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Tax effects of gratuitous transfer of goods under a promotional campaign - a judgment issued by the Province Administrative Court *[Wojewódzki Sąd Administracyjny - WSA]* in Krakow

EXPERT

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Expert Comment

The Province Administrative Court in Krakow, in the judgment of 29 August 2014 (file I SA/Kr831/14), expressed its standpoint regarding the issue of tax effects of gratuitous transfer of goods as part of a promotional campaign.

A promotional campaign in which customers pay for two items of goods and they receive the third one free of charge at the till or after paying for the goods is to be considered gratuitous transfer of goods rather than a discount, which it is not included in the taxable base pursuant to Article 29a par. 7 of the VAT Act. The court admitted that this situation is an instance of two items of goods being purchased rather than three items of goods being purchase at the price of two, which is supported by the fact that it is two items that appear on the receipt and not three. The situation would be different if the receipt showed the third item or if the third item was sold at the price of even one grosz.

The ruling applies to a dispute regarding the classification for VAT purposes of a promotional campaign advertised as: "buy three products at the price of two". The campaign involves issuing certain goods to customers at the till, after they have shown a receipt to document the purchase of two other items of goods in the store.
The campaign organiser was of the opinion that the gratuitous transfer of the third item should be considered a discount as referred to in Article 29a par. 7 of the VAT Act (former Article 29 par. 4). From this point of view, it was the economic effect of the transaction that was important: as a result of the transaction, the customer would get thee items of goods at the price of two.
The tax authority and the Administrative Court in Krakow were of the opinion that the economic effect of the transaction was not sufficient to classify it as a discount. Two aspects proved to be of key importance in this case. Firstly, the additional goods were issued separate of the other, on the customer's request. Secondly, the goods were not included in the receipt documenting the purchase. In this situation it is two items that are actually purchased rather than three. It means that, since the third item of goods was not actually sold, the situation cannot be considered as involving a discount, but as a gratuitous transfer of goods, subject to taxation under Article 7 par. 2 of the VAT Act (provided that the goods are not a small value gift)

The opinion expressed by the Court should be considered correct. In order to avoid payment of VAT on a promotional campaign, the gifts given out to clients should be shown in the receipts or sold at a small price, e.g. 1 grosz. In this way they could not be considered a discount reducing the taxable base for VAT.

VAT

The Supreme Administrative Court *[Naczelny Sąd Administracyjny - NSA]* in the judgment of 29 September 2014 (file I FSK 1480/13), defined the scope of the term "sporadic transactions", as referred to in Article 90 par. 6 of the VAT Act.

Incidental (sporadic) transactions, referred to in Article 90 par. 6 of the VAT Act, shall be understood to mean those transactions that are not typical for the taxpayer's business. The transactions should be incidental, non-significant, minor, and not consistent with the taxpayer's usual activity. For example: a lease of real property by a company (which deals in stone mining), which property the company purchased with the purpose of it being used as a mining site, cannot be considered an incidental transaction, as referred to in Article 90 par. 6 of the VAT Act. This way of using real property which is temporarily redundant for the entrepreneur is a permanent element of the company's business, to be taken into account in its results.

The Supreme Administrative Court, in the judgment of 29 August 2014 (file I FSK 1281/13), held that providing access by a principal for a contractor to cars used for the purpose of performing a transportation service for the principal in return for a discount is not to be considered as provision of a service.

When determining the tax to be imposed on provision of complex services, pursuant to Article 8 par. 1 of the VAT Act, the primary purpose of such services should be considered, and the separate components should not be identified in a way detached from their economic sense. Consequently, a service involving provision of vehicles by the principal to the contractor in order for the latter to provide a transportation service is of technical and auxiliary nature and it is not to be considered as a service, and as such it is not taxable with VAT. The vehicles provided in this way are just "tools" of no significance for the principal which do not generate profit on the principal's side.

CIT

The Province Administrative Court in Poznań, in the judgment of 17 September 2014 (file I SA/Po 15/14), held that expenses incurred for free-of-charge post-guarantee repairs are not to be considered the costs of company representation.

The costs incurred to perform post-guarantee repairs are not to be considered the representation costs referred to in Article 16 par.1. 28 of the CIT Act. Such expenses cannot be considered as incurred for the sole purpose of building the company's good image, as they are intended to ensure operational efficiency and safety of products sold under the company's trademark. Such expenses are also a part of the marketing strategy. By offering free-of-charge service of this type, the company also wins clients whose confidence in the seller will increase. Consequently, the costs of post-guarantee repairs may be considered deductible costs, as they are incurred to derive income, to retain or secure the existing source of income, as specified in Article 15 par. 1 of the CIT Act.

PIT

The Supreme Administrative Court, in the judgment of 19 September 2014 (file III FSK 2280/12), defined the tax effects under the PIT Act concerning provision of overnight accommodation to delegated employees.

The value of the service of providing overnight accommodation to staff if they work outside the employer's establishment is not to be classified as income for them if it is not possible to assign the value gained to each employee. This standpoint is also consistent with the judgment issued by the Constitutional Tribunal on 8 July 2014. (file K 7/13), in which it was emphasized that one of the elements of the gratuitous performance is its individual nature. Thus, each performance must have a value allocable to each individual persons that receives it.

Tax Ordinance Act

The Constitutional Tribunal, in the judgment of 25 September 2014 (file K49/12), held that Article 14o § 1 of the Tax Ordinance Act was compliant with the principle of citizens' confidence in the State governed by law, as stipulated in Article 2 of the Polish Constitution

Pursuant to Article 14o § 1 of the Tax Ordinance Act, if no individual interpretation is issued within 3 months of receipt of the request therefor delivered to the tax authority, it is deemed that on the day following the last day of the said time limit, an interpretation was issued confirming the accuracy of the standpoint presented in the request. The Constitutional Tribunal was of the opinion that "non-issuance" must not be considered the same as failure to deliver, and this means that an individual interpretation needs not to be delivered to the requesting party within the 3-month time limit stipulated in the Tax Ordinance Act. The Tribunal held that such interpretation of Article 14o § 1 did not breach the principle of citizens' confidence in the State and in the laws established by the State, as set forth in Article 2 of the Constitution of the Republic of Poland.

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