KSP NEWS

KSP TAX NEWS 11/2013

We are pleased to present to you KSP Tax News, in which we describe selected rulings and interpretations passed or published in October 2013. We hope this publication proves useful in your everyday business life.

Remuneration paid by a company for transfer of rights and obligations connected with existing customer relations to be recognized as tax deductible cost.

Director of the Fiscal Chamber of Katowice, in an individual interpretation (IBPBI/2/423-801/13/AK), held that remuneration paid by a company under contracts for transfer of all rights and obligations related to the existing customer relations is linked to the company's business activity. The expenses connected therewith serve to secure the source of revenue for the company, are linked with its business activity, and as such they are general costs not linked directly to any specific revenue. In a situation where the company accounts for the aforesaid remuneration in the balance sheet over the period of five years, it should also recognize the same in tax deductible costs, since the time of recognition of the expense in the cost account is essential to establish the time of its recognition as tax deductible cost.

The company which has applied for the interpretation is a manufacturer of automotive components and belongs to an international capital group. The Group is in the course of restructuring of functions performed by each of its members in order to optimize production cost and reduce the costs of products throughout the Group. The company entered into a framework agreement specifying the general rules for the transfer from one related entity to another of rights and obligations resulting from the existing customer relations. Under the agreement, the Company concludes contracts with certain entities within the Group, which specify the amount of remuneration for the transfer of rights and obligations under the existing relations with contracting parties to the Company, and the list of products or groups of products to be transferred. Therefore, the company has applied for an individual interpretation asking whether the payment of said remuneration will constitute tax deductible cost for the Company. The authority shared the opinion expressed by the Company and confirmed that this type of remuneration is linked to the Company's activity and indirectly affects the revenue subject to taxation. Hence, it can be recognized as tax deductible cost.

Expert Comment

"The issue of fees charged for transfer of certain functions between two companies within the same capital group triggers disputes with tax authorities. Additionally, it is not consistently resolved in decisions and rulings adopted by authorities. The interpretation should be perceived as positive. The issuing authority saw the economic sense in charging fees for the transfer of customer relations between two entities within the same group. Since one entity gains the possibility to commence sales to a specific customer who was "transferred" to it by another entity in the Group, it is economically reasonable to incur compensation for the transfer in order to indemnify the other entity for losses resulting from giving up the customer and potential revenue from cooperation

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therewith. This type of compensation is connected with securing a source of revenue and should be recognized as tax deductible cost. The issue is of particular importance since, on 18 July 2013, an amendment was made to the transfer pricing regulations, whereby specific provisions were introduced concerning the evaluation of the arm's length compliance of restructuring transactions. When analyzing the restructuring processes within capital groups, the authorities will now need to consider whether premises exist to charge an additional fee for transfer of functions between entities. Where such premises do occur (i.e. entities not related would regulate their relations in the same way), it is even recommendable to agree upon a fee for the transfer of functions affecting the profit generation. Even more positive is the fact that tax authorities have begun to perceive the economic justification for incurring the costs of this type of fees."

The Constitutional Tribunal held (SK 40/12) that the use of compulsory mortgage in the case of "justified concern that a tax liability may not be paid" is compliant with the Constitution. However, exclusion of expiration of tax liabilities secured with compulsory mortgage contravenes this fundamental law.

The Constitutional Tribunal held that payment of taxes is a general obligation, and the Constitution does not provide for the "expiration right" with respect to tax payments. However, if the legislator resolved to introduce the solution, the constitutional standards should be observed in this respect. Nonexistence of expiration of the amount due secured with compulsory mortgage during a tax inspection leads to distortion of the institution of expiration and it being ostensible. As a result of the regulation, the time framework for taxpayer obligations is different depending on an arbitrary criterion, namely the possession of the real property which can be encumbered with compulsory mortgage, irrespective of the genesis, nature and scope of the outstanding tax amounts, or the taxpayer's attitude during the tax inspection. The same purpose (i.e. ensuring maximum collectibility of taxes) can be accomplished with methods less burdensome for the taxpayer, i.e. by interjecting the expiration term for the duration of the tax inspection. Total absence of expiration for the amounts secured with compulsory mortgage is thus a breach of the regulatory freedom to which the legislator is eligible with respect to the tax law.

