KSP TAX NEWS 05/2013

We are pleased to present to you KSP Tax News, in which we describe selected judgments and interpretations issued or published in May 2013. We hope this publication proves useful in your everyday operations.

No withholding tax with regard to services performed remotely by a foreign entity to a Polish entity – decision of the Province Administrative Court in Kraków

The Province Administrative Court in Kraków (WSA) in its decision of 5 April 2013 (files no. I SA/Kr 229/13) ruled that a Polish company which uses services provided by a foreign entity abroad is not obliged to collect withholding tax.

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Expert comment

"In the presented case, a company being a part of an international capital group, established and running its business activity in Poland used outsourcing services provided by an Indian company. The purchased services related to, in particular, finance and trade support. The services were performed mainly in India. However, in case the services were performed in another place, the service provider was specifying on the invoices the part of remuneration for the works performed in India and the part of remuneration for works performed in another country. Thus, according to the Polish company, in case of services provided only in India, it is not obliged to collect the withholding tax, because the Indian entity has not achieved any revenue on the territory of Poland, within the meaning of Art. 3 point 2 of the CIT Act. There is no provision specifying the rules for determination of the place where the revenue is achieved, therefore it should be assumed, that the revenue was achieved in the place where the related works were performed. The Head of the Tax Chamber in Katowice, who issued an individual interpretation in the subject case, did not agree with this reasoning and stated that it is of vital importance, where the result and effect of the services will be used. WSA in Kraków, taking into consideration the complaint of the Company, adopted a different standpoint. The court pointed out that the provisions do not refer to the result of the service or to the place where it is used. In the absence of clarifying regulations concerning determination of the place where the revenue is reached, the place of performance of the services will be crucial.

The decision of WSA is positive to the taxpayers who benefit from the services which are rendered by foreign entities remotely. Frequently, there is a problem with obtaining the contractor's tax residency certificate and what is more there is very often a lack of understanding as to why the Polish entity does not pay the whole amount, but it collects a part of it towards the withholding tax. If the service is provided remotely (i.e. the people who render those services are not in Poland), in case of lack of the residence certificate it is possible to rely on the fact that the revenue is not achieved on the territory of Poland, thus the withholding tax is not due. At this stage, the subject decision may constitute a support in tax proceedings for the entities which do not have the certificate of residence and which have not collected the tax what was challenged by tax authorities. However, we notice a

slight chance that the Polish authorities will approve the correctness of this approach, thus we consider that its application is risky".

CIT

The Supreme Administrative Court decided in its judgment of 19 April 2013 (files no. II FSK 1681/11) that by the time of the actual performance of a liability expressed in a foreign currency, i.e. repayment of a loan or payment of the purchase price for goods and services, it is impossible to determine the exchange differences. Thus, the calculated but actually not made exchange differences cannot be included in the initial value of a fixed asset.
In the presented case, the company implemented an investment financed with the loan in foreign currency. During implementation of the undertaking, the company was purchasing goods and services from foreign contractors, therefore the transactions were settled in a foreign currency. The abovementioned liabilities have not been settled until the fixed assets created within the investment were submitted for use. The company, using the tax method with regard to the settlement of exchange differences, included in the initial value of fixed assets, the exchange differences calculated up to the date when the fixed assets were handed over for use and afterwards, the company applied for an individual interpretation in order to confirm the accuracy of such actions. Nevertheless, the authority which issued the interpretation found that the company's standpoint is incorrect. The dispute concerned the interpretation of Art. 16g point 5 of the CIT Act, according to which the acquisition price and the cost of manufacture, included in the initial price, should be adjusted for exchange differences accrued until the date of commissioning of the fixed asset or the intangible asset. Pursuant to the authority, as the "accrued" exchange differences should be deemed only those differences which were actually made, because they cannot arise before the liability is settled, according to Art. 15a of the CIT Act. With regard to inclusion of the exchange differences accrued up to the date when the fixed asset is handed over for use, the legislator specified the point at which the exchange differences, which are a part of the initial value, may arise at latest. The standpoint of the tax authority was confirmed by WSA in Wrocław which was considering the complaint against the interpretation and which referred to the same argumentation. Moreover, NSA also considered the standpoint as correct. Therefore, the exchange differences resulting from the liabilities settled after the date when the fixed asset was handed over for use (e.g. payment of subsequent instalments of a loan) will be recognized as income of tax cost as of the date when the exchange differences are incurred, in accordance with the cash basis. The abovementioned standpoint is recently presented by the majority of tax authorities.

