneurs. The advantages and disadvantages of leasing and the difference from a bank loan for fixed assets and intangible assets are presented, which can serve as a guide for entrepreneurs.

Keywords: Operational and financial leasing, Leasing-related taxes, Financial instrument, Economic activity.

1. Introduction

Leasing cars or industrial machines does not surprise anyone today. This type of agreement became widespread in business transactions long before its essential features were specified in the provisions of the Civil Code (hereinafter referred to as the Civil Code), as a result of which it was included in the group of named agreements of the Code. It would seem that civil law regulation has exhausted this topic. However, it turns out that among the provisions of the Income Tax Law there are also complementary rules of the Code. According to the rules of the Civil Code, only movable and immovable things become the subject of a leasing agreement. However, the Tax Law extends this catalog to include trademark protection rights. It is obvious that a person who wants to use leasing of a valuable brand as a tax optimization instrument must remember that such tax extension is limited by the need to meet certain conditions. The range of criteria that must be met in this case is presented both in tax legislation and in judicial practice, as well as in individual interpretations of tax authorities.

According to the Polish Leasing Association, leasing companies provided financing worth PLN 47.8 billion in the first half of 2023. This is 14.9% more than in the previous year. Although the driving force of the industry were light vehicles, mainly passenger cars. Thus, it confirms the definitive fact of the growing interest of entrepreneurs in this form of financing their activities. Data from the macroeconomic environment indicate that this trend may continue, and the total amount of financing provided to entrepreneurs by the Polish leasing industry will exceed PLN 100 billion by the end of 2023.

The vast majority of contracts concluded relate to fixed assets subject to depreciation, such as cars, tractors, semi-trailers, machinery and other industrial equipment. However, the provisions of the current tax legislation also provide for the possibility of concluding leasing agreements for intangible assets. The lease of copyright in the form of a software license or trademark lease is in principle uncontroversial (provided that formal and legal requirements regarding the correct definition of the subject matter and the legal transferability of these rights are met). Therefore, leasing companies are ready to provide financing in this area. However, poor awareness of the potential of this instrument means that there is little interest in leasing intellectual property.

Leases of copyrights (such as software) or trademarks are not the only categories of leasing agreements that cover intangible assets. As an interesting fact, it is worth referring to one of the latest interpretations of the Director of National Tax Information (hereinafter: KIS) regarding the possibility of concluding a financial leasing agreement, the subject of which is an intangible asset in the form of an enterprise of an individual.

2. Concept and classification of leasing

The leasing agreement under the provisions of the Civil Code (Articles 7091-70918) is a nominal, consensual and causal agreement, is bilateral, compensated and reciprocal in nature and can only be concluded for a certain period. The provisions governing the leasing agreement were introduced into the Polish Civil Code by the Act of 26 July 2000 amending the Act - Civil Code, Journal of Laws. 2000, No. 74, paragraph 857. In the justification of the presented act, it was stated that traditionally the term “leasing” refers to contracts involving the provision of goods for use for a fee. According to "Article 2A § 103(1)(j) of the U.S. Uniform Commercial Code, leasing is the grant for a consideration of the right to possess and use goods for a specified period of time”.

A lease agreement in the Polish Civil Code is formalized as a special type of agreement for the use of a thing, which is similar in structure to a lease or rental contract. For this reason, the provisions on the leasing contract have been placed after the provisions on rental and tenancy. Pursuant to Art. 7091 of the Civil Code: *By means of a leasing agreement, the financing party undertakes, within the scope of the activities of its enterprise, to purchase an item from a specific seller on the terms provided for in this agreement and to hand over the item to the lessee for use or for use and benefit for a specified period of time, and the lessee undertakes to pay the financing party in fixed installments, monetary consideration equal to at least the price or remuneration for the purchase of the item by the financing entity.*

According to K. Kopaczynska-Peczniak: “In the context of Article 7091 of the Civil Code on significant negotiations, leasing agreements should be considered as:

- 1) the financing party's obligation to purchase items from the designated seller and on the terms provided for in the leasing agreement;
- 2) the obligation of the financing party to transfer the thing to the beneficiary for use or to use and receive benefits for a specified period of time;
- 3) the beneficiary's obligation is to pay in agreed installments a monetary consideration equal to at least the price or remuneration for the purchase of the item by the financier.

