KSP TAX NEWS 7/2014

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

The Supreme Administrative Court indicated the criteria for recognition of granting loans by a company for activities performed sporadically.

In its judgment of 11 June 2014 (file reference No. I FSK 1292/13), The Supreme Administrative Court indicated, the criteria for recognition of granting loans by a company for activities performed sporadically, within the meaning of art. 90 item 6 of the Tax on Goods and Services Act.

The Supreme Administrative Court concurred with the stand of the company on the issue, that granting only three interest loans to associated entities for the purpose of purchasing a dependent company may be understood as incidental activities which should not be perceived as constituting direct, continuous and necessary expansion of the company's activities. Therefore, it is beyond consideration that act of granting three interest loans constitutes additional, continuous business activities Consequently, the turnover achieved on an account of those loans should not be included in the proportion forming the basis of deducting the charged tax.

Expert's Commentary

"Granting the loans, performed as an element of financial service exempted from VAT leads a lender to generating the turnover exempted from VAT, in the form of received interests' or dues' value. That, in turn, may affect the right to deduct the input VAT tax. In particular, we should analyze the potential impact of using loans on the so-called deduction proportion applied to the purchases associated with the totality of entities' actions. Under the currently effective provisions of the VAT Act, the turnover taken into consideration when calculating the proportion does not include, among others, the turnover generated on account of auxiliary financial services and the services listed in art. 43 item 1 point 7, 12, 38-41 (including the loan granting services) in the scope in which those transactions are of auxiliary character. Before 1 January 2014 the provisions were a little different – they indicated that sporadically – performed part of financial services was excluded from the proportion. The act did not define sporadic activities which made the borderline between sporadic and non-sporadic activities uncertain. Similarly, the current provisions fail to explain what should be understood by the term of auxiliary activities. The new wording of analyzed provisions is based directly on the current provisions of the VAT Directive, and thus it may also affect the interpretation of the factual circumstances occurred under the regulation of the previous wording of the provision (i.e. until the end of 2013). When

Elżbieta Lis
Tax Advisor

E: elzbieta.lis@ksplegal.pl
T: +48 32 731 6858

KSP
legal & tax advice

interpreting the concept of auxiliary or sporadic activities, we should refer to the jurisdiction of the Court of Justice of the European Union (CJEU). This jurisdiction indicates that the auxiliary activities, within the meaning of the VAT Directive, are activities which do not constitute the direct, continuous and necessary supplementation of the basic taxpayer's activity, and in connection with the taxpayer uses only to a minimal degree the assets or services entitling to VAT deduction Jurisdiction of CJEU also indicates that assessing the sporadic character of the selected activity should not be based on the level of revenues it generates (or at least – it may not be the decisive criterion).

Therefore, the analysis of sporadic or auxiliary character of selected activity performed in a specific circumstances, should involve all circumstances associated with the transactions, not only their number of value.

VAT

In its judgment of 25 June 2014 (file reference No. I FSK 1072/13) the Supreme Administrative Court stated that the division of revenues and costs in a consortium executed by the leader in favor of the consortium partners, is not an activity subject to VAT taxation.

The Court found that the division of revenues and costs in a consortium executed by its leader in favor of the consortium partners pro rata to their shares in the joint undertaking does not constitute neither delivery of goods for consideration nor provision of services, within the meaning of the Vat Act, and thus this division does not constitute an activity taxable with VAT.

In his individual interpretation of 4 June 2014 (reference No. IBPP1/443-219/14/DK), the Director of the Tax Chamber in Katowice, addressed the issue of the VAT liability occurrence moment, due to provision of the services to prepare various kinds of opinions, expertises, documentation and scientific works.

Under the general rule included in art. 19a item 1 and item 2 of the act, the tax obligation which concerns foregoing cases occurs upon the actual execution of the respective works planned for each stage of payable service (or the part of the service for which the payment was specified). Therefore, the moment of tax liability occurrence is not determined by the date of signing the respective work advancement or acceptance reports. This means that the taxpayers are not completely free in determining the moment of tax liability occurrence for the service in which the completion is confirmed with a formal document, such as report.

In his individual interpretation of 22 May 2014 (reference No. ITTP3/443-98/14/MD), the Director of the Tax Chamber in Bydgoszcz, addressed the issue of the documents authorizing to apply the 0% VAT tax rate in the scope of intra-community supply of goods.

