KSP Tax News

CIT Paid By Partners of Limited Joint Stock Partnerships

- **On January 16, 2012, the Supreme Administrative Court, in a resolution passed by seven judges (II FPS 1/11) determined that, in view of the laws in force in Poland in 2008, the revenue (income) of a company acting as a partner to a limited joint stock partnership (LJSP) is subject to taxation on the day of receiving the dividend paid to partners on the basis of a resolution on profit distribution adopted by the General Meeting, i.e. under Art. 5.1 of the CIT Act.**

Expert Comments

The resolution adopted by seven judges has settled an issue that has long been a matter of controversy amongst fiscal authorities and administrative courts. It opens up new optimization possibilities for investors wishing to engage in business activity in the form of a limited joint stock partnership.

Limited joint stock partnerships are not subject to corporate income tax. It is their partners that are obliged to pay the tax on the income generated by partnerships.

The rulings passed by administrative courts to date went along two major lines of interpretation regarding the manner and the moment of recognizing income generated by partners in LJSP. The first view has it that a partner in LJSP should recognize the taxable revenue and tax-deductible costs allocated to it (in proportion to its share in profits) generated by LJSP on an ongoing basis during a year and make resultant advance income tax payments. The alternative approach is that an LJSP partner should recognize taxable revenue only upon dividend payment by LJSP. The resolution of the court's seven judges supported the latter approach.

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We have the pleasure in providing you with KSP Tax News in which we present selected rulings passed in January 2012. We hope that our newsletter proves itself useful in your everyday activities.

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The decision of the Supreme Administrative Court (NSA) applies to partners having legal personality. However, it may also be useful in resolving disputes over rules of accounting for income of partners who are natural persons. The resolution will certainly help standardize the approach of administrative courts. The entities wishing to engage in business activity in the form of LJSP will find it easier to obtain a positive outcome of the procedure of applying for individual interpretations. Those partners who paid tax on income calculated in the amount higher than actually obtained from dividend may use the resolution as the basis for a request for repayment of overpaid tax for all taxable years which are not yet time-barred.

CIT

- **The Province Administrative Court of Warsaw, in the ruling of 23 January 2012 (III SA/Wa 1144/11), resolved that a remitter of withholding tax (WHT) is not authorized to apply for overpaid tax in case the tax burden was transferred to a foreign entity.**

  The company making a monetary payment subject to withholding tax is the tax remitter. In case an excessive amount of the tax is withheld as a result of e.g. having no tax residence certificate of the contracting party at the moment of making the payment, an overpayment occurs. The Province Administrative Court decided that in this situation it is the taxpayer and not the remitter that sustains a property loss. Thus, it is only the taxpayer that may apply to a competent tax authority for repayment of overpaid withholding tax. It is also inadmissible that both the taxpayer and the remitter submit requests for repayment of overpaid tax. In the light of the ruling, Polish entities paying remuneration to foreign companies should take into account the fact that withholding higher tax gives them no right to recover overpaid tax if the tax burden was transferred to the taxpayer.

- **The Province Administrative Court (WSA) of Warsaw, in the ruling of 30 January 2012 (III SA/Wa 1183/11) resolved that an expense incurred for damages agreed by way of a settlement is not a tax deductible cost.**

  A company unreasonably overestimated the customs value of imported products, which were subsequently sold to a contracting party. The contracting party decided to lodge claims against the company in civil law proceedings. The Civil Court adjudicated damages to be paid to the contracting party. As a result of

subsequent negotiations, the parties entered into a settlement whereby said damages were reduced. WSA resolved that the expense for the agreed damages does not constitute a tax deductible cost within the meaning of the CIT Act. Unlawful activities of a company which fails to meet its obligations must not be privileged by tax law. It is not an activity intended to preserve or secure a source of revenue. By the same token, the WSA acknowledged the standpoint expressed by the Supreme Administrative Court on 15 December 2011 (II FSK 1190/10) whereby expenses paid on the basis of an out-of-court settlement must not be treated as tax deductible.

- **Province Administrative Court (WSA) of Rzeszów in the ruling of 20 December 2011 (I SA/Rz 757/11) resolved that the form of payment of remuneration for share or stock redemption in a company is tax-neutral.**
  Provisions of the Commercial Companies Code do not indicate the manner of payment of remuneration for disposal of shares/stock for the purpose of their redemption. It is assumed that it can be made both in cash and with the use of cashless settlements (e.g. by transfer of assets). According to the standpoint presented by the WSA, payment of remuneration for such transactions is tax neutral. The ruling, convenient for taxpayers, is in line with other judgments passed by administrative courts in this area.

VAT

- **In the verdict of 26 January 2012 (C-588/10), the EU Court of Justice resolved that the requirement to hold an acknowledgment of receipt of a correcting invoice by the buyer of goods or services is compliant with the EU law, but other means should also be permitted to prove that the buyer received the invoice.**
  It was the opinion of the Court of Justice that Poland was entitled to introduce a provision whereby it is necessary for the buyer of goods or services to hold an acknowledgment of receipt of a correcting invoice. This requirement does not contradict the provisions of Directive 2006/112/EC and is not incompliant with the rule of VAT neutrality. However, different rules should apply to situations where the acknowledgment cannot be obtained by the supplier within reasonable time or its receipt is excessively hindered. In this case, if the taxpayer proves that a transaction was actually made on

conditions laid down in the correcting invoice, and that due care was exercised to ensure that the invoice actually reached the recipient, he should be released of the obligation to hold the acknowledgment of correcting invoice receipt. The verdict of EU Court of Justice opens up to Polish taxpayers a possibility to use proofs other than acknowledgment of correcting invoice receipt. However, they must bear in mind the conditions in which, according to the EU Court of Justice, such a possibility is admitted.

- **The Province Administrative Court (WSA) of Warsaw, in the ruling of 13 January 2012 (III SA/Wa 1235/11) resolved that an occasional nature of activities, in view of the VAT Act, may be proven by the frequency with which the activities are done by a taxpayer and by the fact of whether the activity is of secondary nature with respect to the activities conducted by the taxpayer.**

  While computing the turnover for the purpose of VAT settlement, the company failed to take into account the turnover from the sale of real estate. The company claimed that the sale was of occasional nature. The WSA was of the opinion that to determine whether an activity was occasional, the taxpayer should take into account the fact whether the activity was secondary for the taxpayer, and exceptional when compared to the business activity the taxpayer was involved in. Therefore, the WSA refused to classify the sale of real property, made by the company several times a year, as an occasional activity. The ruling passed by the WSA may be a guideline when interpreting whether other activities (e.g. financial operations made by entities other than financial institutions) are to be classified as occasional.

Excise Tax

- **Province Administrative Court (WSA) of Rzeszów in the ruling of 12 January 2012 (I SA/Rz 795-796/11) resolved that provisions of the Excise Duty Act are incompliant with the Community law to the extent they deny the taxpayer's right to apply a reduced excise rate in case a monthly list of statements was submitted after the statutory deadline.**

  The Company failed to file a monthly list of statements with the customs office within the deadline required by excise duty regulations. The WSA is of the opinion that a failure to observe said deadline for submission of the monthly list of statements should not

result in a ban on application of the reduced rate if the company met all the other requirements to apply such rate. This type of sanction is incompliant with the proportionality principle. The ruling is in line of other judgments, positive for taxpayers, recently passed by Polish administrative courts.

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