Therefore, the structure of the leasing contract in the Civil Code is such that the obligations of the financing party include acquiring the ownership right (or the right of perpetual usufruct) of the thing from the seller within the enterprise managed by him and transferring it to ownership. user for use for a specified period of time. In turn, the beneficiary is obliged to pay the financing party in installments the price or the price and remuneration for the purchase of the item by the financing party. In a leasing agreement, the position of the user of the item should be defined as the position of the dependent owner of the item (Article 336 of the Civil Code). The requirement to “purchase” the leased asset expressed in Art. 7091 CC excludes the possibility of such a legal structure of a leasing agreement in which the financing party only provides the lessee with the leased asset for use, without becoming its owner. The regulations state that the leasing agreement must be concluded in writing under pain of nullity.

The issue of determining the criterion for leasing division is as complex as the issue of determining its essence. The doctrine rightly notes that the formulation of a unified assessment of the legal and economic aspects of leasing is not confirmed by the fact that this institution has different legal forms in individual countries. This procedure is not made easier by the fact that significant differences in the understanding of this legal method also characterize economic practice. Evaluative statements most often take a generalized form. They do not take into account the fact that a more complete assessment of leasing will be obtained only if individual types (forms) of leasing are subjected to appropriate analysis.

The basic classification includes financial and operational options. The UNIDROIT Convention on Financial Leasing contains the following provisions:

Chapter I. Scope and general provisions

1. This Convention governs the financial leasing transaction described in paragraph 2, in which one party (the lessor):
 - a) at the request of the other party (lessee), concludes an agreement (supply agreement) with a third party (supplier), under which the lessor purchases equipment, capital goods or other equipment on terms accepted by the lessee; and
 - b) concludes an agreement (leasing agreement) with the lessee, granting the lessee the right to use the equipment in exchange for payment of rent.
2. The financial leasing transaction referred to in the previous paragraph is a transaction consisting of the following features:
 - a) the lessee specifies the equipment and selects the supplier without relying on the skill or judgment of the lessor;
 - b) the equipment is purchased by the lessor in connection with a leasing agreement which, according to the supplier's knowledge, has already been concluded or will be concluded between the lessor and the lessee, and
 - c) the rent payable under the leasing contract is calculated in such a way as to take into account in particular the write-off of all or a significant part of the cost of the equipment.
3. This Convention applies regardless of whether the lessee has or subsequently acquires the right to purchase the equipment or retain it under lease for a further period and whether he pays a nominal price or rent for it.

The above quote shows:

1. The difference between a contract and a leasing transaction: the economic structure of a leasing transaction and the resulting priority of the supply contract in relation to the leasing agreement: - the decision of the future lessee to use the goods, - the lessor orders the goods for leasing, - provision of the delivered goods to the lessor,
2. exclusion of the issue of purchasing an item after the end of the leasing period as a criterion determining the nature of the concluded agreement,

3. economic purpose of the concluded agreement: providing the lessee with the opportunity to use the item in exchange for paying rent,
4. the ratio of rent to property value. Leaving aside the question of the consequences of distinguishing between a transaction and a leasing agreement, the primary question in the scope of the Convention is the question of what distinguishes financial and operating leasing as two types of leasing, if the criterion is not the acquisition of the object?

An indication of the criterion for distinguishing types of leasing under the UNIDROIT Convention is the statement that: [...] the rent paid under a leasing agreement is calculated taking into account the particular write-off of all or a significant part of the cost of the equipment.

