KSP TAX NEWS 03/2014

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

The national court should refuse entitlement to the right to deduct input tax where it is established that that right is being relied on for fraudulent or abusive ends and the taxpayer knew or may have known that the transaction was connected with a fraud - a judgment by ECJ.

The European Court of Justice held (a judgment in Maks Pen case C-18/13 of 13 February 2014) that, in the light of Directive 2006/112/EC, the national court, in the course of inspecting the legality of a tax-related decision, should question the right to deduct VAT if, during the judicial or inspection proceedings, the services documented with invoices prove to have been performed by another entity, which was connected with a tax fraud, and the taxpayer knew or should have known that he participated in a fraud taking place upstream or downstream in the chain of supply of those goods or services.

The Court pointed out that no party was entitled to deduct VAT if the circumstances of the case indicate that a fraudulent transaction was the basis for such deduction. In the case at hand, the premises indicating a possible fraudulent conduct included inaccuracy of signatures on document confirming the provision of services as well as lack of the personnel, materials or assets required to render the services by the apparent service provider or his subcontractors, as well as inaccurate books of account of the entities participating in the transaction. At the same time, the Court emphasized that in a situation of fraudulent conduct, the taxpayer may be refused the right to deduct only if the taxable person knew or should have known that the transaction he participated in relied on fraud at this or subsequent stage of trading. The Court was of the opinion that the aforesaid circumstances were not sufficient to prove that the taxable person was aware of participating in a fraud. The Court emphasized that it should be borne in mind that provisions of the domestic law must not go beyond what is necessary to attain the objectives of ensuring the correct levying and collection of the tax and preventing tax evasion.

Expert Comment

"The European Court of Justice again confirmed the taxpayer's right to deduct VAT if he did not know or was not in a position to know that he participated in a fraud. The Court indicated that the mere fact that providers of the service being the basis for deduction had no personnel, funds or assets required to perform the service did not suffice to refuse the right to deduct VAT under invoices received. Referring to previous judgments (e.g. Bonik C-285/11), the Court clearly indicated that to refuse the right to deduct VAT to a taxable person, it is necessary to establish, in the light of objective evidence provided by the tax authorities, that the taxable person knew or should have known that acquiring the services he participated in a fraud committed by another

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entity. Thus, according to the ECJ's ruling, the burden of proof that the taxable person was not entitled to deduction rested with the tax authorities. Unfortunately, judgments issued by Polish administrative courts in the same circumstances are usually negative for the taxable persons (see the judgment by the Supreme Administrative Court [NSA] I FSK 1522/12, I FSK 199/13, I FSK 1766/12). This is due to the fact that in Poland most such cases concern the placement on the market of fuel of unknown origin and fictitious trade in scrap metal. We believe the ECJ judgment may contribute to a change of the courts' approach, to the benefit of the taxpayers."

CIT

The Supreme Administrative Court, in the judgment of 14 February 2014 (II FSK 536/12), provided guidelines on how to interpret the scope of tax succession with reference to fulfillment by the acquiring company of the condition to apply the corporate tax exemption under Article 22 par. 4a of the CIT Act.

The taxpayer applied for a written interpretation of the CIT provisions regarding the possibility to use the exemption from taxation of income from dividend, based on Article 22 par. 4a of the CIT Act. In the request, the taxpayer indicated that it intended to make a trans-border combination by acquisition of a company having its registered seat in Netherlands. Upon acquisition of the Dutch entity, the taxable person would become a shareholder in the daughter company of the acquired entity. Therefore, the taxpayer was of the opinion that in the situation where he received dividends or other proceeds from the share in profits of the daughter company, he was entitled to take the period of holding the shares in the daughter company by the acquired Dutch entity into account to fulfill the condition for the exemption referred to in Article 22 par. 4a of the CIT Act. The tax authority considered the taxpayer's standpoint inaccurate, but the Province Administrative Court canceled the interpretation and the Supreme Administrative Court confirmed the ruling as appropriate. The Supreme Court held that in a situation of a business acquisition, the period of holding shares in the subsidiary was also subject to succession based on Article 93 of the Tax Ordinance Act.

