KSP TAX NEWS 12/2012

We are pleased to present to you KSP Tax News bulletin in which we describe selected rulings and interpretations passed or published in October 2012. We hope this publication proves useful in your everyday business life

A Possibility of a Free Use of a Trademark – Judgment by WSA

On 12 November 2012 The Province Administrative Court in Warsaw (WSA) resolved that if a licence fee for the use of a trademark depends on the financial result of the licencee, in case of lack of profits in a particular year and lack of the obligation to pay the licence fee, the use of the trademark generates an income from gratuitous benefits (ref. III SA/Wa 245/12). According to the licence agreement concluded by a taxpayer, the licence fee for the use of a trademark has been determined as a percentage of the balance profit. The fees were to be paid for one year of the use of the trademark, upon acceptance of an annual financial statement of the taxpayer by the partners. However, if a taxpayer shows a loss, it would not pay the remuneration. According to WSA, if a payment of a licence fee for the use of a trademark is not made within a particular tax year, the taxpayer has obtained a gratuitous benefit.

Expert comment

"As a general rule, in case of a gratuitous use of a trademark (or other asset), a revenue arises on the user's part from the gratuitous benefit which shall be taxed with an income tax. However, it seems that WSA interpreted the concept of "gratuitous benefit" too literally. The parties to the licence agreement provided for a mechanism for calculation of the remuneration for the use of the trademark which was dependent on the profit of the licencee's activity. In practice, the remuneration for the trademark is often calculated not as an amount but as a percentage from the factor determined by the parties, e.g. from the balance sheet profit or revenue. In the analyzed case, the party granting the right to the trademark took the financial risk related to the lack of the licencee's profit in the particular year, however, at the same time, that party could received high remuneration in case of remarkable profits. Lack of payments in a particular year resulting from the lack of profit shall not lead in this case to the occurrence of revenue on the taxpayers part for the gratuitous benefit. The licence agreement provided for a payment for such service, however the mechanism of calculation of the payment resulted in the particular year in the amount equal to zero. The above-mentioned judgment proves that the taxpayers who make the payment of the contractual remuneration

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dependent on a condition are at risk of the revenue calculation in case when the condition is not met and when the remuneration is not paid for a relevant settlement period. Therefore, in such case even a nominal amount of remuneration should be provided for in an agreement".

CIT

The Supreme Administrative Court in the judgment of 23 November 2012 (ref. II FSK 613/11) resolved that a company which acquired a contribution in-kind in the form of an organized part of an enterprises is entitled to include the expenditures for repayment of assumed contractual obligations related to that part to the tax deductible costs.

In case of the in-kind contribution of an organized part of an enterprises (hereinafter: OPE), it may also consist of obligations what explicitly results from Article 4a point 4 of the CIT Act. NSA stated that in case of repayment of those obligations by the acquiring company, the general principle resulting from Article 15 point 1 of the CIT Act shall apply. It means that, if OPE is to be used in the acquiring company's activity, the expenditures for the repayment of the acquired obligations may be treated as tax deductible costs. The subject judgment is favourable to the taxpayers, due to the fact that it shows the rule of the continuation of allocating the costs to tax deductible costs .

The Province Administrative Court in Warsaw in the judgment of 15 November 2012 (ref. III SA/Wa 649/12) resolved that in case of an agreement on cession of an operating lease, the taxpayer is obliged to treat the lease fees as a tax deductible costs.

The Court stated that in case of a change of the party to the lease contract (cession of rights to another entity), the contract is not treated as a new one. Therefore, in case of a cession of a lease contract, it is not necessary to verify whether the contract meets the requirements specified in Article 17b point 1 of the CIT Act which determines the possibility of including the lease costs to the tax costs. The legislator specifies as a condition for keeping the continuity of the operational lease, the objective continuity and not the subjective continuity. The judgment is favourable to the taxpayers. It confirms the principle of continuation of allocating the expenditures to the tax costs in case a party to the contract is changed as well as lack of the influence of the contract's cession on its qualification under the tax laws.

