
# KSP TAX NEWS 06/2013

**We are pleased to present you KSP Tax News, in which we describe selected rulings passed in May 2013. We hope this publication proves useful in your everyday operation.**

## Determination of the moment when tax liability arises in VAT as regards transport and forwarding services is incompatible with Community law – judgment of ECJ

**The European Court of Justice decided in its judgment of 16 May 2013 (files no. C-169/12) that the determination of the tax point in the Polish VAT Act with regard to transport and forwarding services is incompatible with Article 66 of the Directive 112. According to Article 19 sec. 13 point 2 letter a) and b) of the VAT Act, the tax liability in respect of those services arises upon receipt of the payment, in part or in whole, however no later than the 30th day of the date when the services were rendered. However, Article 66 of the Directive 112 specifies that by way of derogation from the principle, a Member State may provide that VAT is to become chargeable, at one of the following times: a) no later than the time the invoice is issued, b) no later than the time the payment is received, c) if an invoice is not issued, or issued late, within a specified period from the date of the chargeable event. Therefore, the reference of the tax point to the lapse of a specified period of time from the date of the taxable event is incorrect, if it is not connected with a lack of issuance of an invoice.**

### Expert comment

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*"The judgment of ECJ was issued as a result of a prejudicial question asked by the Supreme Administrative Court which was examining the dispute between a Polish company providing forwarding services and tax authorities. The provisions governing the tax point in VAT with regard to transport and forwarding services have been sparking controversy among taxpayers for a long time. By making the tax point dependable on the receipt of payment or lapse of 30 days from the date when the service was rendered, the Polish legislator caused that this tax point is significantly postponed and it cannot be recognized in the VAT return for the month when the transport was made or when an invoice was issued. At the same time, the tax point cannot be postponed until the receipt of the payment, if it takes place after 30 days from the date when the service was rendered. In case numerous services are performed in a particular settlement period to one contractor and despite the fact of their documentation with a collective invoice, the date of recognizing the output VAT in respect of particular transport services may differ and it makes the settlement difficult.*

*It should be pointed out that the decision of ECJ specifying the incompatibility of the national provision with the Community law does not repeal the binding force of this provision, however, it makes it impossible to apply this provision within the scope in which it is contrary to the Community law. It means that the tax liability*

*related to transport services should arise upon receipt of the payment because this part of the provision is doubtless and it is compatible with the Community law. It should be also noted that an analogous regulation with regard to the tax point concerns construction and construction-installation works. It can be concluded on the basis of the subject judgment that this regulation is incompatible with the Community law in the part, in which it requires to refer the tax point to the lapse of 30 days from the date when the service was rendered. This means that also with regard to construction-installation services, the output VAT should be recognized in the VAT return for the month when the payment was received. However, it can be questionable whether the tax authorities will agree to such deferral of tax payment.*

*It should be also noted that Article 19 sec. 13 point 2 of the VAT Act determining the tax point in a manner inconsistent with the Community law with regard to transport, forwarding and construction services is valid only until 31 December 2013. From 1 January 2014 when a new amendment to the VAT Act comes into force, the tax liability related to the abovementioned services will arise on general principles."*

## CIT

**The Supreme Administrative Court, in its judgment of 8 May 2013 (files no. II FSK 1904/11) decided that in order to allocate several uncollectible receivables due from one debtor to the tax deductible costs, a Company is obliged to appropriately document each of the uncollectible receivables separately.**

In the considered case, the Company had several uncollectible receivables resulting from the sale with regard to a single contractor and which previously were considered as revenue due. After the enforcement proceeding was instituted in order to enforce the first part of the receivable, the bailiff issued a decision on unrecoverability of debts. Finally, the enforcement proceeding was discontinued due to the lack of the debtor's assets. According to the Company, the documents it owns (statement on the unrecoverability of a part of one of the debts and decision on discontinuance of the enforcement proceeding) justify the allocation of all debts due to the Company by the customer to the tax deductible costs. The tax authority did not agree with this standpoint in its individual interpretation issued at the request of the Company. As far as the tax authority is concerned, according to Article 16 sec. 1 point 25 of the CIT Act, each debt should be individually documented in a manner specified in this provision. Although the statement on the unrecoverability of a part of one of the debts justifies the fact that the whole debt may be considered as tax deductible costs, however, this decision is not sufficient in order to document the unrecoverability of the remaining debts, even if they are owed by the same debtor. The Company filed an appeal against the abovementioned interpretation, however, the standpoint of the tax authority was considered as correct both by the Province Administrative Court in Szczecin and the Supreme Administrative Court which was examining the cassation appeal. The courts upheld the view that each debt should meet relevant conditions specified in Article 16 sec. 1 point 25 of the CIT Act, i.e., previously booked as revenues and subsequently documentation of the unrecoverability in a manner specified in Article 16 sec. 2 of the CIT Act, however, a decision on discontinuance of the enforcement proceeding is not a relevant way to document the unrecoverability. The subject judgment confirms the restrictive case-law of the administrative courts as regards

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the possibility to classify the unrecoverable debt to tax deductible costs, according to which the provisions determining this classification should be interpreted very strictly and literally and failure to meet any of the formal requirements makes it impossible to classify the debt to the tax deductible costs, despite the fact that the debt is actually unrecoverable.

