KSP TAX NEWS 2/2014

We are pleased to present to you KSP Tax News, in which we discuss selected rulings and interpretations passed or published in January 2014. We hope this publication proves useful in your everyday business life

Correction of depreciation write-offs after receipt of a subsidy - a judgment by the Province Administrative Court *(WSA)* of Łódź of 22 January 2014

The Province Administrative Court in Łódź, in the judgment of 22 January 2014 (file I SA/Łd 1204/13), held that correction of depreciation costs on the portion of the initial value of a fixed asset that will be returned in the form of a subsidy, recognized as deductible costs in previous account periods, should be made on a one-off basis in the month of receipt of the subsidy.

In the case at hand, a company implemented an investment task involving construction of a sanitary sewer. The company was a beneficiary of the Cohesion Fund. The final payment, i.e. 20% of the co-financing, was made after the fixed asset had been accepted for use. The company sought the answer to the question whether correction of the costs should be made on a one-off basis in the month of receipt of the financing, or the deductible costs should be corrected in earlier periods.

The provisions of Article 16 par. 1.48 of the CIT Act stipulate that return of expenditure for acquisition (manufacture) of fixed assets means that the depreciation write-offs on the portion of their value corresponding to the returned expenses are not deductible costs. Making the correction of depreciation retrospectively would lead to outstanding tax amounts and interest on the amounts becoming due, in the same way as if the costs in each of the periods were determined inaccurately. WSA of Łódź shared the company's standpoint and held that correction of the costs should be made in the month of receipt of the subsidy.

Expert Comment

"Co-financing of acquisition or manufacture of fixed assets may be made immediately after spending own funds for this purpose or in the period of several months or even longer, as in the case subject to the aforesaid judgment. In connection with the foregoing, a question arises about the tax treatment of depreciation allowances that have already been charged to tax costs.

The CIT Act does not explicitly provide for the moment from which the write-offs are no longer tax costs. In this respect two approaches can be distinguished. According to the first one, the reimbursement of expenditure for acquisition or manufacture of fixed assets necessitates a retrospective correction, i.e. the obligation to exclude the write-offs already made from tax costs. According to the other approach, shared by the Province Administrative Court, the reimbursement of

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said expenditure leads to the obligation to reduce the costs of depreciation from the month of receipt of the reimbursement.

If we consider that reimbursement of expenditure made after some period of use of the fixed asset brings about the obligation to exclude from tax costs the depreciation write-offs already made, the taxpayer would be obliged to pay not only the outstanding tax but also interest thereon. So the situation of the taxpayer would then be the same as if he determined the tax costs in breach of the law. Consequently, a financial fine would be imposed on the taxpayer in connection with the reimbursement obtained. WSA of Łódź negated the possibility of such consequences in a situation where the taxpayer applied the correct rules of fixed asset depreciation.

The judgment is another instance of rulings positive for taxpayer in this respect, and it may be used as another argument in disputes with tax authorities in these matters."

VAT

The Supreme Administrative Court, in the judgment of 20 November 2013 (file II FSK 178/13), held that for withdrawal from the contract to be the basis for the issuance of correction invoices, the goods must actually be returned.
Annulment or dissolution of an agreement based on the VAT Act may be perceived in economic terms rather then in terms of the civil law. Thus, a Company that renounced an agreement due to failure to pay for goods cannot issue a correction invoice until the parties have settled their mutual accounts and the goods have been returned.

The Province Administrative Court of Wrocław, in the judgment of 23 January 2014 (file I SA/Wr 1914/13), held that a supply by a commune of land on which parts of buildings are located (e.g. stairs, porch) to the owners of the buildings, shall be considered a supply of land with no buildings, subject to VAT exemption.
When interpreting Article 43 par. 1.9 of the VAT Act concerning VAT exemption of the supply of land with not buildings located thereon, the economic and business aspects of the transaction must be taken into account. The purpose of the provision cannot be ignored based on the linguistic interpretation only. In the situation subject to dispute, the seller - a community being the owner of the land - was not in a position to transfer to the other party some parts of buildings, since it was not their owner.

The Province Administrative Court of Poznan, in the judgment of 23 January 2014 (file I SA/Po 572/13) shared the standpoint presented by a marketing agency which claimed that a transaction of transfer of prizes to loyalty scheme participants was an element of provision of a comprehensive marketing service to the contracting party.
Thus, only a comprehensive service of loyalty scheme handling is subject to taxation. The transfer of prizes is not the goal in itself, but it is a component inextricably linked to the service. Performing the service with the exclusion of prize

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delivery would not be complete, and the contracting party would not be provided with the full benefit connected with the purchase of the service.

The Supreme Administrative Court, in the judgment of 28 January 2014 (file I FSK 237/13), held that agent's services performed as part of the cash-pooling services are subject to VAT exemption.
Article 43 par. 13 of the VAT Act extends the scope of the exemption from tax to include services which are part of a service exempt from VAT, making up a separate whole, proper and necessary to provide the service (the cash-pooling service is subject to exemption under Article 43 par. 1.40 of the VAT Act). The service of an agent, albeit it may in principle be considered a separate one, when performed as part of the cash-pooling structure is not this type of transaction and consequently it is subject to exemption from VAT.

CIT

According to the standpoint of the Province Administrative Court of Wrocław, expressed in the Judgment of 21 January 2014 (file I SA/Wr 1825/13), the tax obligation of non-residents is closely linked to deriving revenue in the territory of Poland.
Territory shall mean a place in which all activities are done, where real estate or other income-generating sources are located. Payment of remuneration or conclusion of an agreement are not determinant for the territory. Also the location of the company's registered office is of no significance. By the same token, a company leasing various types of tools when doing work at foreign contracting parties is not obliged to withhold and pay to the tax office the withholding tax on the amount due, paid to the the lessors for the lease of the tools.

On 25 November 2013, the Minister of Finance issued a general interpretation (file DD6/033/127/SOH/2013/RD-120521) concerning the so-called costs of representation (entertainment).
With reference to the judgment by the Supreme Administrative Court of 17 June 2013 (file II FSK 702/11), the Minister of Finance held that expenditure incurred by a taxpayer for small treats, drinks, and meals, irrespective of the place of their serving, served during negotiations / talks with contracting parties pertaining to the business operated by a taxpayer shall not be excluded from deductible costs, and shall be considered representation (entertainment) costs.

TAX ORDINANCE ACT

On 27 January 2014, the Supreme Administrative Court represented by 7 judges adopted a resolution (file II FPS 5/13) in which it held that if the accuracy of a tax return filed together with a request for overpayment is challenged, the authority is not obliged each time, prior to considering the request, to open proceedings to determine the amount of the tax liability referred to in Article 21 §3 of the Tax Ordinance Act.
Where the inaccuracy of the return consists of formal deficiencies, incorrect calculations, etc., initiation and conduct of separate proceedings to determine the tax obligation is not necessary. However, if the requestor, together with the request for confirmation of overpayment, files a tax return, in which all or

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substantial portion of the tax calculation is corrected, and based thereon he pursues his claim, the tax authority should open proceedings *ex officio* to determine the amount of the tax liability.

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

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