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We are pleased to present to you KSP Tax News, in which we describe selected judgments and interpretations issued or published in December 2012. We hope this publication proves useful in your everyday operation

Food and beverage services as entertainment costs – legal issues presented to the Supreme Administrative Court (NSA)

The Supreme Administrative Court in the judgment of 17 December 2012 (FSK 702/11) addressed a legal question to the panel of 7 judges, whether the costs incurred on purchase of food and beverage services, purchased for the purpose of meetings with contractors held both in the business seat of the company and outside, constitute on the basis of the CIT Act, the so-called entertainment costs (please note that there is no exact equivalent term in English for „koszty reprezentacji". In the Polish doctrine there is a discrepancy whether these costs cover entertainment costs or costs of representation of the Company. For the purpose of the Tax News, we use the term „entertainment costs"). Moreover, the General Prosecutor in the request of 17 December 2012 asked for consideration, by the expanded composition of NSA, the legal issue (II FPS 7/12) concerning the possibility of qualifying those costs of food and beverage service which do not characterize with "grandeur", "luxuriance" or "ostentation" and do not excess the customary expenses accepted in the current realities of the economy as entertainment costs under the PIT Act (II FSK 702/11).

Expert comment

„Pursuant to Art.16 point 1 item 28 of the CIT Act, the entertainment costs are not the tax deductible costs, inclusive of in particular the expenses incurred on food and beverage services, purchase of food or beverages including alcohol. The same provision is specified in Art. 23 point 1 item 23 of the PIT Act. The possibility and terms for inclusion of the expenses incurred for e.g. a lunch with a client to the tax deductible costs remains still highly controversial. Both the tax authorities and administrative courts have not developed an unanimous standpoint within this issue yet. It should be stressed that there are recently two opposite trends in the NSA jurisdiction as regards the above-mentioned issue. According to the first which is explicitly unfavourable to the taxpayers, any costs incurred for food and beverage services connected with business meetings should be treated as entertainment costs, therefore those expenses should be excluded from the tax deductible costs – and it is of no importance whether the

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consumption takes place in the seat of the taxpayer or restaurant (e.g. judgment of 25 January 2012, II FSK 1445/10). As far as the second trend in subject jurisdiction is concerned, the representation is a grandeur, luxuriance in someone's way of living related to the social position. Thus, an ordinary meal at a restaurant does not prejudge the entertaining or representative character of such expenditure (e.g. the judgment of 25 May 2012, II FSK 2200/10). Despite the fact that both the courts and tax authorities point the „grandeur" and „luxuriance" as the features of representation, there is a large discrepancy in assessment of similar factual states. *A standpoint according to which a food and beverage service may constitute a tax cost also exists, however it concerns only the situation when the meal is served in the taxpayer's seat.* In the light of the above, the fact that the abovementioned legal issues were submitted for adjudication by an expanded composition of NSA should be regarded positively. It must be noted that NSA will adopt an unanimous standpoint as to the proper interpretation of both Art. *16 point 1 item 28 of the CIT Act and the parallel Art 23 point 1 item 23 of the PIT Act. The adoption of the resolution by the expanded NSA composition will be binding to the courts adjudicating in similar cases".*

CIT

The Supreme Administrative Court in the judgment of 14 December 2012 (II FSK 996/11) resolved that the payment of contractual damages resulting from non-performance of a contract due to reasons known to the taxpayer at the time of signing the contract does not constitute tax deductible costs. The Company concluded a contract under which it was obliged to deliver fuel, the price of which was to be determined based on the indexing formula. Due to the fact that the formula was specified incorrectly, thus the delivery price was grossly underrated. As a consequence, the Company has not performed the deliveries referring to the invalidity of the contract resulting from its conclusion under an error. However, the company finally lost the court dispute as regards the subject case and it was obliged to pay contractual damages. The Minister of Finance decided in the individual interpretation that the payment of the contractual damages does not meet the general prerequisite specified in Art. 15 point 1 of the CIT Act in this case, i.e. to be incurred in order to maintain or secure the income source. The same standpoint shared also NSA. The court found that the faulty indexing formula constituted the circumstance well known as of signing the contract, thus the withdrawal of its performance and payment of the contractual damages did not constitute the actions undertaken in order to secure or maintain the income sources. It results from this judgment that the contractual damages may be regarded as tax deductible costs only, if they result from the circumstances which could not be foreseen by the taxpayer. The courts were not so restrictive until now and did not make the right to include the contractual damages to the tax deductible costs dependable on the date when the circumstances justifying non-performance of a contract occurred.