The interpretation of the Director of the Fiscal Chamber of Katowice, issued on 30 January 2014 (IBPBI/2/423-1428/13/SD) indicates that the obligation to collect the withholding tax from remuneration paid to a foreign entity in connection with provision of the services referred to in Article 21 par. 1 of the CIT Act will also arise if said services are provided abroad, if the effect of the work is used by the Polish entity.

The Director held that a different interpretation of the regulations in this situation would lead to a conclusion that no service rendered abroad would be taxable in Poland. Thus, the Director was of the opinion that amounts paid by the Polish entity to a foreign company for provision of intangible services within the scope of Article 21 par. 1 of the CIT Act would in fact always be subject to withholding tax in Poland. This standpoint contradicts the approach presented recently by administrative courts, whereby to establish whether a service was taxable under article 21 of the CIT Act, the place of physical rendering of the services was of essence rather than the place of using the effect thereof (cf. judgment by the Supreme Administrative Court of 4 July 2013, file II FSK 2200/11).

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VAT

In the judgment of 7 February 2014 (I FSK 1664/12), NSA held that amounts paid by the tenant to the landlord based on an agreement in connection with premature termination of the lease contract for reasons attributable to the tenant cannot be treated as compensation.
The court was of the opinion that this type of charges were VAT-able, as they resulted from the same source as the legal relation binding the parties to the lease contract. So, if the lease contract was subject to VAT, also the amounts paid under the premature termination agreement were VAT-able.

Director of the Fiscal Chamber of Warsaw, in an individual interpretation issued on 14 January 2014 (IPPP1/443-1091/13-2/AP), held that the VAT obligation with respect to the service of granting a license by the Company arose, in principle, upon completion of the service, i.e. upon the end of the period for which the license was given.
However, if, before the end of the period, the company giving the license received a license fee, the tax obligation will arise once the fee is received. The Director further held that in this situation the company should issue an invoice no later than by the 15th day of the month following the month of receipt of a part of or the entire payment, but no earlier than 30 days before receipt of the payment or a portion thereof or before completion of the service. The Director was of the opinion that it would be appropriate to issue the invoice 30 days before receipt of the entire or a part of the license fee payment also in a situation where the company does not receive the payment within the deadline agreed on the invoice or in the contract.

Civil Law Transaction Tax

The Supreme Administrative Court, in the judgment of 12 February 2014 (II FSK 500/12), held that in the case of sale of an enterprise, if the agreement stipulates the aggregate selling price only, without it being broken down into the value of each asset making up the enterprise, it was appropriate to levy the civil law transaction tax on the entire value of the transaction at the higher rate, i.e. 2% of the market value of the enterprise.
According to the Act on Civil Law Transaction Tax, the sale of goods is subject to 1% tax, while the sale of other property rights - to 2% tax. In the light of the Supreme Court's judgment, if an enterprise is sold, to apply the lower rate of tax with respect to the things making up the assets to be transferred, the agreement should specify the value of each asset (things and rights) transferred as part of the enterprise.

PIT

The Supreme Administrative Court, in the judgment of 7 February 2014 (II FSK 347/12), held that income from exercising the rights from share options received arose upon sale of the shares at the option price.
In the case at hand, as a result of exercising the share option, the taxpayer acquired shares at the option price, and at the same time, he sold the shares at the market price. The court was of the opinion that in the light of pro-constitutional interpretation of Article 17 par.1.10 of the PIT Act, it should be considered reasonable that the taxpayer could not derive benefits from the very fact of acquiring the shares as a result of exercising the option, since in this situation the acquisition and sale were at the same moment. Therefore, the tax proceeds arise only after the shares are sold at the option price.

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Director of the Fiscal Chamber of Katowice, in the individual interpretation of 23 January 2014 (IBPBII/1/415-974/13/MK, IBPBII/1/415-975/13/MK), held that a situation where the client received a reward for an indirect purchase, i.e. a purchase made by a third party based on the client's recommendation or encouragement, could not be considered bonus sales.

The Director was of the opinion that a reward was given as part of the bonus sales if the entities entering into the sales agreement were the same as those that received the reward. Thus, the exemption to be applied to rewards given as part of the bonus sales under Article 21 par. 1.68 of the PIT Act will be applicable to rewards given as part of bonus sales to those Clients who buy the taxpayer's goods directly and consequently collect the required number of points. Those rewards that are given for indirect purchase, i.e. purchase made by another person based on recommendation, were to be considered as the so-called income from other sources.

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