Challenging the provisions of Article 70 § 6 of the Tax Ordinance Act in the wording subject to the question upon a decision of the legislator became void on 31 December 2002. At the moment, the equivalent is Article 70 § 8 of the Tax Ordinance Act which is constructed in a similar way, and as such it will also be exposed to questioning.

CIT

The Province Administrative Court of Gliwice, in its judgment (I SA 292/13) held that the provisions on expiration of tax liabilities specified in Article 70 § 1 of the Tax Ordinance Act are not applicable to a loss, since a loss is not a tax liability.

A taxpayer operating a business in the form of a civil law partnership considered expanding the activity by moving a part of it to the Special Economic Zone.

However, he assumed that in the first financial years, the new activity may bring tax losses. The taxpayer resolved to apply to the tax authorities for an individual interpretation asking when the loss incurred in one of the following financial years, as referred to in Article 9 par. 2 of the PIT Act, will expire. The taxpayer was of the opinion that the expiration would occur after 5 years, just as in the case of a tax liability (Article 70 of the Tax Ordinance Act). The problem consisted in the fact that tax books are to be retained until the time of expiration of tax liabilities. Director of the

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Fiscal Chamber held that the standpoint presented by the taxpayer was incorrect, as the legal definition of a tax liability did not encompass a loss. The taxpayer filed a complaint with the Province Administrative Court (WSA). WSA, dismissing the complaint, indicated that the legislator used legal definitions and they should not be treated as recommendations, opinions or guidelines, but rather directly - as binding legal norms. What it means for taxpayers is that if a taxpayer incurs a loss on the business activity it operates, which is deducted in subsequent financial years, the tax books should be kept until the expiration of the personal income tax liability for the financial year in which the loss is deducted. In practice it means that where a loss is deducted, the books required to verify the accuracy of its calculation must be retained much longer - even for 10 years.

VAT

The Province Administrative Court (WSA) of Wrocław (I SA/WR 1372/13) held that the first occupancy includes also those activities/transactions that occurred before the VAT Act of 1993 took effect, **provided that, from the perspective of the current regulations, such transactions would be taxable.**

The company intended to sell or make an in-kind contribution of the rights of perpetual use of land and real property owned, located on the land owned by another company. The real property to be sold was acquired by the company or produced by the company on its own. The Company considered the option of applying the VAT exemption stipulated in Article 43 par. 1 item 10 of the VAT Act or resignation from the exemption under Article 43 par. 10 of the VAT Act. The Company inquired whether the transaction of sale of the real property would be subject to the exemption, and consequently whether it was entitled to select the option of the transaction being taxed with VAT. The problem was whether the notion of "the first occupancy" included also those transactions that were made before the VAT Act of 1993 took effect. The Minister of Finance, in the interpretation, held that the company's standpoint was incorrect, as the referenced provisions of the VAT Act were not applicable to circumstances that occurred before July 1993. WSA confirmed the taxpayer's point of view, and held that the expression "giving for use as a result of taxable transactions" being a part of the definition of first occupancy under Article 2 item 14 of the VAT Act should not apply to the time of performing the transactions, but merely to the sort of transactions. Thus, the first occupancy encompassed also those transactions that were made before the VAT Act of 1993 took effect, i.e. before 1993, provided that from the perspective of the current regulations the transactions would be VAT-able if performed now. The foregoing means that to determine the rules for taxation of the sale of real property with VAT, the transactions of sale or lease made before 1993 may also be of significance.

According to the standpoint expressed by the Director of the Fiscal Chamber of Katowice, the funds received by a company from a limited joint-stock partnership (LJSP), equivalent to output VAT under an invoice documenting an in-kind contribution, will constitute tax proceeds (IBPBI/2/423-801/13/AK).

