KSP TAX NEWS 9/2012

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

Settlement of product price adjustments following a price change - judgments by the Supreme Administrative Court (NSA)

Pursuant to the verdicts of the Supreme Administrative Court of August 2, 2012 (file II FSK 31/11, II FSK 180/11), the result of revenue adjustment should be charged to the account period in which the original invoice was issued. The collective adjusted invoice issued due to an increase or decrease of the price should thus be recognized in the account period in which the tax obligation from the sale of goods arose. NSA is of the opinion that each time the revenue adjustment documented by an adjusted collective invoice should be charged against previously shown revenue, since the subsequent issuance of the adjusted invoice leads to no change to the date on which the revenue arose. In practice it additionally means that where revenue is derived in foreign currency, its conversion into Polish zlotys should be made at the average FX rate announced by the National Bank of Poland (NBP) on the day of deriving the original revenue rather than the date of issuance of the adjusted collective invoice.

Expert Comment

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"The Corporate Income Tax Act does not specifically provide for the manner of revenue adjustment. To date it was a common practice, both with respect to the VAT Act and the CIT Act, that the manner of making the adjustment depended on its cause. Where the cause for the adjustment already existed at the time of issuing the original invoice (e.g. if an error occurred in the quantity or value of goods in the invoice), the adjustment should be made "retrospectively", whereas in case the cause arose after the invoice issuance (e.g. as a result of arrangements between the parties regarding the price change), the adjustment should be made on the current basis.

In the situation concerned, the basis for the adjustment was the fact that the parties agreed remuneration for the supply of goods in an amount other than

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specified in the original invoices. The agreement between the parties provided for a mechanism of price adjustment in a situation where, after an account period ends, the profitability level accomplished by the parties to the transaction is other than originally assumed. Hence, the cause for the adjustment occurred after the original sale took place. In this situation, NSA resolved that the adjustment should be made retrospectively, supporting the decision with the argument that the general rules regarding revenue should be applied, i.e. revenue may arise once only and it arises upon the original transaction of sale. ***This approach is inconsistent with the interpretations provided so far by both: tax authorities and administrative courts.*** *Additionally, the approach presented by NSA is going to trigger significant problems of practical nature for taxpayers. First of all, it means that upon issuance of a collective adjusted invoice, the taxpayer must go back to each adjusted invoice and increase or decrease the revenue specified therein accordingly. In certain situations it may also lead to tax arrears. Moreover, the taxpayer who is obliged to adjust revenue in a foreign currency must apply the historical FX rate of the day preceding the original revenue date to convert it into Polish zlotys.*

The NSA's verdicts discussed here seem to be exceptional and we hope they will not affect the favourable line of judgments passed in this area".

CIT

The Supreme Administrative Court in the judgment of August 02, 2012 (file II FSK 41/10) resolved that remuneration paid by the taxpayer for a loan, computed as interest on the company's profits, must not be recognized as deductible costs.

NSA pointed out that the definition used in judicial rulings indicates that interest constitutes remuneration for the use of third party's money or other exchangeable items, usually payable in exchangeable items of the same type as the main debt in proportion to its amount and term of use. The definition indicates that only the remuneration for the use of the principal, which is fixed as a percentage of the loan sum, is regarded as interest. Other forms of remuneration, computed on the basis of a rate other than a percentage of the sum borrowed (e.g. depending on the company's profit) does not fulfill the requirements of the interest definition and thus must not be treated as deductible cost by the taxpayer. The judgment issued by NSA is an example of the court's conservative approach to the manner of computing remuneration for a loan, and taxpayers should be cautious when fixing the same in agreements.

The Province Administrative Court (WSA) of Warsaw in the judgment of August 06, 2012 (file III Sa/Wa 2839/11) stated that the validity of a certificate of tax residency cannot be confirmed by a declaration that no changes occurred in the residency, submitted to the Polish taxpayer by a foreign contracting party.

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WSA is of the opinion that, pursuant to the provisions of the CIT Act, to prove tax residency of a foreign entity, a valid certificate must be issued by a competent foreign administration authority. Confirmation of validity of a certificate that was not provided with a validity date by the authority is not equivalent to holding a valid certificate. Certification of tax residency validity should each time be issued by the authorized foreign authority in the form of a new certificate. The WSA's verdict is not in line with the interpretation of validity of tax residency certificates, favourable for taxpayers, which has recently been advocated by administrative courts. However, the Court indicated that it is possible to validate the tax residency certificate each year rather than for the purpose of each payment of the amount due. Taxpayers who make payments for e.g. the use of copyrights or payment of dividends or interest, who are exempt of withholding tax payment (WHT) based on the tax residency certificate should take heed of the aforesaid judgment.

The Minister of Finance, in the interpretation dated May 31, 2012 (file DD5/8211/52/RDX/10/PK-1490/2010) modified *ex officio* the interpretation issued by Head of the Fiscal Chamber of Warsaw of February 25, 2010, and stated that making use of a warranty (surety) provided by a related entity leads to revenue arisen from gratuitous performance on the side of the entity receiving the warranty.

The Minister of Finance changed *ex officio* the interpretation issued by the Head of Fiscal Chamber in Warsaw, which was favourable for taxpayers, to adjust it to the current line of rulings issued by administrative courts. Said line is that a gratuitous warranty (surety) obtained by a company from another entity, e.g. its shareholder or a contracting entity, is a gain which should be added to the company's revenue as gratuitous performance subject to CIT. The Minister of Finance seldom exercises his power, provided for in the Tax Ordinance Act, to amend a tax interpretation *ex officio*. The taxpayers who treated a warranty or a surety provided to them as tax-neutral should revise their approach in this respect.

VAT

Head of the Fiscal Chamber of Łódź in the individual interpretation of August 01, 2012 (file IPTPP2/443-412/12-2/KW) stated that the IE-599 document, obtained in the form of a paper printout, may be the basis for applying 0% VAT in case of export.

Application of 0% VAT for indirect export is possible provided that, *inter alia*, the taxpayer holds documents confirming export outside the European Union. The Export Notification IE-599 fulfills the condition. The Head of the Fiscal Chamber believes that also a printout of the notification from the Export Control System (ECS) meets the requirement. If the paper version of IE-599 shows the identity of the goods subject to delivery and export, the taxpayer is entitled to apply 0% VAT for the supply. The decision of the tax authority is convergent with the line of judgments, convenient for taxpayers, whereby it is possible to apply 0% VAT to exportation of goods with no need

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for the tax authority to certify that Notification IE-599 printed from ECS is genuine.

The Province Administrative Court (WSA) of Warsaw in the judgment of August 23, 2012 (file III SA/Wa 1903/12) resolved that exportation of goods takes place not only when the goods are subject to the Community export procedure.

WSA is of the opinion that export of goods is a notion independent of the "export procedure". The Court expressed the opinion that applying the export procedure to certain goods is not a condition for the goods dispatch or transportation (export) outside the territory of the Community. It is also not necessary to use the original customs document to apply 0% VAT on the export of goods. The verdict stipulates that the taxpayer may use a document other than the original customs document, e.g. a xerox copy, photocopy or official copy thereof, but they must be certified true copy of the original by e.g. a seal of the competent customs authority. The standpoint is convenient for the taxpayers who sell goods to entities outside the European Union.

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

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