The Province Administrative Court in Poznań in its judgment of 4 April 2013 (files no. I SA/Po 143/13) decided that pursuant to Art. 14 of the CIT Act, the tax authorities are entitled to determine the income resulting from acquisition of shares against contribution in-kind, connected with agio, in the amount other than the nominal value of the acquired shares.
The Company applied for an individual interpretation in order to confirm, that in case of acquisition of shares against the contribution in-kind, the income of the contributing party is always the nominal value of the acquired shares, regardless of the ratio in which the value of the contribution in-kind was allocated for acquisition of shares and the ratio in which it was transferred to the reserve capital. As far as the company is concerned, the tax authorities have no possibility to increase the value of the income under Art. 14 of the CIT Act, but only to verify the market value of the subject of the contribution in-kind. According to the facts presented by the company, the subject of the contribution in-kind were the shares (stocks)

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purchased for the price higher than the nominal value of the shares acquired against the contribution in-kind. However, the tax authority stated in the individual interpretation that the authorities keep the right to determine the value of income of the contributing party on the basis of Art. 14 of the CIT Act. WSA in Poznań which was examining the complaint against the interpretation confirmed the abovementioned standpoint. According to the court, it explicitly results from Art 12 point 7 of the CIT Act that the legislator combines the income value with the nominal value of the acquired shares, which does not have to correspond to the shares' market value. However, the situation in which the abovementioned value differs significantly from the market value of the subject of the contribution in-kind is unacceptable and it cannot be assumed that the amount of the income resulting from shares' acquisition could be freely shaped by the shareholders. Thus, the tax authorities are not entitled to interfere in the ratio, according to which the value of the contribution in-kind is transferred to the reserve capital, however, they are entitled to determine the market value of the subject of the contribution in-kind and the correct amount of the income of the contributing party. The court referred also to the decision of the Supreme Administrative Court of 31 January 2013 (files no. II FSK 1223/11) which adopted the same standpoint. Those judgments modify the earlier case-law according to which, the tax authorities, as a rule, cannot question the amount of the income if the contribution in-kind was made in connection with agio and if the income was recognized in the nominal value of shares acquired against the contribution in-kind.

The Supreme Administrative Court in its judgment of 19 April 2013 (files no. II FSK 1755/11) decided that a guarantee of the subsidiary's loan granted by a city results in a revenue of that subsidiary for gratuitous services.
A company, in which the city is the sole shareholder, took a loan for financing its activity. The condition of granting the loan was obtainment of a guarantee which was granted by the city free of charge. According to the company, it does not receive the revenue from the gratuitous services, because the fact that the city granted the guarantee did not result in any benefit for the company. This standpoint was considered as incorrect by the tax authority, according to which the company received a revenue in the amount equal to the guarantee, for which it does not pay. The company filed a complaint against the interpretation. WSA in Poznań which was examining the case in the first instance found the company's standpoint to be correct. The court pointed out that the city is obliged by law to grant the guarantees to the entities established for the purpose of providing public services and what is more, it cannot do that for remuneration due to the fact that the provisions of the regulations concerning the local government finance does not provide for such a source of revenue. However, this judgment was considered as incorrect by NSA, which, during examination of the cassation appeal, opted for the standpoint adopted in the individual interpretation. According to NSA, the revenue for the guarantee granted gratuitously is the greater credibility which allows getting the loan. Therefore, the taxpayers, one of which obtained the benefit gratuitously and the other one for remuneration, cannot be treated equally. This judgment is a continuation of recently presented case-law, according to which obtainment of a guarantee gratuitously always generates revenue resulting from gratuitous services.

