KSP TAX NEWS 10/2013

We are pleased to present you KSP Tax News, in which we describe selected rulings passed in August 2013. We hope this publication proves useful in your everyday operation.

Positive verdict concerning recognition of catering expenses as deductible costs - a judgment by the Supreme Administrative Court *[Najwyższy Sąd Administracyjny - NSA]*

The Supreme Administrative Court, in the judgment of 24 September 2013 (file II FSK 2081/13), confirmed that expenses incurred for entertainment[1] encompass those costs only which are principally and solely intended to create and improve the company image.

In the case at hand, the company planned to arrange for periodic meetings with entities it regularly cooperated with, and which were the participants of its sales network. The arrangements were to involve catering and accommodation for the attendees. The company applied for an interpretation to determine whether the expenses incurred for said catering and accommodation services could be recognized as deductible costs. The standpoints of the Director of the Katowice Fiscal Chamber and of the Province Administrative Court of Gliwice were negative for the taxpayer. The Supreme Administrative Court revoked both the judgment and the interpretation issued by the Head of the Fiscal Chamber. The grounds of the judgment largely relied on the opinion expressed in the verdict by 7 judges of 17 June 2013 (file II FSK 702/11) and the court confirmed that expenses incurred for "business representation" involved those costs only which are principally and solely intended to create and improve the company image. Consequently, the court resolved that expenses for catering and accommodation in the case at hand could be recognized as deductible costs, as they were used to derive revenue and did not constitute entertainment. The same standpoint was expressed by the Province Administrative Court of Warsaw in the judgment of 26 September 2013 (file III SA/Wa 656/13), which indicated that "*entertainment expenses, which cannot be recognized as deductible costs, are those that serve exclusively to create a positive image of the company. The court is of the opinion that if expenses are linked to ordinary business activity, they can be recognized as deductible costs*".

Expert Comment

"For years now the notion of "entertainment", as provided for in Article 16 (1)(28) of the CIT Act, has raised controversies. To date, it was usually considered that entertainment should be understood to involve sumptuousness and grandeur. Recently, opinions have also emerged whereby entertainment should be understood as "representation of someone's interest, acting on somebody's behalf". In the aforesaid judgment of 7 judges, the Supreme Administrative Court presented an interpretation of the notion of "entertainment expenses" different from that described above, and it indicated that

[1] Be advised that the Polish legislator uses the term "representation", which is broader than the notion of "entertainment" and may cover expenditure incurred for the purpose of purchasing food and catering services, gifts for contracting parties, etc.

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these were expenses the sole and major purpose of which was to create and improve the company image and should directly contribute to the increase of the deductible costs by the taxpayers. The interpretation undoubtedly narrows down the notion of entertainment expenditure. Adoption of this standpoint would mean that a substantial amount of expenses incurred for catering, which had so far been excluded from deductible costs, may, after all, be recognized as such. This standpoint of the NSA was shared by the courts taking the aforesaid verdicts, which is indicative that a line of judgments positive for the taxpayers has been started with respect to the interpretation of the notion of entertainment expenses within the meaning of Article 16 (1)(28) of the CIT Act".

VAT treatment of the use of real property without a contract

The Supreme Administrative Court, in the judgment of 9 September 2013 (file I FSK 1315/12), resolved that no value added tax is to be imposed in certain cases of use of the real property with no valid contract.

The Mayor of a town, acting on behalf of the State Treasury, concluded a contract for real property rental. After the term specified in the contract, the rental expired. However, the Company did not return the property used, and continued to use the plot of land. As the requests sent to the company for return of the land proved ineffective, the commune imposed thereon an obligation to pay compensation and applied to the Minister of Finance to find out whether the compensation was to be considered remuneration for a service, and, by the same token, whether the use of the real property with no effective contract was subject to VAT. The Minister of Finance issued an interpretation that was inconvenient for the taxpayer, as he assumed that in the situation at hand the contract for rental was subject to tacit extension. However, the court resolved that no legal relationship, in which mutual performances were made, existed in the situation (even of an implied nature). The commune requested that the company transfer the real property. Hence, the court held that in this situation, the compensation was not a payment within the meaning of the VAT regulations. The judgment confirms the opinion that the use of real property with no valid contract can be taxed with VAT only in the situation of an implied consent of the other party to such use. However, if one of the parties clearly expresses an objection against continued use of the real property, the situation cannot be considered as provision of a service within the meaning of the VAT regulations.

Additional requirements concerning the right of exemption for the services of vocational training non-compliant with Directive 112

The Supreme Administrative Court, in the judgment of 12 September 2013 (file I FSK 1145/12), held that the provisions of the VAT Act which condition the VAT exemption for vocational training on fulfillment of additional requirements set forth in other regulations were non-compliant with the Community law (Directive 112).

