KSP NEWS

KSP TAX NEWS 5/2012

We are pleased to present to you KSP Tax News, in which we describe selected rulings passed or published in April 2012. We hope this publication proves useful in your everyday operation.

VAT imposed on supply of a plot of land with fence – Ruling of Supreme Administrative Court

On 17 April 2012, the Supreme Administrative Court (NSA) passed a judgment (file I FSK 918/11) whereby a fence does not constitute an independent structure in the context of the VAT Act, and therefore a supply of land with a fence is not exempt from VAT, as the land has no buildings or structures attached. It is the Court's opinion that when interpreting the notion of "a structure" in the context of the VAT Act, the economic significance of the term must be referenced. VAT is a harmonized tax within the European Union, and to interpret certain notions used in the VAT Act it is incorrect to refer to national civil law regulations, which are different in each Member State. Consequently, if a sale effected by a VAT payer involves a non-developed plot of land intended for construction, which has only a fence attached to it, the transaction is subject to the basic VAT rate.

Expert Comment

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"The above judgment is of considerable importance for entities which engage in transactions in the real estate market. In case of supply of land with buildings and structures attached, the rules of taxation are determined by the rules applicable to the buildings and structures located thereon. Moreover, if one plot of land has a building attached whose supply is subject taxation with the basic rate and a structure which is eligible to VAT exemption, the value of the plot should be allocated on a pro rata basis to those components thereof, taxed at the rate applicable to the building/structure. In practice such rules raise numerous doubts. If, in addition to a building, a plot is provided with a fixed fence or hardened parking area, it has to be determined whether these are structures, and should thus be considered separately in terms of determining the VAT rate, or whether, as construction facilities connected with the building, they are not subject to separate VAT taxation. Similar situation occurs in the event of sale

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of land with no buildings attached, which is provided with such components as a fence or a parking area. In this case it should be determined whether the components are structures or the land should be considered as non-developed. Hitherto tax authorities have frequently assumed that if a fence encloses a plot with a building attached, it is a construction facility to be taken into account when determining the VAT rate upon the property sale. However, if the plot contains a fence only or the fence encloses more buildings, it is a separate structure and affects the VAT rate in case of real property disposal.

NSA expressed a different view in this respect. The Court took into account the economic nature of the land attachments. If the plot is intended for construction purposes, and thus a building is going to be attached to it in the future, the fence is of exclusively auxiliary nature and forms no separate structure. In practice, this classification adopted by the Court was not affected by the fact that at the time of the transaction, the building has not yet existed.

The judgment is of importance for entities planning transactions of disposal (sale, in-kind contribution, etc.) of land property, both non-developed, but with a fence or hardened parking area, and those with a number of attachments such as buildings, fences, parking lots, pavements, etc. In the specific case being the subject of the verdict, the NSA closed the way for the taxpayer to optimize VAT settlements connected with splitting the plots with the purpose of their subsequent sale. However, the ruling is also important for entities which do not view the transaction in terms of optimizing their tax settlements, but aim to safeguard themselves against potential challenging of the adopted tax rules by fiscal authorities.".

VAT

The Supreme Administrative Court in the judgment of 3 February 2012 (file I FSK 589/11) resolved that the requirement for a contractor to hold a confirmation of adjusted invoice receipt is not a strict one.

The judgment in practice confirms the verdict of the European Court of Justice (C-588/10). Pursuant to the provisions of the VAT Act, reduction of the taxable base for a specific account period is possible if the taxpayer holds a confirmation of receipt by a contractor of an adjusted invoice before the end of the time limit for submission of the return for the period. However, in a situation where obtaining such a confirmation is not possible within reasonable time, or it is excessively difficult, the taxpayer may also use other evidence proving that the taxpayer exercised due care to ensure that the buyer was provided with the adjusted invoice and that the transaction was actually done subject to the conditions specified in the adjusted invoice. NSA pointed out that such evidence may have the form of e.g. copies of the

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invoice, reminder letters addressed to the contractor with the aim of obtaining the confirmation of receipt, proofs of payment or accounting documents which make it possible to specify the amount actually paid to the taxpayer in respect of the transaction concerned.