However, from an economic point of view, this recommendation this recommendation is highly imprecise and cannot be compared in this form with the economic consequences of ownership. After eliminating the enigmatic nature of the directive containing the terms: “take into account in particular the write-off ...”, replacing it with an unambiguous term “calculate at a level not lower than ...”, there remains freedom arising from the formulation “all or a significant part of the cost of the equipment”. Changing this wording to “the entire value of the equipment” would make the Convention a clear criterion for distinguishing between financial and operating leasing. For the purposes of the discussion, it was assumed that: the difference between operational and financial leasing, which arises as a result of applying the criterion of the amount of remuneration, is that the rent for financial leasing requires taking into account all costs associated with the purchase of goods.

Despite this inaccuracy, the UNIDROIT Convention rightly focuses the search for the constitutive features of the financial and operational option on economic aspects, in contrast to the formalistic approach that links the criterion for qualifying the type of leasing not to functions and rights, but to the institution of ownership as such. The calculation of expenses and benefits resulting from the provisions of the leasing contract becomes fundamental. This approach does not eliminate the issue of ownership, which is important for a leasing institution. However, it places it in a different context: not formal and primary, but as a possible (but not exclusive) form of guaranteeing specific rights in the broadly understood use of things.

According to the economic process, ownership of the means of production is not a goal, but a method of ensuring its use. If the legal order allows the use of a means of production to the extent necessary to achieve production goals without acquiring ownership title (lack of ownership does not create risks that are excluded only through purchase), then for the entrepreneur the criterion for making the decision on how to ensure the right to use the good is only the result of statements of expenses and costs. Purchasing is only an attractive alternative if it is a cheaper way of using things than other forms available.

As a rule, the following types of leasing agreements can be specified:

- financial leasing, characterized by the fact that the financier receives compensation for the cost of the leased object,
- operational leasing, which allows more than one person to use the same thing,
- indirect leasing, in which the financier acquires the leased asset from a third party,
- direct leasing, in which the financier is also the manufacturer of the product,
- sale-leaseback, characterized by the fact that the user transfers ownership of the thing to the financier, and then acquires only the right to use it under a leasing agreement.

Entrepreneurs deal with two types of leasing every day: operational and financial. These definitions also arise from tax legislation. The choice of form depends solely on the taxpayer using the leasing agreement, which may depend on the need to settle tax expenses and the length of the period during which the leased asset is planned to be used.

3. Types of leasing

Operational leasing. In this form of contract, the leased item is included in the assets of the lessor (for example, a leasing company). However, the cost of generating income for the user using the subject of the agreement is monthly rental payments. Since VAT is added to each leasing installment, with this form of leasing, unlike financial leasing, there is no obligation to pay VAT in full at the beginning of the leasing agreement. Additionally, it should be mentioned that the cost of obtaining income may also include a down payment.

This fee can be included as a one-time fee, which is confirmed by the individual interpretation issued by the Director of the Tax Chamber in Bydgoszcz on March 8, 2016, ref. ITPB1/4511–1158/15/AK, which reads:

(...) the conclusion of the contract is determined by the initial leasing fee, i.e. it should be related not so much to the entire contract understood in time, but to the moment of its conclusion. This applies not so much to the duration of leasing services, but to the right to use them in general. Therefore, no fee is charged for the entire duration of the leasing contract. Accordingly, this fee is a one-time expense associated with concluding a leasing agreement. Consequently, there is no obligation to settle it in proportion to the duration of the contract; the down payment must be included as a tax-deductible expense only once on the date it is incurred.

It is also worth remembering that the amount of remuneration agreed in the contract, less the VAT due, must correspond at least to the initial value of the fixed assets. After the end of the contract period, the lessee has the right to purchase the used item. In the case of operational leasing, the subject of the contract remains the property of the lessor, and depreciation is written off by the lessor.

