KSP TAX NEWS 1/2014

We are pleased to present to you this year's first issue of KSP Tax News. It provides information about selected rulings and interpretations delivered or published in December 2013. We hope you find it of interest and wish that the decisions adopted by courts or tax authorities in 2014 all be positive for taxpayers.

Conditions for considering a loan extended to a subsidiary a "sporadic" transaction for the purpose of determining the proportion to calculate VAT deduction - a judgment by the Supreme Administrative Court *[Najwyższy Sąd Administracyjny - NSA]* of 5 December 2013.

The Supreme Administrative Court, in the judgment of 5 December 2013 (file I FSK 1757/12) held that a loan extended to a subsidiary on several occasions in a situation necessitated by its difficult financial standing should not be included in the turnover referred to in Article 90 (3) of the VAT Act.

In the case at hand, a manufacturing company extended five loans over the period of several years of its operation, of which four were given to a subsidiary handling distribution, in which the company held 100% of shares, and one was provided to a third party. The loan extended to the subsidiary was necessary due to its difficult financial situation and negative credit score. The manufacturing company believed that the loans were each time a "sporadic" transaction within the meaning of Article 90 (6) of the VAT Act, since they were not linked to any core activity and were of incidental nature, supported by the factual circumstances. Therefore, the company was of the opinion that revenue in the form of interest should not be included in the turnover referred to in Article 90 (3) of the VAT Act, and thus it should not affect the proportion used to determine the amount of input tax. This standpoint was negated by the Director of the Fiscal Chamber of Katowice in an individual interpretation. The Authority was of the opinion that the fact of extending several loans excluded their recognition as "sporadic" transactions. However, the interpretation was dismissed by the Province Administrative Court *[Wojewódzki Sąd Administracyjny - WSA]* of Gliwice as a result of an appeal filed by the company. The decision was subsequently confirmed by the NSA.

Expert Comment

"Article 90 of the VAT Act provides that if the taxpayer carries out both taxable transactions and transactions with respect to which no right to deduct VAT exists (e.g. VAT-exempt transactions), and it is not possible to separate the amounts of input tax linked to taxable and non-taxable transactions, the taxpayer shall be entitled to deduct input VAT on a pro-rata basis. The proportion generally corresponds to the ratio of turnover from taxable transactions to that from tax-*exempt ones. Additionally, according to Article 90 (6) of the VAT Act in force as at 31 December 2013, the proportion does not include turnover from financial transactions of sporadic nature, where the term "sporadic" was not defined by the VAT Act. In said verdict, the NSA listed the conditions*

Magdalena Patryas
KSP Partner:

E: magdalena.patryas@ksplegal.pl
T: +48 32 731 6853

KSP
legal & tax advice

to be met for a loan, i.e. a VAT-exempt transaction, to be considered "sporadic". In the first place it should be noted that NSA expressed the opinion that a "sporadic" transaction in the context of Article 90 (6) of the VAT Act, in the light of the wording of Article 174 of Directive 112, meant an ancillary activity in respect of the main activity. Thus, the frequency and repetition of loans is not of decisive nature, but what matters is the economic cause for their granting. In the situation concerned, four out of five loans were extended to provide funds to a subsidiary whose financial standing was difficult, and whose uninterrupted business activity was in the economic interest of the loan provider. By the same token, extending the loan contributed to generation of the amount of turnover in the operations of the lender, i.e. in its production activity. Additionally, the NSA emphasized that to classify a transaction as ancillary, it is of essence to establish the extent of commitment of assets with respect to which VAT can be deducted. In the case at hand, the amounts of loans led to insignificant commitment of the company's assets. Thus, extending the loan on several occasions in the circumstances of the case and a one-off loan granted to a third party were each time sporadic transactions not be included in the turnover referred to in Article 90 (3) of the VAT Act.

To contrast the facts examined by the NSA, it is worth to refer to the judgment delivered by the WSA of Gliwice on 17 December 2013 (file III SA/Gl 1492/13). In this case a company operating in the area of vehicle sale resolved to commence the activity of extending loans to clients, dedicated to purchase cars. The company believed that since the offer was addressed to selected entities only and due to the fact that it intended to grant max. 10 such loans in a year, the transactions should be considered sporadic and be excluded from the turnover to be used for calculation of the proportion. However, the Director of the Fiscal Chamber of Katowice, in an individual interpretation, disagreed with this opinion and so did the WSA of Gliwice in the judgment delivered in response to an appeal filed by the company. The authority and the WSA were of the opinion that the company in fact intended to expand its activity to include the granting of loans, and thus the transactions were not to be treated as ancillary but as part of its core business. This was determined, inter alia, by the fact that the loan granting was listed in the Polish classification of activities and in the articles of association of the company, and the intention was to perform the transactions on a continuous and organized basis in response to the market demands, even if the circle of potential borrowers was limited.