CIT

The Province Administrative Court (WSA) of Krakow, in the verdict of 25 April 2012 (I SA/Kr 354/12) resolved that a company may recognize a loss resulting from liquidation of fixed assets not fully depreciated as deductible costs.

According to the verdict of the WSA, to recognize a loss resulting from liquidation of fixed assets not fully depreciated as deductible costs, it is not necessary to liquidate the fixed assets physically. It is sufficient to liquidate them in books as a result of a decision on discontinuation of their use. The verdict is favorable for taxpayers. According to the standpoint expressed by tax authorities to date, for a loss resulting from fixed asset liquidation to be recognized as deductible cost, it was necessary to physically liquidate the asset. The Court adopted an approach based on *ratio legis* rather than on literary wording of the CIT Act provisions, and assumed that most essential was the fact of taking a decision on discontinuation of the fixed asset use, confirmed by its removal from the register of fixed assets.

PIT

In the resolution of 2 April 2012 (file II FPS 3/11), the Supreme Administrative Court resolved that the residency relief established by the provisions of the Personal Income Tax Act applied not only to revenue from the sale of a building but also to the land whereupon the building was located.

The residency relief was provided for in the PIT Act in 2007-2008 (art. 21 par. 1.126a of the PIT Act). The relief may still be used by taxpayers who are currently selling a house or a flat purchased at the time. Recently tax authorities have expressed the standpoint that the relief applies only to the sale of a flat or a building whereas the land on which they are located is subject to taxation. In accordance with the WSA resolution, the residency relief applies not only to the revenue from the sale of a building, a part thereof or a share therein, but also to the land whereupon the building is erected. This results from the fact that, as a rule, the land and buildings located thereon, form the entire real property, and must not be subject to separate sale. Therefore, also the residency relief must not apply separately to one component of the real property only. The resolution clarifies the doubts regarding the extent of use of the residency relief in favor of taxpayers.

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The Supreme Administrative Court, in the verdict of 11 April 2012 (II FSK 1724/10) decided that transportation of an employee to the place of work, funded by the employer, was not to be classified as revenue for the employee in the light of provisions of the PIT Act.

NSA stated that the mere fact of creating for an employee a possibility to use the means of transport to the place of work funded by the employer did not result in generation for the employee of revenue subject to PIT. Revenue shall only be generated for the employee in a situation where it can be determined whether and to what extent the employee made use of the gratuitous transportation. In the said ruling, NSA indicated that its resolution on medical package of October 2011, unfavorable for employers, could not automatically be applied to all types of benefits funded by the employer. The NSA ruling is another example of interpretation concerning benefits other than pay, funded by employers, which is favorable for taxpayers.

TAX ORDINANCE ACT

The Province Administrative Court in the judgment of 2 February 2012 (file I SA/Sz 950/11) resolved that the body of rulings referenced by a taxpayer in an application for an individual interpretation should be taken into account when issuing the interpretation.

The authorities, issuing interpretations, frequently indicate that rulings referenced by the applicants to support their standpoints are binding upon parties only in the specific case and in strictly defined factual situation. WSA resolved that an authority must each time analyze the referenced body of rulings, which follows from Art. 14e of the Tax Ordinance Act. Based on the provision, the Minister of Finance may ex officio modify the general or individual interpretation issued, if he finds it non-compliant, particularly in view of the body of rulings passed by courts, the Constitutional Tribunal or the European Court of Justice. Consequently, the tax authority is to a greater extent obliged to analyze the body of rulings in the course of proceedings for issuance of an interpretation. The WSA is of the opinion that the authority must specifically respond to the arguments provided in the standpoints of tax authorities and the body of rulings, and a general statement that the standpoints are not binding on the authority issuing the individual interpretation is inadmissible. The judgment concerned may lead to a changed approach by tax authorities to the arguments provided by the taxpayers.

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