Financial leasing. When choosing this type of leasing agreement, the taxpayer must know that the leased asset will be included in the assets of the lessee. Thus, unlike operating leasing, there is an obligation to write off depreciation. In this respect, operating leasing and financial leasing differ significantly. Additionally, the user may only include the interest part of the leasing installment as tax deductible costs. In the first installment, VAT must be paid in full in advance immediately upon receipt of the item. It is worth adding that the customer becomes the owner of the leased item automatically after paying the last installment. The situation is different in the case of the down payment; with financial leasing, the lessee does not bear the costs associated with this contribution. In the case of financial leasing, the item will be included in the register of fixed assets of the lessee, which makes depreciation write-offs.

The last decade has become a period of intense digitalization of economic processes. The source of market information has enabled the analysis of wider investment potential and an increasing understanding of the proper allocation of financial resources, as well as the speed and flexibility of trading available funds while maximizing profitability. In such conditions, one can confidently put forward the thesis about the revival of the leasing institution. Today, few entrepreneurs think about acquiring fixed assets - this is a relic of the past. Modern investments are based on the potential financial benefits that can be obtained, and this is achieved, including through: leasing, rental (short-term, long-term).

Entrepreneurs use leasing not only of cars, but also of all types of machines, devices, electronic equipment and real estate. However, nothing prevents this form of financing from also covering intangible assets. The form of leasing is, of course, decided by the entrepreneur, especially since operational leasing and financial leasing are two completely different types of leasing that impose different obligations on the lessee.

The decisive factor when choosing the type of leasing is the initial costs, which in the case of operational leasing are significantly lower due to less attraction of equity capital. The majority of contracts concluded on the Polish market are operating leases.

An entrepreneur entering into a financial leasing agreement is required to pay VAT in full in advance, and in case of operational leasing, VAT is added to each leasing payment.

In addition, it is recommended to select an operating lease if the expected useful life of the asset is relatively short. As a result, there may be an increase in ongoing operating expenses and a reduction in the tax base. The final choice of the form of the leasing agreement remains with the taxpayer. In this case, only the entrepreneur is able to determine which form will be most beneficial for him, taking into account the type of activity being carried out, the expected period of use of the object and financial issues, including taxation issues.

4. Conclusion

Intellectual property (IP) in the form of trademarks, patents, copyrights, know-how or designs is one of the main driving forces of the modern economy, representing a central (business) resource that is used in business processes. Although a license is undoubtedly one of the most common, when it comes to a significant range of benefits, it is worth mentioning that leasing intellectual property, especially a trademark, carries the potential for financial benefits, including tax ones. Multinational corporations use intellectual property (IP) to avoid taxes on a massive scale. Economists estimate that intellectual property abuse costs the U.S. budget \$90 billion annually, and curbing this practice is a real challenge for lawmakers and economics to develop desirable and effective solutions in this area. Tax Law.

Leasing is a "financial instrument" intended mainly for entrepreneurs. Regardless of what leasing formula an entrepreneur chooses, it should be perceived primarily as a method of external financing. Business practice shows that it is usually easier to obtain than a bank loan. This is due to the fact that leasing is not subject to restrictions arising from the provisions of banking legislation or the recommendations of the Polish Financial Supervisory Authority regarding bank loans. This article discusses the practical aspects of the use of operational and financial leasing in the case of intellectual property on the basis of current Polish and European legislation. The advantages and disadvantages of various types of lease of intangible property are revealed.

A significant part of a company's value is its equipment, buildings, furnishings and materials. However, intangible assets are becoming an increasingly important part of a company's overall asset portfolio, especially in the commercial realities of the digital age. These items typically maintain their value and sometimes even increase in value depending on current market conditions as well as the company's potential, unlike other types of assets that can lose value.

From patents to trade secrets, many intellectual property (IP) functions as intangible assets. The IRS describes assets in this category as valuable property that cannot be touched or seen. These items have always been an important part of daily activities in various fields, but the growing emphasis on "knowledge industries" in recent years has further emphasized the importance of intangible assets.

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