KSP TAX NEWS 11/2014

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Revenue point in the sale of shares - a judgment by the Province Administrative Court of Poznan

EXPERT

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The Province Administrative Court of Poznan *[Wojewódzki Sąd Administracyjny - WSA]*, in the judgment of 29 October 2014 (case no I SA/Po 443/14), held that when shares in a limited liability company are sold, subject to payment to be made in installments, the tax revenue arises on the date when the amount of the installment to be paid to a taxpayer becomes due, and the taxpayer can demand its payment.

The case applied to a taxpayer who, in return for the sold shares, was to receive payment in 72 equal monthly installments. There was some doubt regarding the way to determine the revenue point for the sale. The Court shared the taxpayer's view that in this case the "revenues due" as referred to in Article 17 sec. 1 pt. 6 of the PIT Act shall be understood in line with the notion of mature claims within the meaning of the civil law, and linked with the last day on which the debtor can satisfy the claim. Thus, revenue from each installment arises on the maturity day thereof.

Expert Comment

"The court's resolution applies to the revenue point in the sale of shares or stocks. Pursuant to Article 17 sec. 1pt.6 of the PIT Act, revenues from cash funds are defined as due revenues from the sales of shares (stocks) and securities , even if they are not actually received. In view of these regulations, some controversies arise in a situation where the payment for a share is spread into installments.

The tax authorities hold that revenue from the sale of shares or stocks arises once the ownership right is transferred to the buyer. According to the lexical meaning, the term "due revenue" means revenue which is due in full amount, and it is of no significance that it was not received. It is also irrelevant whether the payment for the acquired shares was agreed to be paid in installments or in a one-off amount. The tax authorities are of the opinion that contractual arrangements should not affect the tax point. Such an approach could be seen in a recently issued individual interpretation of 26 September 2014 (case no IPPB2/415-560/14-4/AS) in which the Director of the Warsaw Tax Chamber held that revenue from the sale of shares or stocks arose once the ownership was transferred to the buyer.

However, the standpoint expressed in the court jurisdiction approach is that the civil law provisions should be applicable to this situation. The aforesaid judgment of the Poznan Province Administrative Court is an example of that approach. According to the civil law provisions, a claim due is a claim the payment of which can be demanded by the creditor from the debtor. A claim becomes due at the onset of the date on which the payment is to be made. Thus, the revenue from each installment arises at the onset of the payment date.

When the parties agreed upon payment in installments for the shares sold, the adoption of the solution indicated by tax authorities leads to the necessity to recognize revenue already at the time of transfer of the share ownership to the buyer, although the installments become due only after certain agreed time limits. Thus, the tax has to be paid even before the seller is entitled to demand payment. Therefore, it is the approach presented by the Poznan Administrative Court, based on the civil law meaning of the notion of revenues due, that should be considered accurate. However, if an individual interpretation is sought in a similar case, a positive decision will probably be possible only after the case has been taken to court."

VAT

The Supreme Administrative Court *[Naczelny Sąd Administracyjny - NSA]*, in the judgment of 21 October 2014 (case no FSK 1571/13), expressed the opinion regarding the VAT effect of construction works performed by a replacement contractor.

The Supreme Administrative Court held that in a situation where, in the event of a default on the side of the original contractor, the client orders performing construction works to replacement contractors, no service is provided for the sake of the original contractor either by the client or by the replacement contractor. Additionally, the Court held that the replacement contractor cannot be considered asthe substitute contractor of original contractor, and that in this case the requirements for re-invoicing are not met.

It means that when the original contractor pays to the client for the costs of services performed by the replacement contractor, the amount will not be considered as remuneration for the service and as such it will not be subject to VAT and needs not be documented with an invoice

Director of the Warsaw Tax Chamber, in an individual interpretation of 2 October 2014 (case no IPPP1/443-1041/14-3/Igo), held that lease of premises in a building involved the lease of common area as well, and thus the first occupation of the common area took place once the premises were transferred for use by the lessees under lease agreements.

The tax authority shared the opinion of a taxpayer who claimed that the use of leased premises was not possible without the use of the common area. As a consequence, it is considered that the first occupancy of the common area is made at the same time the lease agreements are concluded. Thus, the sale of common area in buildings will be subject to the exemption under Article 43 sec. 1 pt. 10 of the VAT Act, which stipulates

that sale of buildings, structures or parts thereof is subject to exemption if, at the moment of supply, they are occupied, and the period before first occupancy and the their supply is longer than 2 years.

In the judgment of 26 October 2014, case C-605/12 (Welmory Sp. z o.o. with its registered office in Gdańsk), the European Court of Justice interpreted the term of a "fixed establishment".

The Court held that if a taxpayer establishes his business in one Member State, and receives services supplied by a second taxpayer established in another Member State, it may be considered, under certain conditions, that the service provider has a 'fixed establishment' in the other Member State within the meaning of Article 44 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

The Court indicated the conditions for the other Member State to be considered the "fixed establishment", which include in particular "sufficient degree of permanence" of the business operated in that State and a suitable structure in terms of human and technical resources to enable the taxpayer to receive the services and use them for business purposes.

CIT

The Province Administrative Court of Gliwice, in the judgment of 30 October 2014 (case no I SA/Gl 347/14), confirmed accuracy of the standpoint presented by the tax authority whereby the application of Article 15b of the CIT Act concerning mandatory adjustment of costs was the taxpayer's responsibility regardless of how difficult it would be.

A taxpayer recognized expenses incurred to purchase production materials at the moment of deriving revenue from the sale of finished goods. The taxable person was able to identify whether an invoice for a particular material was paid within the payment deadline or not, but he was unable to determine whether the cost of the material had already been recognized as tax costs, which is necessary for Article 15b of the CIT Act to apply, in particular with respect to payment deadlines longer than 60 days (then, the time limit of 90 days runs from the date of costs recognition, and once it ends, the costs should be adjusted). Thus, the taxpayer was of the opinion that in his case the provisions on compulsory cost adjustments were not applicable. This view, however, was challenged by the tax authority and the WSA of Gliwice. The court was of the opinion that the taxpayer was obliged to keep accounting records in such a way as to be able to apply Article 15b of the CIT Act regardless of how difficult it may be.

PIT

Director of Katowice Fiscal Chamber, in an individual interpretation of 13 October 2014 (case no IBPBII/1/415-584/14/ŁM) confirmed that using the company car for travel between the place of residence and the place of work did not generate a revenue from gratuitous benefit for the employee.

In the situation at hand, employees were obliged to park the cars in the place of their residence, although their work was done sometimes in the employer's establishment and sometimes in other places they were delegated to. The use of the cars for private purposes was possible subject to additional payment only. In view of the facts of the case, the authority held that travel between the place of work and place of residence,

including travel to the employer's establishment, did not generate an additional revenue as gratuitous benefit for the employees.

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

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