In the case at hand, NSA considered a situation where an association offered training to persons unemployed and searching for a job. As part of the training, the association intended to apply VAT exemption stipulated in Article 43 (1)(29a) of the VAT Act. The exemption under the provisions applies to vocational training or retraining in the forms and subject to the rules set forth in separate regulations. In the course of proceedings intended to issue the individual interpretation, the Minister of Finance stated that the association had no right to apply an exemption, since it did not meet the statutory

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requirements, and in particular the requirements to conduct classes in the form and subject to the rules laid down in separate regulations. The matter was ultimately resolved by the NSA, which pointed out that the Polish lawmaker implemented additional requirements, not provided for in Directive 112, regarding the use of the tax exemption. Directive 112 provides that the VAT exemption applies to services of vocational training or retraining provided by bodies governed by public law having such as their aim or by other organisations recognised by the Member State concerned as having similar objects. Therefore, provisions of the VAT Act are inconsistent with Article 132 (1i) of Directive 112 to the extent they condition the exemption on the form and rules of the vocational training and retraining set forth in separate regulations. Hence, it means that VAT exemption should cover all vocational training and retraining administered by bodies governed by public law or institutions having similar objects.

Provision of newsletters is VAT- free

Head of the Fiscal Chamber of Katowice, in an individual interpretation of 2 September 2013 (file IBPP1/443-476/13/KJ), held that provision of access for employees and visitors at the company's registered office to a newsletter (brochure) was not a transaction subject to VAT under the VAT Act.

The company published newsletters for its staff members, with information on the company's situation, projects planned and underway, as well as personnel changes in the company. To publish the same, the company incurred costs of printing and distribution. Printing, typesetting and publication were made by a third party. The company applied for an individual interpretation and inquired whether provision of access for the staff to the newsletter was subject to VAT. The Head of the Fiscal Chamber of Katowice held that provision of newsletters to staff and visitors in the company's registered office was not a transaction subject to a tax obligation. He supported his standpoint with an argument that the provision of access to the newsletter did not involve consumption, and the employee or a person receiving the newsletters did not receive any financial gain. It means that publication of a newsletter does not fulfill the requirements of the definition of goods supply. For taxpayers it means that issuance of brochures or newsletters does not lead to a tax obligation under the VAT Act.

Term of validity of a certificate of residence

The Supreme Administrative Court, in the judgment of 4 September 2013 (file II FSK 2579/11), held that a certificate of tax residence was valid as long as the facts presented therein remained unchanged.

In the case at hand, a bank applied for an individual interpretation regarding the necessity to update the certificates of residence. The Bank explained that, as a taxpayer, it withheld the tax in revenue derived by non-residents. The bank was of the opinion that if the certificate bore no validity date, it was valid as long as the facts stated therein remained unchanged. The Head of the Fiscal Chamber of Poznan disagreed with the bank's standpoint and in his interpretation he held that the bank should each time demand that the client provide valid certificates. When resolving the dispute, NSA pointed out that the taxpayer was obliged to hold a valid certificate, yet the bank did not need to require a valid certificate of the taxpayer each time it paid out money to the taxpayer. A certificate with no validity date is valid until the taxpayer changes the place of residence or the registered office. Whenever in doubt, the tax authorities can investigate the facts by their own means, i.e. verify whether the place of residence

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or registered seat as at the date of tax withholding is as specified in the certificate. Thus, it means that a certificate of residence submitted remains valid until it is challenged by a tax authority or until a change is made by the person using the certificate.

Technological networks and the real estate tax

The Supreme Administrative Court, in the judgment of 10 September 2013 (file II FSK 2498/11), held that technological networks located inside a building were not separately taxable with the real estate tax.

The company had technological networks (power distribution, gas supply, heat distribution and computer networks) located both indoor and outdoor. The company was of the opinion that the indoor networks were part of the building fittings, and as such they were not subject to separate taxation. The outer networks were considered by the company as taxable in the same way as structures. However, the mayor, acting as the tax authority in the case, disagreed with the company in this respect and held that both the outer and the indoor networks were to be considered separate structures. The mayor held that the company was obliged to pay the tax on the value of the networks, irrespective of where these were located. NSA did not share the opinion of the tax authority and noted that the mayor failed to consider the fact that some of the networks were located inside the building and served to properly use the same. NSA pointed out that a facility which met the statutory criteria for being considered a building, with all the technical/engineering systems and equipment connected therewith, was subject to real estate tax charged on the usable area. For the taxpayer it means that all types of technological networks located inside a building are not separately taxable with the real estate tax.

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

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