KSP TAX NEWS 10/2012

We are pleased to present to you KSP Tax News, in which we describe selected judgments and interpretations issued or published in September 2012. We hope this publication proves useful in your everyday operation

Consulting services and providing access to know-how - a judgment passed by Province Administrative Court (WSA) in Rzeszow

On 13 September 2012, the Province Administrative Court (WSA) in Rzeszow stated in its judgment (file I SA/Rz 621/12) that it was inadmissible to recognize a payment made by a party to an agreement for a know-how transfer without a detailed review of all the activities performed under the agreement. If the agreement concerns provision of access to know-how, i.e. knowledge related to experience acquired in an industrial, commercial or scientific discipline, the knowledge should each time be defined. In particular, it should be proven which specific knowledge is made available and which discipline it involves. However, if the services made under the agreement are consultations with experts (e.g. accountants, lawyers), who make use of information generally accessible to professionals, this type of services are consulting services rather than provision of access to know-how. In this case the payments cannot be treated as royalty payments in the light of the relevant double taxation avoidance agreement.

Expert Comment

„The judgment issued by WSA in Rzeszow is favourable for taxpayers. Tax authorities and fiscal control bodies often put in doubt the reasonableness of costs of intangible service acquisition. The authorities sometimes adopt an approach whereby in case consulting services are acquired from foreign entities from a capital group, they also involve provision of know-how, which leads to the necessity to pay the withholding tax. Inspectors frequently disregard the fact that to treat a transaction as provision of access to know-how, certain requirements must be met. The knowledge made available must not be general knowledge. It must follow from the experience acquired and be fixed in writing and made accessible in this form. Transfer of know-how does not include verbal consultations with a professional, or consulting services provided by a professional based on his knowledge. The above

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judgment may be an argument in a dispute with tax authorities in this matter".

CIT

The Supreme Administrative Court (NSA) in the judgment of September 11, 2012 (file II FSK 269/11) decided that the amount of own claim which forms a contribution in-kind to a capital company is not a deductible cost.

A taxpayer has operated business activity of providing loans. He intended to make a contribution to a capital company in the form of claims, both mature and not-mature, resulting from the loans he has provided. The taxpayer was of the opinion that the claims thus contributed should be classified as deductible costs in accordance with Art. 15 sec. 1j item 3 of the CIT Act. The Supreme Administrative Court (NSA) disagreed with such standpoint. According to the court's judgment, in view of the above regulation, only expenses for acquisition of an asset can be treated as deductible costs, i.e. acquired claims rather than own ones. The verdict is not favorable for taxpayers. The amount of own claims is not going to be a deductible cost for the entity making the contribution in-kind, despite the fact that the claim was connected with incurring certain expenses, i.e. outflow of funds intended for giving the loan.

The Province Administrative Court (WSA) in Wrocław, in the judgment of September 7, 2012 (file I SA/Wr 819-821/12) resolved that an increase of share capital of a company made upon a resolution adopted by the shareholders' meeting, is subject to the civil law transaction tax.

Pursuant to the provisions of the Capital Directive, Member States shall exempt from capital duty transactions which were, as of 1 July 1984, exempt or taxed at a rate of 0.5 % or less. WSA resolved that due to the fact that at that time the activity of increasing share capital was subject to 5 and 10% tax, at the moment Poland is not obliged to exempt it. The Polish provisions of the Act on Civil Law Transactions which stipulate that an increase of the share capital is taxable, are in conformity with the EU law. In practice it means that those taxpayers who, after the day of Poland's accession to the European Union, paid the civil law transaction tax on an increase of the share capital in a limited liability company stand no chance to have the overpaid tax refunded.

VAT

The Province Administrative Court (WSA) in Krakow in the judgment of September 18, 2012 (file I SA/Kr 881/12) resolved that payment to a contractor of a cash bonus due to accomplishment of certain sales target or timely payment of the amount due is a rebate within the meaning of provisions of the VAT Act.

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According to the WSA's judgment, payment of the cash bonus to a contractor has equivalent economic effect as giving a rebate to the contractor. Giving a cash bonus is thus not a separate service under the VAT regulations, but in fact it is a rebate. As a consequence of this standpoint, a rebate is to be recognized as reducing the taxable base. The court stated, however, that the taxpayer is not obliged to document the bonus received with a correcting invoice. The WSA's judgment is consistent with the Supreme Administrative Court's resolution of June 25, 2012 (file I FPS 2/12) recognizing a cash bonus as a rebate. However, it seems that WSA's standpoint regarding the way of documenting the bonus is more lenient. According to NSA's resolution passed in June, a correcting invoice must be issued, whereas the aforementioned judgment states that an account note should be sufficient to document the bonus. A written statement of reasons for the judgment should confirm the above standpoint.

PIT

The Province Administrative Court (WSA) in Warsaw in the judgment of September 4, 2012 (file III SA/Wa 3063/11) resolved that the use of the exemption from taxing revenue derived from share exchange, as provided for in Art. 24 sec. 8a of the PIT Act, is not limited to a majority shareholder.

In the case in question, an individual holding shares in a holding company with other shareholders contributed to said company shares or stock in other companies (share exchange). As a result of the transactions, the holding company became the holder of majority votes in the companies. WSA stated that the scope of exemption of the revenue derived from share exchange under Art. 24 sec. 8a of the PIT Act also includes situations where a minority shareholder makes the exchange, but, as a result of the share contribution made jointly with the shares held by others, the majority of votes is obtained. An interpretation to the contrary would be non-compliant with the EU law, which stipulates that share exchange should generally be tax-neutral. The judgment is favourable for taxpayers and enables planning asset restructuring through tax-neutral exchange of shares.

The Province Administrative Court (WSA) in Gliwice, in the judgment of September 19, 2012 (file I SA/Gl 161/12) resolved that purchase of an insurance policy by the employer for an employee leads to generation of revenue subject to PIT.

In the case under discussion, the company purchased insurance policies for its staff traveling abroad on business. The insurance covered only the period of the business trip, and the employee could not make use of the policy on out-of-business basis. The company was of the opinion that payment for the insurance policy for the staff member did not lead to generation of revenue for the employee, and the company, as the remitter, was not obliged to

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collect the advance PIT. However, WSA resolved that said benefit was not included in the list of PIT exemptions, and thus it was subject to taxation. It means that revenue will be generated for the taxpayer even when the primary purpose of the policy purchase is to secure the employer against incurring costs in the future for the employee's treatment if he suffers an accident during the business trip. This standpoint is consistent with the negative line of judgments presented recently by administrative courts, and the employers and employees must take into account the risk of levying PIT on this and similar benefits.

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

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