KSP TAX NEWS 6/2014

We are pleased to present to you KSP Tax News, in which we describe selected judgments and interpretations issued or published in May 2014. We hope this publication is of interest to you.

Head of Fiscal Chamber identified the tax point for the supply of goods

The Director of the Fiscal Chamber in Poznan, in an individual interpretation of 22 April 2014 (file ILPP5/443-11/14-5/KG), expressed an opinion regarding the tax point for the supply of goods.

The Director held that the time of supply of goods within the meaning of Article 7 par. 1 of the VAT Act corresponded to the time of release of the goods, as referred to in Article 544 of the Civil Code. According to the provisions of the Civil Code, if an item sold is to be sent by the seller to a place which is not the place of fulfillment of performance, it is considered that, if in doubt, the release is made once the item is handed over by the seller to a carrier engaged in transporting this type of items in order for it to be delivered to the destination. Consequently, the Director held that where goods are sent by the supplier to the purchaser via a carrier (forwarder, courier), the goods are delivered once they are issued to an entity responsible for their delivery.

Expert Comment

"The amendment made to the VAT Act, effective from 1 January 2014, concerns, among other things, the tax point. Pursuant to Article 19a par. 1 of the Act, the tax point for a delivery of goods is the moment the delivery is made, i.e. the right to use the goods as their owner is transferred. In practice, the above raises serious doubts, since taxpayers find it difficult to determine the point, in particular in a situation where the goods are not collected by the client from the warehouse but are sent. The above may be of import if deliveries are made at the end of a month. In this situation , the tax may be settled in the current or the next accounting period. In the situation considered by the Director, the taxpayer indicated that goods were sent with his own means of transport or with the use of a forwarding company, and no agreement or sales regulations existed to provide for the transfer of the right to use the goods as the owner, and the order to deliver the goods to a courier was given by the seller or by the buyer. The Director shared the opinion that in this situation, the date of supply of the goods was the moment of handing over the goods to the courier. The above releases the taxpayer of the necessity to monitor the date of the actual receipt of the goods by the customer, which in practice might be impossible. Thus, it may be reasonable to analyze terms and conditions of delivery and consider inclusion of certain contractual provisions that would make it possible to recognize the tax point as the moment of goods release from the warehouse. Additionally, the above may also be confirmed in the sales regulations or by inclusion of the relevant clause in invoices."

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VAT

The Head of the Fiscal Chamber in Bydgoszcz, in an individual interpretation of 28 April 2014 (file ITPP2/443-154/14/EK), held that a taxpayer is entitled to deduct VAT under "an estimated VAT invoice" for electricity consumption.
If the “estimated VAT invoice", i.e. an invoice documenting the gross amount due for forecast electricity consumption by a taxpayer in a given account period meets the conditions required for it to be considered an invoice in the light of VAT regulation, the taxpayer is entitled to make deductions of the input VAT in the settlement for the period in which the invoice was received, since, according to Article 86 par. 10 of the VAT Act, the right to deduct arises in the settlement for the period in which the taxpayer received the invoice.

CIT

The Supreme Administrative Court [*Naczelny Sąd Administracyjny - NSA*] in the judgment of 27.05.2014 (file II FSK 1478/12), shared the taxpayer's opinion and held that revenue derived from in-kind contribution with agio in the form of a right to trademarks should be recognized in the amount of the nominal value of shares taken up in return for the in-kind contribution.
The court considered erroneous the standpoint expressed by the tax authority whereby the nominal value of a share should in principle correspond to its market value, which excludes the arbitrariness of the issue. As the Court indicated, provisions of the Commercial Companies Code make it possible to determine the nominal value of shares issued in return for in-kind contribution as different from the market value. The legislator did not authorize the tax authorities to verify the nominal value of shares. The possibility to accurately apply the provisions of Article 14 par. 1-3 in conjunction with Article 12 par. 1.7 of the CIT Act applies exclusively to determination of the market value of the subject to be sold, and thus to determination of the market value of the in-kind contribution rather than the shares taken up.

Head of the Fiscal Chamber in Poznan, in an individual interpretation of 15.04.2014 (file ILPB4/423-11/14-5/ŁM), shared the taxpayer's opinion that when balances are transferred between a EUR-denominated bank account of a company and an account of a related company under the cash pooling structure, no FX differences arise.
As a result of such an operation, the Company does not lose control over the cash funds, and in particular the funds are not finally transferred to another cash pooling participant. The transfer of the balance amounts is just a technical measure necessary for the structure to operate. Thus, it must be considered that the cash flows which occur as a result of such an operation do not trigger foreign exchange differences.

PIT

The Supreme Administrative Court, in the judgment of 21.05.2014 (file II FSK 835/12), held that transfer of real property to partners in a registered partnership as payment of a share in profits cannot be considered in records as a disposal of fixed assets for consideration, used for purposes connected with business activity.
Payment of a share in profits in an in-kind form is not a sale of a fixed asset for consideration. It is to be classified as performance replacing the execution of an obligation of non-equivalent nature. Thus, no revenue from business activity will arise

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on the side of the partners as a result of sale of fixed assets used for purposes related to the business activity.

TAX ORDINANCE ACT

In the judgment of 12.05.2014 (file III SA/Wa 3204/13), the Province Administrative Court held that a legal successor may take over the rights resulting from tax law interpretation provided that the rights were acquired by his predecessor.

Therefore, if the Company intends to combine with another one by way of acquisition, it may, as the legal successor of the acquired company, make use of the protection afforded by the individual interpretation of tax law regulations only if the acquired company applied the interpretation.

MISCELLANEOUS

On 28 April 2014, the Supreme Administrative Court adopted a resolution of 7 judges (file I FPS 8/13), concerning the effects of cancellation of the regulation on granting immediate enforceability to a non-final decision and discontinuation of proceedings.

According to the resolution, the provisions on granting immediate enforceability to a non-final decision, and consequently discontinuing the enforcement proceedings, lead to cancellation of the consequences arising therefrom of material law nature, in the form of interruption of the limitation period. Thus, the standpoint whereby cancellation of a decision subject to immediate enforceability does not interrupt the limitation period was considered incorrect.

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

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