It is worth emphasizing that on 1 January 2014 the provision of Article 90 (6) of the VAT Act was amended. As of this date, "ancillary" financial transactions are excluded from calculation of the proportion. This wording of the provision better reflects the provisions of the VAT Directive. Also the judgments described above interpreted the provision on "sporadic" transactions in line with the VAT Directive, i.e. with account being taken of whether the transactions were ancillary in kind. Thus the judgments referred to above remain valid also in the legal situation in force since 1 January 2014."

KSP Legal &Tax Advice
ul. Chorzowska 50
40-121 Katowice

T: +48 32 731 68 50
F: +48 32 731 68 51

E: kancelaria@kspelagal.pl
www.ksplegal.pl

VAT

The Supreme Administrative Court, in the judgment of 6 December 2013 (file I FSK 1758/12), held that a package including accommodation, SPA and dinner, sold via an on-line shopping platform was not a comprehensive service and must not be taxed with one VAT rate.

The NSA referred to verdicts delivered by the European Court of Justice which indicated that the assessment of whether a service was comprehensive and taxable

subject to the rules to be followed for the main service should be made independently of provisions of the contract concluded by the parties. The comprehensive nature of a service was to be determined based on the fact that individual services are linked so closely that they form an economic whole and their separation would be artificial. Said verdict makes tax accounting more complex for entities that provide broadly understood hotel services in the form of packages that encompass also additional services.

CIT

The Supreme Administrative Court, in the judgment of 18 December 2013 (file II FSK 3032/11), shared the standpoint whereby to determine the value of revenue as a result of taking up shares in an increased share capital of a capital company in return for an in-kind contribution, the application, *mutatis mutandis*, of Article 14 (1-3) of the CIT Act regarding the market value must not lead to establishing the revenue in an amount other than the nominal value of shares taken up.
As the Commercial Companies Code uses the notion of nominal value of shares only, to determine the value of a share by its measuring at market value would be in breach of the provisions of the Commercial Companies Code and would lead to a situation where a share has a different value for the purpose of tax law and for the purpose of trading. The judgment should be evaluated as positive. It may be used as an argument in a dispute with a tax authority in a situation where revenue is estimated in connection with an in-kind contribution made to a capital company.

The Province Administrative Court of Warsaw, in the judgment of 19 December 2013 (file III SA/Wa 1647/13), held that if a correction invoice is issued to document an after-sale rebate, the correction of revenue for CIT purposes should be made on a current basis. Also in a situation where the correction is made in the next tax year with respect to revenue derived in the preceding tax year, the correction should be recognized on a current basis.
The court was of the opinion that retrospective recognition of tax effects of business events was only possible where the laws so provide. Thus, in the absence of the relevant regulations, the correction should be settled in the year in which it was made. Therefore, where the revenues derived in the preceding tax year are corrected based on a correction invoice issued in the new tax year, the corrections in the form of reduction of the revenue should be made on a current basis in the period of issuance of the correction invoice. The judgment is positive for taxpayers, but we wish to point out that it is odd with respect to the current line of judgments, which is supported by the below judgment issued by the WSA of Gliwice.

The Province Administrative Court of Gliwice, in the judgment of 17 December 2013 (file I SA/Gl 846/13), held that if a correction invoice is issued to document an after-sale rebate in the form of a cash bonus, the cost should be corrected retrospectively in CIT since the invoice did not change the moment of incurring and deduction of the cost, but merely its amount.
In the case at hand the company received a cash bonus as a result of an after-sale rebate documented in the correction invoice. The court was of the opinion that the rebate resulted in a correction of the costs of purchase of the goods to which the rebate was linked, which means that the taxpayer should correct the cost of acquisition of goods in the account period in which they were shown. The judgment supports the standpoint expressed currently in most verdicts of administrative courts, which leads to negative consequences for the taxpayers receiving cash bonuses and rebates. What is

KSP Legal &Tax Advice
ul. Chorzowska 50
40-121 Katowice

T: +48 32 731 68 50
F: +48 32 731 68 51

E: kancelaria@kspelagal.pl
www.ksplegal.pl

KSP
legal & tax advice

more, the tax authorities believe such an approach should also be adopted in a situation where the taxpayer did not issue a correction invoice but a credit note.

* * *

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

KSP contact :

Magdalena Patryas
Partner
T: +48 32 731 68 53
E: magdalena.patryas@ksplegal.pl

Elżbieta Lis
Partner
T: +48 32 731 68 58
E: elzbieta.lis@ksplegal.pl

KSP Legal &Tax Advice
ul. Chorzowska 50
40-121 Katowice

T: +48 32 731 68 50
F: +48 32 731 68 51

E: kancelaria@kspelagal.pl
www.ksplegal.pl

KSP
legal & tax advice