PIT

The Supreme Administrative Court in the judgment of 6 December 2012 (II FSK 709/11) decided that in case of performance of work by an individual

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under an enterprise management contract, the company being the ordering party is obliged to pay advance PIT payments also from the gratuitous services, such as granting a mobile phone, car or computer for use.

Under the civil-law enterprises management contracts concluded with individuals, a company was obliged to pay remuneration and incur maintenance costs of equipment and devices granted for their use: mobile phones, cars and computer. According to the company, the obligation of paying the advance PIT payments included only payment of dues. However, the tax authorities state that this obligation included income as both pecuniary and non-pecuniary benefits inclusive of usage of mobile phones, cars and computers. NSA agreed with the tax authorities. In the most recent jurisdiction of the administrative courts, the restrictive standpoint is presented, according to which, the value of any additional benefits received by employees should be subject to PIT. The subject judgment extends the taxation in this respect also with the civil-law contracts, such as e.g. an enterprises management contract or commission contracts.

VAT

The Province Administrative Court (WSA), in the judgment of 4 December 2012 (I SA/Gd 1016/12) resolved that the right to deduct the input VAT cannot be refused under Art. 88 point 3a item 4 letter c) of the VAT Act, i.e. due to the ostensible nature of the action, if such an action was actually carried out.

In the subject case, the capital-related and personally related companies were performing transactions between each other as regards the sale of the perpetual usufruct right. According to Art. 88 point 3a, item 4, letter c) of the VAT Act, the deduction right shall not apply to the action of an ostensible nature (Art. 83 of the Polish Civil Code - CC) or an action invalid due to its inconsistency with statutory law, principles of social life or an action designed to circumvent statutory law (Art. 58 of the CC). The tax authorities recognized that the purpose of the series of sales was the increase of the right's value and the last transaction was of ostensible nature. The court disagree with that standpoint. According to WSA, an action of an ostensible nature is the action which was not actually performed but was to make an impression as it had been performed. In case of an action of an ostensible nature, the parties consciously do not want to invoke legal consequences which should result from such an action. However, in the subject case, the perpetual usufruct right was actually transferred and the price was paid, therefore it was not ostensible. We cannot deem the particular contract as ostensible only due to the fact that the series of transactions preceding such contract were performed to all appearance or in violation of regulations. This judgment clarifies the prerequisites for depriving the taxpayer of the right to deduct VAT under allegation that the action was invalid due to its ostensibility. The court rightly pointed out that the ostensibility should be proved as regards the particular action and it should not be concluded from the relationship between the parties or whether the action was the last one in the series of transactions. The key argument against the ostensibility allegation is the fact that the contract (action) was performed.

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The Supreme Administrative Court in the judgment of 20 December 2012 (I FSK 133/12) decided that the refusal of applying 0% VAT rate as regards intra-community delivery of goods cannot be based only on the argument that the supplier has not indicated the EU VAT identification number of the buyer.

In the subject case, the Polish supplier was performing intra-community delivery of goods (WDT) for the Slovakian client who had not the EU VAT number yet, however who had applied for it before the contract was concluded. Being aware of the above, the supplier applied the rate of 0% VAT. In the opinion of the tax authorities, it was not authorized to do so, because it did not meet the requirement to submit the client's EU VAT identification number. Finally, the NSA' s standpoint was in favour of the taxpayer. The court pointed out that in the light of the CJEU ruling in Case C-587/10, failing to submit the EU VAT number of the purchaser cannot constitute the only reason for refusal of applying the 0% VAT rate with regard to WDT. If the supplier acting in good faith can provide sufficient evidence to conclude that the purchaser was acting as a taxpayer in such transactions, however it is not able to submit the identification number of the client, it cannot be refused to apply the 0% VAT rate. This judgment complies with the jurisdiction of CJEU. It allows to apply the 0% VAT rate also, when the supplier is not able to obtain the client's identification number but it can otherwise prove that the client is the taxpayer subject to VAT. Nevertheless, it should be emphasized that the supplier is still obliged to meet other formal requirements, in particular to document that the goods have been actually transported abroad.

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If you wish to be provided with additional information in this respect, please contact us.

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