KSP TAX NEWS 04/2014

We are pleased to present to you KSP Tax News with selected rulings and interpretations issued or published in March 2014. We hope this publication proves useful in your everyday business life

The nominal value of shares received in return for an in-kind contribution to a limited liability company to be the base for taxation purposes – a decision by the Supreme Administrative Court

The Supreme Administrative Court (NSA - Naczelny Sąd Administracyjny], in a decision of 31 March 2014 (file I FPS 6/13), refused to adopt a resolution by 7 judges in connection with a legal issue submitted by the Polish Ombudsman concerning the base for VAT taxation of in-kind contribution made to a limited liability company in a form other than an enterprise or an organised part thereof.

The Ombudsman filed a request for resolving discrepancies identified in the body of rulings regarding determination of the taxable base in a situation where an in-kind contribution is made to a limited liability company, based on Article 29 of the VAT Act. The Ombudsman was of the opinion that two different standpoints were presented. According to the first one the taxable base should be the sum total of the nominal value of shares which is the amount due within the meaning of Article 29 par. 1 of the VAT Act, whereas the second one assumes that it is the market value of the goods or services less the amount of the tax that forms the taxable base, pursuant to Article 29 par. 9 of the VAT Act. NSA refused to adopt the resolution. To justify the refusal, the Court indicated that no conflicting decisions or rulings existed, despite the opinion expressed by the Ombudsman. Additionally, NSA held that the regulation which was to be clarified at the Ombudsman's request, was repealed as of 1 January 2014 by the Act Amending the Act on Goods and Services Tax of 7 December 2012 due to its non-compliance with the EU directives, in particular with Directive 112.

Expert Comment

"*The practice of tax authorities and administrative courts has shown that controversies arose in connection with the issue of whether the value of an in-kind contribution should include VAT or not, i.e. whether an entity making the in-kind contribution should take up shares to the net value and VAT may be subject to a separate settlement in cash, or the shares should be taken up to the gross value of the subject of the in-kind contribution. As an example in a situation where the taxpayer offered to settle an in-kind contribution so that the value thereof was determined in the net amount and VAT was to be settled in cash, the Director of the Fiscal Chamber in Katowice in an individual interpretation of 19 June 2012* [1] *held that "due to the fact that provisions of the VAT Act do not specify the form of settlement of the transaction, it should be considered that the parties to the transaction were free to select the way to settle the same".*

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[1] No. IBPP2/443-576/12/AM

In turn, NSA, in the judgment of 14 August 2012,[2] held that "the sum total of the nominal value of shares is the gross amount from the in-kind contribution made, i.e. the amount that includes the tax". By the same token, NSA ruled out the possibility to settle VAT separately in pecuniary form.

NSA referred to the above judgment in the decision refusing to adopt the resolution. Thus, it can now be expected that no discrepancies will occur in specifying the base for VAT taxation with respect to in-kind contributions. Additionally, it is worth noting that in place of the repealed Article 29 of the VAT Act, Article 29a is in force, which provides a general rule whereby the taxable base consists of anything that constitutes consideration. A non-pecuniary contribution is made to a company in return for shares. The nominal value of the shares, which is the amount due for making the in-kind contribution, reflects the value of thereof.

It means that transactions of in-kind contributions, involving assets in a form other than an enterprise or an organized part thereof, will necessitate financing VAT in cash on the side of the contributing entity and as such they will not be tax neutral."

CIT

The Supreme Administrative Court, in the judgment of 28 March 2014 (file II FSK 1728/12), held that compensation for premature termination of a contract may be recognized as tax deductible if a reasonable decision on contract termination was taken in order to retain or secure revenue from business operations.
The case involved a Bank which, as a result of closing down an unprofitable establishment, terminated a lease contract, and was thus obliged to pay the amount agreed with the landlord. The Bank was of the opinion that the amount of the compensation can be included in the deductible costs, since the establishment was generating losses. NSA shared the taxpayer's opinion. The Court emphasized that the measures taken by the Bank were reasonable since they ensured deriving, retaining or securing revenue for the Bank's overall business which could not be limited to one establishment only.

The Province Administrative Court of Warsaw, in the judgment of 28 March 2014 (file III SA/Wa 2491/13), shared the opinion expressed by the tax authority and held that a Company participating in a cash-pooling structure should in the first place determine who the beneficial owner of the interest paid was, and subsequently establish the manner of taxation thereof.
The Court held that a German company acting as a cash pooling agent was not entitled to interest paid by the taxpayer (except for the portion which was due to it for participation in the cash-pooling structure). The legal title to interest is held by each of the companies that participate in the structure. Thus, it is ungrounded to apply the provisions of the agreement with Germany concerning double taxation avoidance to the entire amount of interest, since it is the regulations applicable for the domicile / registered address of the beneficial owners that should be used.