**The Province Administrative Court in Poznań (WSA) in its judgment of 22 May 2013 (files no. I SA/Po 174/13) found that the difference between the nominal value of debts and their market value repaid by a company as a result of a conversion of the receivables into shares constitutes a revenue subject to taxation.**

In the presented case, the Company had debts resulting from a loan as well as supplies and services acquired from a former partner who had assigned those debts to a third party. It was planned to increase the share capital of the Company, the shares of which would be acquired against the abovementioned receivables (conversion of the receivables into shares). Nevertheless, due to the fact that the market value of those receivables was significantly lower than their nominal value, the increase of the Company's share capital and contribution in-kind were made at the market price. Therefore, the Company applied for an individual interpretation as regards the question, whether there shall arise taxable revenues due to the expiration of the debt as a result of the confusion. According to the Company, the contribution in-kind, inclusive of the receivables as well as expiration of liabilities resulting the confusion, does not constitute its taxable revenue in the light of Article 12 sec. 1 point 3 letter a of the CIT Act . Nonetheless, the Director of the Tax Chamber in Poznań presented an opposite view, according to which the Company will receive revenue in the amount of the difference between the nominal value of the receivables and their market value. In the opinion of the tax authority, it is justified by the fact that with regard to the Company, the debt in the nominal value of the receivables will expire against the payment in the form of issuance of shares in the amount only of the market value of the receivables. WSA in Poznań which was examining the appeal filed by the Company against the individual interpretation, considered the abovementioned view as correct. According to the court, the Company receives an explicit revenue because as a result of the conversion, it causes the expiration of the receivables at their nominal value and it incurs the cost at the market value which is significantly lower.

**The Province Administrative Court in Warsaw in its judgment of 10 May 2013 (files no. III SA/Wa 3497/12) decided that in case of a set off of the partner's liability with the liability of the company in respect of the issuance of shares against cash contribution, it cannot be presumed that in fact it is a conversion of liabilities into shares, thus that it is a contribution in-kind.**

In the subject case, a joint-stock company had a receivable in respect of a loan granted to a limited liability company. The share capital of the limited liability company was to be increased and the shares were to be acquired against cash contribution. In order to acquire those shares, the joint-stock company intended to set off the liabilities related to the loan with the liability of the limited liability company resulting from the contribution. According to the joint-stock company, it will obtain revenue only from the repayment of loan interest by means of the set off and what is more, the value of the cash contribution will constitute a tax deductible cost for the Company resulting from sale of shares. Nevertheless, the tax authority stated in its individual interpretation issued with regard to the presented case that

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in the analyzed situation, in fact there is a conversion of receivables into shares, thus there is a contribution in kind (i.e. in receivables). In the opinion of the tax authority, if the cash contribution has not actually been made to cover the shares, the tax consequences should be analogous to those which would arise in case of the contribution in-kind, therefore the joint-stock company will receive an income in the amount of the nominal value of the acquired shares. The Company filed an appeal to the Province Administrative Court in Warsaw which reversed the abovementioned interpretation. The court decided that the presumption of the tax authority that in case of the set off of mutual liabilities, inclusive of the receivables resulting from the acquisition of shares against cash contribution, it is in fact a conversion of receivables into shares, is groundless. According to the court, the set off is also a way to settle liabilities, therefore there is no reason to claim that the cash contribution has not actually been made.

## VAT

**The Ministry of Finance, in an official letter of 8 May 2013 (files no. PT10/0810/2/158/BLI/2013/RWPD16371/RD42946) confirmed that if a relevant VAT correction is made by the so-called wrong debtor before the tax authority finds that this obligation has been violated, the sanction in the form of an additional tax liability will not be imposed.**

The Ministry issued a general interpretation as a response to the letter on the interpretation of Article 89b sec. 6 of the VAT Act, concerning the sanction applied with regard to the taxpayers who failed to correct the input tax on the unpaid invoices. A taxpayer is obliged to make an appropriate correction of input VAT for the month in which 150 days lapsed from the term of payment of the invoice. In case of a failure to fulfil this condition, the taxpayer should make the correction of the submitted VAT return for that period and if this failure is found by the tax authority, it imposes an additional tax liability in the amount of 30% of the tax amount resulting from the unpaid invoices. The interpretation dispels doubts and shows that even in case of a failure to meet the obligation concerning the correction to be made in a timely manner, if the taxpayer, before the tax authority finds the violation, corrects the VAT return for the period in which the obligation was to be fulfilled, the penalty will not be imposed. It should be noted that in case a tax proceeding is instituted, the right to correct the statement is suspended, and upon the issuance of the final decision, there is no right to submit the corrected statement within the scope covered with the decision. Therefore, an effective correction of the statement as regards the correction of input tax resulting from unpaid invoices may be made before the tax proceeding within VAT is commenced.

**The Ombudsman applied on 17 May 2013 (files no. RPO-727170-V/13/JG) to the Supreme Administrative Court to decide on the legal issues concerning taxation of employees with PIT with regard to team building events.**

The Ombudsman presented two legal issues to be settled:

1) Do the costs, covered by the employer, of participation of the employees in a team-building event and the value of which is not free of PIT under Art. 21 sec. 1 point 11 of the PIT Act, constitute for the employees who were

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able to participate in the event a revenue from another gratuitous benefit within the meaning of Art. 12 sec.1 of the PIT Act?

2) Is it possible, in case the values of benefits provided during a team-building event and financed by the employer cannot be assigned to benefits obtained (received) by a particular employee, to determine – under Art. 11 sec. 2a point 2 of the PIT Act – with regard to a particular employee, the amount of the revenue from another gratuitous benefit within the meaning of Art. 12 sec . 1 of the PIT Act?

The above specified questions illustrate the doubts causing the most significant discrepancies in the jurisdiction with regard to the employees' revenues from team-building events. Increasingly longer period of uncertainty and issuance of contradictory decisions raise doubts among the employers who are the payers of the advance payments in respect of personal income tax. An unanimous interpretation in respect of that issue is highly recommended.

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

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