KSP TAX NEWS 8/2014

We have the pleasure of presenting to you the KSP Tax News, a bulletin in which we describe selected judgments and interpretations issued or published in July 2014. We hope you find this publication interesting.

The Constitutional Tribunal considered taxation of "other gratuitous benefits" compliant with the Constitution, and provided an interpretation of the notion in line with the Fundamental Law

In the judgment of 8 July 2014 (file K7/13) the Constitutional Tribunal expressed an opinion on taxation of the so-called other gratuitous benefits provided by employers to their staff members.

The Tribunal considered levying the personal income tax on such gratuitous benefits compliant with the Constitution of the Republic of Poland, provided that some additional conditions are satisfied:

a) the benefit is provided at the employee's consent (the use of such benefits is fully discretionary)
b) The benefit is provided in the interest of the employee (and not of the employer), i.e. the employee will benefit therefrom in the form of an increase of assets or avoidance of expenses that they would otherwise have to incur.
c) Benefits flowing to the employees are measurable and allocable to individual employees (i.e. the benefit is not available on a general basis to everybody).

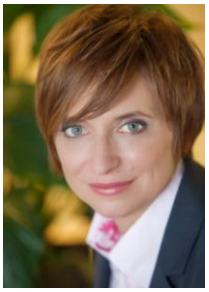
Expert Comment

According to provisions of the Personal Income Tax Act in force at the moment, revenue consists of cash or monetary values received by a taxpayer or left to the taxpayer's disposal in a calendar year as well as the value of in-kind benefits and other gratuitous benefits. Taxation of the other gratuitous benefits provided by employers to their employees has for years now been subject to interpretative discrepancies and doubts amongst administrative court judges. To date, the Supreme Administrative Court (Najwyższy Sąd Administracyjny - NSA) adopted two important resolutions in this respect: one on 24 May 2010 (file II FPS 1/10) and the other on 24 October 2011 (file II FPS 7/10), both of which applied to accounting for the so called "medical package". According to the resolutions, benefits received by the employee as part of the medical package were to be classified as other gratuitous benefits subject to taxation.

The Constitutional Tribunal provided a thorough interpretation of such "other gratuitous benefits". The effects of the judgment will be important for assessing all gratuitous benefits offered to employees in terms of tax law. The judgment passed by the Constitutional Tribunal indicates that taxation of other gratuitous benefits provided by employers to their staff depends on satisfaction of additional conditions.

First of all, a gratuitous benefit must lead to a material advantage on the side of the employee. The advantage may be of two types: an increase of assets (which usually results from cash payments) or saving on expenses (which may follow from an in-kind benefit or a service).

The discretionary nature of the benefit is another condition that must be met for the benefit to be considered as taxable revenue for the employee. Voluntary acceptance of gratifications such as a company flat, a monthly bus pass, health insurance package or transportation benefit is a condition for them to be considered a saving on expenses,



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since in the absence of such a benefit provided by the employer, the employee would have to incur his/her own expense in this respect. However, if the gratuitous benefit was accepted as a condition necessary to perform work in accordance with the law, no benefit taxable with PIT arises on the side of the employee (e.g. insurance).

The benefit must also be measurable and allocable to each individual employee (rather than generally available to all staff members).

Another condition to be met for the gratuitous benefit to be taxable with personal income tax is that the subject of the benefit must be handed to the employee by the employer or, if it is a service, it must be actually provided to the employee.

The interpretation presented by the Constitutional Tribunal ultimately resolves the issue of taxation of benefits such as additional insurance, transportation to/from the workplace, integration events, or participation in a business dinner.

Additional insurance of staff members may lead to taxable benefit provided that the benefit is awarded to the employee at his/her prior consent.

The same is applicable with respect to the transportation benefit - the employee may not be interested in transportation arranged for by the employer (e.g. because, using their own car they give a ride to other family members). However, if the employee takes a decision to use the transportation benefit (even contrary to their original statement), they definitely save on an expense they would need to incur otherwise, and thus they receive a taxable benefit.