A company having the seat of its economic activity in Poland, an active VAT payer, intended to take up shares in a limited joint-stock partnership in return for an in-kind contribution in the form of fixed assets (a production line) and a trademark. The company was of the opinion that the subject of the contribution was not an enterprise or an organized part of an enterprise, so the in-kind contribution will be subject to VAT as a supply of goods (with respect to the production line) and provision of services (with respect to the trademark). Hence, the company was to issue an

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invoice and record the output VAT for the contribution made. In return for the contribution, the company was to take up shares in the LJSP, the nominal value of which would correspond to the net value of the contribution. The amount of the output VAT was to be transferred to the company by the LJSP in cash. The question was whether, if the Company settles the VAT and receives the output VAT, a taxable revenue will arise on its side. The Company was of the opinion that no such revenue will arise, since VAT is neutral with respect to the income tax. In response to the request for interpretation, the authority held that the company's standpoint was incorrect. The authority was of the opinion that the amount received by the company was just an equivalent to VAT resulting from the invoice documenting the in-kind contribution rather than a tax. Consequently, the cash received by the company from LJSP, equivalent to the output VAT, will constitute revenue for the entity making the contribution as cash received. In the light of the above decision, making an in-kind contribution, where the value of equity increase is determined as the net value of the contribution, brings about negative tax consequences. Currently tax authorities commonly confirm that the value of capital increase is to be determined as the gross value of the subject of contribution.

The VAT effects of utility re-invoicing - a reference for preliminary ruling to the European Court of Justice (I FSK 1389/12).

The Supreme Administrative Court (NSA) applied to the European Court of Justice for a preliminary ruling concerning interpretation of the Community law.

1. Should the provisions of the Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax be interpreted to mean that a lessor supplies electricity, heat and water and provides the services of sewage disposal to a lessee who makes use of the goods and services supplied/provided to the leased premises by professional third parties in the situation where the lessor, who merely transfers the costs thereof to the the lessee, is a party to the contracts for supply of the goods and provision of the services?
2. If the response to the first question is affirmative, do the costs of electricity, heat and water used by the lessee as well as the service of sewage disposal increase the taxable amount for the lessor (the rent fee) referred to in Article 73 of Directive 112 for provisions of the lease service, or are the supplies and services to be considered separate from the service of lease?

The decision of the European Court of Justice in the above case will be of essence for entities providing rental services. It will be possible to determine whether, e.g. the invoicing for utility supply should be made using the VAT rate applicable to services of this type or the VAT rate applicable to lease, as an item of calculation of the rent fee.

NSA, in the resolution of seven judges (I FPS 4/13) held that a VAT payer that makes an intracommunity supply of goods not having all the required documents confirming the supply of the goods to the buyer is obliged to show the supply of goods in the records at the national rate and show the amount of VAT in the tax return.

The company was of the opinion that to apply the VAT rate of 0% to intracommunity supply, it is enough to have a copy of the invoice, a specification of the items making up the cargo and, additionally in certain situations, a confirmation that the buyer received the goods sent to the company in the form of an email or facsimile message or confirmation of payment for the delivered goods. Where the company does not have all the documents to prove that the goods have been supplied to the buyer, until the same are obtained, the company must recognize the output tax

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fulfilling only some of the record-keeping obligations. The company applied for an individual interpretation. The authority did not share the company's standpoint and held that the VAT Act provides for a closed list of documents confirming the intracommunity supply, so the supply can be proven and specific legal effects can be expected only if the specified documents are held. The Company lodged a complaint with the Province Administrative Court. The court did not allow the complaint. Subsequently the company decided to file a cassation appeal with the Supreme Administrative Court (NSA). As a result of proceedings carried out by NSA, a resolution of 7 judges was adopted in which they held that the taxpayer that makes in intracommunity supply of goods not having all the required documents confirming provision of goods to the buyer is obliged to show the supply of goods in the records at the national rate and show the amount of VAT in the tax return.

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

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