The Supreme Administrative Court, in the judgment of 5 March 2014 (file II FSK 1711/13), held that a portion of fixed assets with respect to which the use permit was issued can also be considered a "complete and usable" fixed asset within the meaning of Article 16a par. 1 of the CIT Act.
The court held that a Company which obtained a conditional permit to use a group of buildings with the exclusion of cellars may recognize the depreciation write-downs for the used part thereof as deductible costs. Article 16a of the CIT Act should be interpreted in the context of general rules concerning deductible costs, so it is

[2] File I FSK 1405/11

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inadmissible to deprive a taxpayer of the right to recognize as deductible the costs of depreciation write-downs to a portion of a building used legally for the purpose of business activity.

The Province Administrative Court of Warsaw, in the judgment of 25 March 2014 (file III SA/Wa 2492/13) defined which of the expenses incurred for arranging conferences, training, sports events and gifts for contracting parties can be recognized as tax deductible.
The court held that food service expenses connected with a training course taking several days can reasonably be recognized as tax deductible, as they cannot be considered expenses incurred for entertainment ("representation") with the exclusive purpose of creating or improving the company image. However, with respect to gifts handed to contracting parties, the expenses incurred for this purpose cannot be recognized as tax deductible since, in the opinion of the Court, they are spent for the purpose of entertainment ("representation") and not advertising, which should be addressed to potential customers. The Company may fully recognize as deductible the expenses related to the substantive content of the conference.

VAT

The Province Administrative Court, in the judgment of 5 March 2014 (file I SA/Po 827/13), held that corrections to input VAT from bad debt relief can only be made in the tax return for the period in which the bad debt is considered credible.
A creditor, when correcting the input VAT based on Article 89a of the VAT Act, makes the correction in a specific tax return. If he does not exercise the right, he may do it at a later date, but he must came back to the proper return and still meet all the requirements for correction. Thus, the standpoint of the company, in which it assumed that it was entitled to make a correction in the return for each account period after the end of 150 days of the payment date, was considered incorrect

The Supreme Administrative Court, in the judgment of 7 March 2014 (file I FSK 503/13), held that no VAT obligation arose on payments to be recognized against unspecified future supplies.
Payments received must apply to a specified subject of a transaction to trigger tax obligation. Thus, no tax obligation arises under the VAT Act for a company that sells footwear and receives advance payments to its bank account not linked to any specific delivery, but paid with respect to non-specified future deliveries.

The Director of the Fiscal Chamber of Katowice, in an individual interpretation of 10 March 2014 (file IBPP2/443-120/14/WN), specified the taxable base for VAT on services provided by a pool leader under a cash pooling structure.
According to the standpoint presented by the Director, the taxable base for services provided by the pool leader to a company participating in the cash pooling was an amount collected by the pool leader from the account held by the company which included the fees for administering the company's cash and remunerations encompassing amounts of debit interest charged on the amount of own funds included by the pool leader, debiting the company's bank account.

The European Court of Justice, in the judgment of 13 March 2014 in the case C-107/13, held that if a delivery was not conclusively made, despite the supplier being obliged to pay VAT and not returning the payment on account, the tax deduction made by the recipient of the invoice issued for the payment on account had to be adjusted.
According to the above judgment, the tax could not be deducted if for whatever reason the service is not performed. In this case, the taxpayer is obliged to adjust the input tax.

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PIT

The Supreme Administrative Court, in the judgment of 5 March 2014 (file II FSK 684/12), held that an insurance agreement in which the group of parties insured is open and changing over the insurance term, also leads to generation of revenue from gratuitous benefit on the side of members of the governing bodies in the insured companies.

NSA referenced the well-established line of judgments whereby, since members of the management board are subject to insurance cover upon payment of the premium, if an accident or any other contingency occurs from the moment of payment, which leads to payment of compensation, the insurance is paid. Thus, the interest under the group insurance is secured, and such a benefit should be treated as a gratuitous benefit subject to taxation.

TAX ORDINANCE ACT

The Province Administrative Court [Wojewódzki Sąd Administracyjny - WSA] in Warsaw, in the judgment of 4March 2014, held that once the legal predecessor acquired the right to use protection with respect to the facts specified in an individual interpretation, the protection extended to cover the same facts to occur with respect to the legal successor.

The case involved a bank that combined with another bank through acquisition. According to the standpoint presented, the legal successor used the protection resulting from an individual interpretation issued for the acquired entity with respect to the same facts. The above is subject to the legal successor's observance of the interpretation and the interpretation being issued before said business combination.

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

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