If the documents (functioning also in the electronic form), connected with the executed intra-community acquisition of goods, which are at the disposal of the company, unequivocally confirm the actual supply of the goods to the EU buyers, on the territory of an EU member state other than Poland, then those documents may be the sufficient basis for applying the preferential tax rate of 0% (art. 42, item 3 and 11 of the VAT Act). It should be noted that the provisions do not determine the form of

KSP Legal & Tax Advice
ul. Chorzowska 50
40-121 Katowice

T: +48 32 731 68 50
F: +48 32 731 68 51

E: kancelaria@ksplegal.pl
www.ksplegal.pl

KSP
legal & tax advice

documents that specific entity should use within the context of the justifiable application of 0% tax rate. Therefore, any form is admissible, as long as it at least allows to substantiate the transfer of goods from the territory of a country, and their supply to the territory of another member state. In the age of the broadly understood technological communication, there is no basis for denial the probative force of documents sent – for example – by email.

CIT

In his individual interpretation of 12 June 2014 (reference No. ILPB3/423-283/13/14-S/JG), the Director of the Tax Chamber in Poznań, taking into consideration the judgment of the Province Administrative Court in Wrocław of 18 February 2014, considered non-pecuniary dividends as not constituting the transfer for consideration of things within the meaning of art. 14 item 1 of the CIT Act.

The gratuitous disposal of the ownership to a real property is not a transfer for consideration of things, because the consideration, specified in art. 14 item 1 of the CIT Act, assumes the execution of a specified reciprocal provision, in exchange for received benefits. Additionally, the transfer of real property ownership, made by a company and treated as a substitute of a pecuniary benefit always decreases the assets of that company. Consequently, in that case the tax revenue within the meaning of art. 12 item 1 of the CIT Act will not rise.

In his individual interpretation of 6 June 2014 (reference No. IPPB5/423-246/14-4/KS), the Director of the Tax Chamber in Warsaw, addressed the issue of the premises for closing the accounting books of a limited joint-stock partnership (pl. spółka komandytowo-akcyjna (SKA)) as of 31 December 2013.

In the light of art. 4 item 2 of the Act amending the Corporate Income Tax Act, the Personal Income Tax Act and the Tonnage Tax Act of 8 November 2013, the SKA that:

1) were not established after art. 4 item 2 of the Act amending the CIT, PIT and the Tonnage Tax acts took effect (12 December 2013), and their financial year started in 2013 does not end on 31 December 2013 or
2) did not change the financial year after the above provision took effect

- are not obliged to close the accounting books and to prepare the financial statement as of 31 December 2013. In his interpretation, the Director addressed the obligations of the SKA which introduced changes to its financial year prior to the moment when the provisions took effect and whose partners were solely legal persons.

It should also be noted that in factual circumstances, in which the partner of an SKA is a natural person, the Directors of chambers challenge the possibility to introduce a financial year other than a calendar year - e.g. the interpretation of the Tax Chamber in Poznań of 15 April 2014, reference No. ILPB3/423-80/14-2/JG and of the Tax Chamber in Bydgoszcz of 31 March 2014, reference No. ITPB4/415-42/13/TK. Those interpretations have assumed that the financial year in a presented situation may only be a calendar year.

KSP Legal & Tax Advice
ul. Chorzowska 50
40-121 Katowice

T: +48 32 731 68 50
F: +48 32 731 68 51

E: kancelaria@ksplegal.pl
www.ksplegal.pl

KSP
legal & tax advice

TAX ORDINANCE

In its judgment of 18 June 2014 (file reference No. III SA/Wa 3203/13), the Province Administrative Court in Warsaw, issued a decision on the premises for using the preferential rate of interest on tax liabilities, referring to art. 56 § 1 of the tax ordinance.

The provision of art. 56 § 1a of the tax ordinance allows to apply the reduced rate of interest on tax liabilities also if the tax liability has been paid at the taxpayer's initiative, and the liability has been paid within 7 days of submitting the correction of the tax declaration. As a result, the voluntary payment of the interest left after the end of the tax year, as a result of paying smaller advances, justifies the application of the reduced rate, specified in art. 56 § 1a of the tax ordinance, to the calculation of that interests.

* * *

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

Contact in KSP:

Magdalena Patryas
Partner
T: +48 32 731 68 53
E: magdalena.patryas@ksplegal.pl

Elżbieta Lis
Partner
T: +48 32 731 68 58
E: elzbieta.lis@ksplegal.pl

KSP Legal & Tax Advice
ul. Chorzowska 50
40-121 Katowice

T: +48 32 731 68 50
F: +48 32 731 68 51

E: kancelaria@ksplegal.pl
www.ksplegal.pl