PIT

The Supreme Administrative Court in the judgment of 8 November 2012 (ref. II FSK 602/11) resolved that participation of employees in social events is subject to Personal Income Tax.

The court found that the mere participation in an organized event means that the employee could take advantage of all benefits provided for during such event. If the employer incurred costs of the event on a flat rate basis, the cost should be divided into the number of the participating employees and thus the income per each employee subject to the Personal Income Tax may be calculated. The extent to which a particular person benefited from the range of

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the services is of no importance. NSA presented a similar standpoint in the judgment of 8 November 2012 (ref. II FSK 527/11). In this case, the company was paying anonymously the civil liability insurance for the members of the management board. The Court found it appropriate to determine the income obtained by each member of the management board in such a way that the cost of the joint contribution should be divided into the number of the members of the management board performing their function at that time. Those judgments constitute further examples of unfavourable to the taxpayers jurisprudence which recognizes that determination of taxable income regardless of the actually obtained benefits is correct.

VAT

The Supreme Administrative Court in the judgment of 22 November 2012 (ref. I FSK 49/12) resolved that the tax obligation for the performance of comprehensive logistic services arises in accordance with the general principle, that is upon the issuance of an invoice, not later than 7 days after performance of the services.

The taxpayer provided comprehensive services to the contractors consisting of lease of warehouse, storage, forwarding, transport and customs agency. NSA ruled that the tax obligation for such comprehensive services does not arise in accordance with the special principle resulting from Article 19 point 13 item 4 of the VAT Act, that is upon receipt of the whole payment or its part, however no later than before the due date specified in the agreement or invoice. There is a special provision and it should be understood exactly. Thus, if a particular action is not included in the catalogue specified in that provision, this provision shall not apply. Even if storage and lease of premises for this purpose constitute the core part of the comprehensive services, the tax point shall be determined pursuant to the general principle specified in Article 19 point 4 of the VAT Act. The subject judgment confirms that the taxpayers providing comprehensive services cannot determine freely the VAT tax point and the special tax points shall be strictly interpreted.

TAX ON CIVIL LAW TRANSACTIONS

On 19 November 2012, the Supreme Administrative Court (ref. II FPS 1/12) composed of 7 judges passed a resolution stating that making the in-kind contribution in the company under the legal status before 1 January 2007 was not subject to tax on civil law transactions (PCC).

The jurisdiction of the administrative courts as regards application of exemptions provided for in Article 2 point 4 of the PCC Act was extremely uneven under the legal status of 31 December 2006. Pursuant to that provision, an activity is not subject to PCC, if at least one of the parties is subject to VAT for that activity or is exempted from VAT. As a rule, making an in-kind contribution constitutes a delivery of goods and services under the legal status as at 1 January 2007 it was exempted from VAT under the executive regulations.

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It raised doubts, whether the change of Articles of Association resulting from the increase of the share capital by making an in-kind contribution is subject to PCC. In some judgments it is expressed that the change of the Articles of Association due to the increase of the share capital, as an activity subject to PCC, is something different than the actually made in-kind contribution which may be subject to VAT. Due to the fact that the subject of taxation is different, both taxes are due. NSA composed of 7 judges stated that this approach is wrong and that we do not deal with two separate actions but with only one, which on the grounds of VAT is a taxable activity. It means that the disposition provided for in Article 2 point 4 of the PCC Act is met and the increase of the company's share capital by making an in-kind contribution was not subject to the PCC up to 31 December 2006. This resolution is favourable to the taxpayers. If the tax is unduly paid, an overpayment arises to which the taxpayer is entitled. Unfortunately, the right to file a request on acknowledgement of the overpayment expires with the expiry date of the limitation period of the tax obligation, i.e. after five years from the end of the year in which the tax was to be paid. By the end of December 2012 such request may be filed by the taxpayers who increased the share capital in December 2006.

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