The Constitutional Tribunal is of the opinion that the objective criterion of material benefit on the side of the employee is not met if the employer offers to staff members participation in integration or training events organised outside the place of work (e.g. trips). In this case, even if the employee participates in the event (conference, training session) at their own discretion, no benefit arises on their side, even in the form of saving on an expense. No assumption can be made that if it was not organized by the employer, the employee would spend money to take part in such an event.

In the light of the above judgment, it may be worth analysing the benefits granted to employee and verifying the tax classification made to date. This judgment will certainly affect the approach of tax authorities and the other judgments in this respect.

VAT

The Supreme Administrative Court (NSA), in the judgment of 1 July 2014 (file I FSK 1123/13), held that the amount of PLN 100 applicable to the overall value of small-value gifts referred to in Article 7 par. 4. 1 of the VAT Act is the net amount.

Pursuant to Article 7 par. 4. 1 of the VAT Act, a small-value gift involves goods provided to one person to the overall value of up to 100 zlotys during one tax year, where the taxpayer keeps records that make it possible to identify the recipients of the gifts.

The VAT Act does not stipulate whether the amount is to be understood as a net or gross amount. The NSA pointed out the provision of Article 7 par. 4. 2 of the VAT Act whereby small-value gifts involved also those goods that were not entered on records, if the purchase price thereof did not exceed PLN 10. The court was of the opinion that the notion of "purchase price" as used in the provision, should also be referred to the above-mentioned amount of PLN 100.

The Director of the Fiscal Chamber in Warsaw, in an individual interpretation of 16 June 2014 (IPPP3/443-243/14-2/JK), indicated that a cash discount applicable to an earlier payment should be documented with a correction invoice. Pursuant to Article 29a par. 7 of the VAT Act, the taxable basis did not include price discounts on early payments. The Director of the Fiscal Chamber of Warsaw was of the opinion that a rebate granted for early payment (a cash discount) was of conditional nature. It was granted under a suspending condition, i.e. provided that an early payment was made. If the condition is met after delivery, the discount is granted after the transaction. Thus, it cannot be taken into account in the unit price at

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the moment of issuing the original invoice, and for the same reason, in the taxable base. Therefore, the provision will not be applicable. At this stage it is not known whether the discount has actually been granted or not. The above is confirmed by the provision of Article 106j par. 1.1 of the Act, which stipulates that if, after issuance of an invoice, a rebate is awarded (as referred to in Article 29 par. 7.1 of the Act, i.e. a cash discount), the taxpayer shall issue a correction invoice.

PROCEEDINGS BEFORE ADMINISTRATIVE COURTS

The Supreme Administrative Court, in a resolution adopted on 7 July 2014 by 7 judges (file II FPS 1/14), held that the principle of ban on *reformatio in peius* shall not apply to individual interpretation of the tax law.

Pursuant to Article 134 § 2 of the Law on Proceeding Before Administrative Courts, the court must not issue a judgment negative for the appellant, unless a breach of law is identified which leads to invalidation of a deed or an act subject to appeal. The possibility to apply the above principle to an appeal relating to individual interpretations was subject to serious doubts in judicial rulings and decisions. In the resolution of 7 judges, the NSA held that the norm stipulated in Article 134 § 2 of the Law consisted of two inseparable components: the general rule in the form of a prohibition on passing a judgment negative for the appellant, and the exception from the rule, i.e. a situation where the court considers a deed or an act invalid. The provisions on invalidity are not applicable to individual interpretations of the tax law, and consequently, according to the NSA, application of the entire Article 134 § 2 of the Law is excluded. The NSA emphasized that it was inadmissible to apply certain components of a legal norm only, so the principle of ban on *reformatio in peius* did not apply to individual interpretations of the tax law.

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

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