KSP NEWS

KSP TAX NEWS 12/2013

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

Classification of land as not occupied with building(s) for VAT purposes must be supported with objective circumstances associated with the transaction - a judgment passed by the Supreme Administrative Court *[Najwyższy Sąd Administracyjny - NSA]*.

The Supreme Administrative Court, in the judgment of 7 November 2013 (file I FSK 1436/13), held that classification of the supply of land as site occupied with building(s) or with no building(s) located thereon cannot be based entirely on the economic intentions of the purchaser if the classification is not supported with objective circumstances obvious for both parties to the transaction and for third parties. A supply of land which is occupied with a building/buildings must not be considered a supply of land that has not been built on if the purchaser begins demolition of the building(s) only after the supply has been made.

In the case at hand, the company purchased land from the first owner with the intention of using it for construction purposes. This designation of the land was also specified in the local site development plan. The old stadium building and structures that were located on the site had no economic value for the company, and after the transaction of sale the company demolished the same on its own. The company was of the opinion that the transaction was VAT-able, as its economic sense was to supply land that was not built on in order to use it for construction of buildings. However, in an individual interpretation issued with respect to the presented facts, the tax authority was of an opposing view, and held that the transaction was in fact a supply of land that was built on, and it met the requirements for being exempt from VAT under Article 43 (1) (10) of the VAT Act. As a result of a complaint lodged with the Province Administrative Court *[Wojewódzki Sąd Administracyjny - WSA]* of Warsaw, on 9 April 2013, a judgment was passed (file III SA/Wa 3297/12), in which the company's opinion, whereby the economic significance of the transaction prevailed, was considered accurate. However, NSA considered the standpoint inaccurate, canceled the judgment by WSA, and upheld the individual interpretation. NSA was of the opinion that in the case at hand, the facts did not indicate that the economic sense of the transaction was a supply of land with no building located thereon. Such a sense existed only in subjective intentions of the company, which could not be the exclusive basis for classification of the transaction for VAT purposes.

Expert Comment

"The aforesaid judgment of NSA is of considerable practical importance, as it lays down specific rules for the link between the economic sense of a transaction and the classification of a supply of land for VAT purposes. NSA is of the opinion that a transaction cannot be classified for tax purposes entirely on the basis of subjective

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intentions of one of the parties to the transaction. It means that both parties to a transaction should perform it for a specific, consistent economic purpose, which must be possible to prove based on factual circumstances The analysis of the body of rulings passed to date by administrative courts in similar cases indicates that a supply of land with buildings located thereon as a site which is not built on for VAT purposes may occur if the demolition work has begun before the supply is made. The foregoing confirms the conclusion made by NSA that the economic sense of a transaction must be known to both parties to the transaction, and it must be reflected in their reciprocal agreements and factual circumstances. This conclusion is consistent with the judgment of the European Court of Justice of 19 November 2009 (C-461/08) in which the classification of land as not built on was made based on the fact that the seller has begun the demolition of buildings before the actual supply, although, at the moment of supply the demolition had not been finished, and in fact the area was partly built on. The foregoing means that if real property is sold with buildings or structures located thereon, which are of no economic value for the purchaser, for the transaction to be considered a supply of land occupied with no buildings, and in order to avoid exemption from VAT, it is necessary to obtain a final demolition permit and to begin the demolition work before the supply is made. Also, the provisions of preliminary sale agreement will be of significance, as they may impose upon the seller the obligation to obtain the relevant demolition permit and to commence the demolition, as a condition for conclusion of the sale contract."

PIT and CIT

The Minister of Finance, in the general interpretation of 8 November 2013 (file DD2/033/55/MWJ/13/RD-111005), held that expenditure in the form of a fee for rental of a passenger car used for the purpose of business activity was not limited to the amount stipulated in Article 23 par. 1 (46) of the PIT Act and Article 16 par. 1 (51) of the CIT Act.

Pursuant to the said provisions, expenditure recognized as deductible costs, incurred for the use of a passenger car not recorded in the fixed asset register, in the amount not exceeding the product of the number of actual mileage and the rate per 1 km of the mileage is not deductible cost. The Minister of Finance was of the opinion that the costs related to the use of a passenger car entailed the costs of using the car. However, the expenses of passenger car rental fee served exclusively to gain the possibility to use the car, and as such they were not linked to its operation, which excluded the necessity to apply to them the limits specified in the aforesaid legal regulations.

CIT

The Province Administrative Court of Gliwice, in the judgment of 4 November 2013 (file I SA/Gl 799/13), held that a tax exemption under Article 17 par. 1 (34) of the CIT Act applied not only to revenue from business activity within a special economic zone in the strict sense, but also to revenue from auxiliary activity necessary for the zone activity to be carried out, despite the fact that such auxiliary activities are carried out outside the SEZ.

Providing grounds for the standpoint, the court pointed out that if a company derived revenue from maintenance services (not covered by the guarantee) which involved repairs at the purchaser (i.e. outside the zone) of machines manufactured by the company within the SEZ, it made use of the income tax exemption if, in the course of the repair, it replaced components with new parts produced within the zone.

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The Head of the Fiscal Chamber of Poznan, in an individual interpretation of 5 November 2013 (file ILPB3/423-848/10/13-S/GC), shared the taxpayer's view with respect to recognizing as deductible the amount equivalent to multiplication of rent fee, paid under a court settlement, in the event of termination by the company of the lease contract for the premises that no longer complied with the requirements for conducting its business activity.

The above indicates that where rational and economically justifiable expenses are excluded in a clear manner from tax costs under Article 16 of the CIT Act, they may be recognized as deductible costs provided the taxpayer proves a cause-effect connection between them and the revenue or preserving or securing the source of revenue.

VAT

The Supreme Administrative Court *[NSA]*, in the judgment of 13 November 2013 (file I FSK 1606/12), held that expenses incurred for organization of an art contest for children, as part of corporate social responsibility activities (CSR), were the basis for reduction of the output VAT.

NSA was of the opinion that the expenses described by the company were similar to marketing expenses in a broad meaning of the term, i.e. they were general administration costs linked to the company's business activity. Therefore, the contest organized in this way, and creation of future awareness of service users must not be separated from the company's activities that are subject to taxation. The marketing expenses were indirectly linked to taxable activity, so the company was entitled to deduct VAT from the invoices documenting the same.

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

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