VAT

The Supreme Administrative Court in the judgment of 18 April 2013 (files no. I FSK 943/12) ruled that the point at which the construction works services are performed is the date when the services are completed and not the date

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when the hand-over protocol is signed. The relevant tax rate is the rate applicable as of the first date.
In the presented case, the company was the co-contractor of a construction project for the local government, including successive stages of the construction works. The construction works were completed on 30 November 2010, however their acceptance and documentation of the services with an invoice took place at the beginning of 2011, because the ordering party could not obtain the financing from the Office of the Marshal at the end of 2010. Due to the fact that the VAT rate was increased on 1 January 2011, the company applied for an individual interpretation confirming its standpoint, according to which, in the light of Article 41 point 14a of the VAT Act, the date of execution of the construction works is the date when they were actually completed and not the date of their acceptance with a protocol, thus the rate applicable up to 2010 should apply in the subject transaction. The tax authority took the standpoint of the company as incorrect and decided that the date determining the appropriate rate is the date of acceptance of the construction works by the ordering party. Nonetheless, the interpretation was repealed as a result of a complaint submitted to the Province Administrative Court in Kraków and the decision of that court was upheld by NSA. In the opinion of those both courts, signing of the acceptance protocol is an act confirming that an event, in the form of construction works, has already taken place. Therefore, the rate of taxation of the construction works is the rate applicable up to the end of 2010, despite the fact that the tax obligation arose in 2011.

The Province Administrative Court in Poznań, in the judgment of 4 April 2013 (files no. I SA/Po 15/13) decided that in case of issuance of an invoice to a wrong purchaser, it is impossible to issue a correcting invoice in the form of an adjustment note by the correct purchaser.
In the presented case, a Polish company was using fuel cards of a German entity under an agreement and it was fuelling its trucks up. In return, the German entity was charging the Polish company with the costs of the fuel and was issuing VAT invoices monthly which were settled by the Polish company on the basis of a reverse charge. As far as the subject transaction is concerned, the Polish tax authorities refused the German entity to refund VAT, arguing that the actual purchaser of the fuel was the Polish company and only the taxpayer to which the goods are supplied is entitled to tax deduction. Therefore, the company has taken steps aiming at obtaining the tax refund. The company requested from the fuel suppliers to issue correcting invoices specifying the German entity as the purchaser. However, the supplier refused due to the closed reporting period. Taking the above into consideration, the company applied for an individual interpretation to confirm that it is entitled, as the correct purchaser, to issue adjusting notes specifying the company as the addressee of the invoices documenting the sale of fuel. The tax authority did not agree with the company. A negative standpoint was also presented by WSA in Poznań which was examining the complaint against the interpretation. According to the court, the provision of the invoice regulation entitle to issue adjusting notes only by the purchaser of goods or services who received an invoice or a correcting invoice containing errors. Thus, the Polish company does not have such an entitlement because it has not received the invoices and indication of a different purchaser has not resulted from an error but deliberate actions. It does not result from the invoices documenting the sale of fuel that the company was a party to the transaction. Therefore, an adjustment note in this case would be contrary to its purpose.

The Province Administrative Court in Warsaw in the judgment of 9 April 2013 (files no. III SA/Wa 3297/12) ruled that for the purpose of a legal-tax

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qualification of a sale of a real estate within determination of an appropriate VAT rate, the economic aspect of the transaction is crucial.

In the subject case, a company acquired a land from the first owner for construction purposes. Such a designation of this land was indicated in the zoning plan. No buildings on the property were indicated in the preliminary agreement, however as of signing the sale agreement it appeared that an old set of buildings of a former stadium is located on the land. The seller issued an invoice for this transaction at the rate exempted from VAT, however the company considers it as incorrect. As far as the company is concerned, the sale constituted, from its economical purpose point of view, a supply of undeveloped land and not a supply of buildings, thus it should be subject to taxation and the company should be entitled to deduct VAT with regard to the transaction. The tax authority found in the individual interpretation that the abovementiioned standpoint is incorrect and it decided that the fact that the building located on the land were of no economical value does not mean that the buildings can be omitted. Therefore, due to the fact that the sale of those buildings is subject to tax exemption resulting from fulfilment of provisions specified in Art. 43 point 1 sec. 10 of the VAT Act, the supply of land should also be subject to exemption. WSA did not shared this standpoint of the tax authority and during examination of the individual interpretation, it agreed with the company's view. According to the court, the economical aspect of the transaction as well as the purpose for which the transaction is carried out are decisive for qualification of this transaction and it results also from the case law of the ECJ. Thus, in the subject case, the sale should be considered as a sale of an undeveloped building land subject to VAT. The abovementioned judgment constitutes an argument for the use, in the transaction of sale of a property, of the VAT rate which does not include the buildings, if they are not to be used by the purchaser and if they have no economical value for the purchaser. In such a situation, the VAT taxation will correspond to the economic purpose of the transaction.

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