KSP TAX NEWS 7/2012

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

Export of goods – a resolution of the Supreme Administrative Court concerning interpretation of "exporting goods to a country outside the territory of the European Union"

The Supreme Administrative Court (NSA) adopted a resolution on 25 June 2012 (files no. I FPS 3/12), according to which, pursuant to art. 2 section 8 of the VAT Act in the wording binding in 2012, the requirement of "exporting goods to a country outside the European Union" is met not only if the procedure of goods' exporting specified in art. 161 of the Community Customs Code is commenced by reporting the goods' exporting in the customs office located in Poland. However, NSA decided that in order to apply 0% VAT rate by a taxpayer as regards export of goods, it is necessary that the place where the export begins must be Poland and it requires indication that the goods outside the European Union are exported – pursuant to art. 22 section 1 of the VAT Act - within the transport which has begun within the territory of Poland in the performance of the activity referred to in art. 7 of the VAT Act.

Expert's Comment

"The resolution of NSA touches a recently very controversial issue being of vital importance for the taxpayers who deal with export of goods outside the European Union when the goods are declared in the customs office located in a Member State other than Poland. According to some tax authorities, in case of reporting the beginning of the export procedure in a Member State another than Poland, such a delivery is not considered as export within the meaning of the Polish VAT Act but it is only a relocation to another Member State within the same enterprise and afterwards it is deemed as export from another Member State.

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The subject resolution explains some doubts within the abovementioned scope. The fundamental statement of NSA is that reporting the commencement of the export procedure within Poland is not necessary in order to consider such a delivery as export. Therefore, it is admissible to recognize a delivery from Poland which is to be entered for customs clearance in another Member State as export.

Nevertheless, the Court stipulated that a taxpayer is obliged to prove that the export procedure consisting in preparation of goods for shipment and the shipment itself begins in Poland. Nevertheless, in many cases this requirement may be difficult to be proved. When a consignment is transported outside the European Union in the same condition as it was dispatched by the taxpayer from Poland and without division of the transport into stages – from Poland to another Member State and subsequently from that state to a state outside the EU, proving that the abovementioned requirement is met will be relatively simple. However, the situation may become more complicated if the goods exported outside the EU are re-packed in a warehouse in another country or stored for some time".

CIT

In the judgement of 1 June 2012 (files no. II FSK 2360/10), NSA ruled on recognition of the expenditures incurred in connection with conclusion of an agreement on public road repair in tax costs.

NSA is of the opinion that the issues concerning the formal basis for cash transfer made by the company in performance of contracts (agreements) concluded in relation to its business activity cannot be resolved at the stage of interpretation proceedings. If the taxpayer specifies in the request for interpretation that the contract of donation constitutes the basis for cash transfer for the benefit of a poviat in relation to the agreement on public road repair – such expenditures do not constitute tax deductible expenses. However, if the taxpayer proves that the cash paid for the benefit of the poviat in relation to the agreement constitutes a counter-performance, such expenditures can be regarded as tax expenses provided that the performance is connected with realization of a particular investment. The subject judgment underlines the essential influence of the manner of defining the counter-performances connected with reconstruction of road infrastructure related to realization of real-estate investments on tax consequences.

NSA in the resolution of 25 June 2012 (files no. II FPS 2/12) resolved that a loss corresponding to a non-depreciated initial value of an investment in extraneous fixed assets and which does not meet the prerequisites referred to in art. 16 section 1 of the CIT Act can be deemed as tax deductible expenses, if the taxpayer's actions resulted from the aim specified in art. 15 section 1 of the CIT Act.

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NSA specifies in details the terms: "loss" and "liquidation". The Court acknowledged that in each of the analyzed cases, the normative environment in which the term "loss" has appeared should be investigated. The loss should be connected exclusively with a situation which does not depend on the taxpayer's actions. However, if the taxpayer's actions consisting in liquidation of a not fully depreciated investment results from his independent decisions and are economically justified, the actions may aim at keeping or securing the source of income. NSA explicitly agreed also with the favourable to the taxpayers standpoint presented recently by courts, according to which the term "liquidation" should be widely understood and thus, not only as a physical destruction but also as a deletion from the fixed assets account.

The Province Administrative Court (WSA) in Gdańsk, in the verdict of 12 June 2012 (files no. I SA/Gd 439/12) assessed the possibility of estimating the revenue from a contribution in-kind made to a Cypriot company under art. 14 sections 1-3 of the CIT Act to a market value.
WSA decided that if the nominal value of the shares acquired in exchange for a contribution in-kind in the form of fixed assets corresponds to the market value of fixed assets, the nominal value of shares will constitute the revenue. However, if the nominal value differs from the market value of the in-kind contribution, the provisions specified in art. 14 sections 1-3 in connection with art. 12 section 1 point 7 of the CIT Act shall apply (i.e. a tax authority can adjust the revenue upwards). This judgment is definitely unfavourable to the taxpayers and contrary to the hitherto approach of the tax authorities according to which, in case of estimation of revenue from shares' acquisition in exchange for a contribution in-kind, the revenue can be estimated only on the basis of the nominal value of the acquired shares.

PIT

In the judgment of 6 June 2012 (files no. I SA/Łd 500/12), WSA in Gdańsk ruled as regards taxation with PIT of cash received by a shareholder in connection with a partial withdrawal of contribution without leaving the partnership (legislation in force after 31 December 2010).
Since 1 January 2011, only the revenues from reimbursement of contributions made to a partnership are exempted from PIT. Pursuant to the Court's opinion, reimbursement of the contribution in a company which is not a legal entity will not be subject to tax only if the such partnership is liquidated or if the shareholder leaves the partnership. According to WSA, the cash received by a shareholder for a partial withdrawal of a non-cash contribution from a partnership, when he still remains in the company, is subject to PIT. Pursuant to art. 10 section 1 point 3 of the PIT Act, the revenue resulting from the above should be qualified to the income source from an business activity. The judgment is unfavourable to the taxpayers.

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It differentiates the tax consequences of a partial withdrawal of contributions from a partnership and the complete withdrawal of the contribution. From the economic point of view, such differentiation appears to be irrational. Nevertheless, the above results from an oversight of the legislator who probably has forgotten, when amending the provisions from 2011, about the fact that such a situation may have place in practice.

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If you wish to get more specific information with regard to the above, please contact us:

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