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Vast subject matter causes lengthy proceedings regardless of the authority conducting them - a judgment by the Province Administrative Court (WSA) of Warsaw

EXPERT

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The Province Administrative Court (WSA) of Warsaw in the judgment of 18 November 2014 (case no III SA/Wa 1004/14) held that in a situation where the size of the body of evidence resulting from extensive business activity leads to proceedings of lengthy duration, the cause is beyond the authority's control.

The case involved a company that requested return of interest on outstanding corporate income tax from the tax authority for the duration of the inspection proceedings which took 30 months. The company referred to Article 54 (1)(7) of the Tax Ordinance Act which provides that interest for delay does not accrue for the period from the opening the tax-related proceedings until delivery of the 1st instance authority's decision unless the decision is delivered within three months of opening the proceedings. The company filed a complaint with the Province Administrative Court. The Court dismissed the complaint and argued that the complexity of the case and the size of the body of evidence, being beyond the tax authority's control, justified the extended proceedings in accordance with Article 54 § 2 of the Tax Ordinance Act.

Expert Comment

"The judgment applies in fact to the notion of delay arisen for reasons beyond the authority's control. The WSA's decision marks a continuation of a line of unfavourable rulings in this respect. For several years now, the administrative courts have been of the opinion that complexity of a case justifies lengthy inspection proceedings and such factors should thus be considered as being beyond the control of the authority handling the case (such was the decision expressed, inter alia, in a judgment of Gdańsk WSA of 19 August 2014, case no

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I SA/Gd 756/14, NSA's [Naczelny Sąd Administracyjny - NSA] judgment of 24 January 2013 no II FSK 961/11 and of 13 November 2009, case no II FSK 2001/08).

In contrast to the foregoing opinion, in the judgment of the Supreme Administrative Court of 24 November 2009, case no II FSK 930/08, the Court held that Art. 54 § 2 was applicable to a situation where delay was attributable to a party and there was a link between the party's conduct and the delay. This interpretation of the regulations deserves approval. It is difficult to agree with the opinions expressed in the judgment subject to discussion, as it gives rise to unjustified differences in treatment of smaller and larger business entities. Moreover, no grounds for such different treatment can be found in the current legal regulations".

Tax Ordinance

The Supreme Administrative Court in the judgment of 5 November 2014 (case no I FSK 1551/13) held that where transformation of the legal form took place, the transformed entity was entitled to legal protection resulting from individual interpretations issued for the entity subject to transformation.

The case involved a capital company being transformed into a partnership. The NSA admitted a cassation complaint lodged by the transformed entity and held that in a situation where the legal form of a company is transformed, with the asset and personal identity being retained, the individual interpretations issued for the legal predecessor are binding for the successor as well.

VAT

The Director of the Tax Chamber of Bydgoszcz, in an individual interpretation of 30 July 2014 (case no ITPP2/443-576/14/PS) held that awarding a discount, to be understood as giving a rebate for early payment, required issuance of an adjusted invoice.

The tax authority disagreed with the standpoint presented by the taxpayer who claimed that it was the business strategy adopted by an entrepreneur that was determinant in deciding whether the award of a discount gave rise to a reduction of the taxable base and issuance of the adjusted invoice. Since the discount was awarded for specific deliveries to the buyers, and consequently the price of the supplied goods was reduced as a result of the discount, the taxpayer using the discounts was obliged to adjust previously issued invoices.

The Director of the Tax Chamber of Bydgoszcz, in an individual interpretation of 5 November 2014 (case no ITPP1/443-960/MN), expressed the opinion that the date of completion of construction and assembly services, within the meaning of the VAT Act shall be the date of actual performance of the services.

The tax authority was of the opinion that determination of the moment of performing a service should be objective and may not be subject to a contractual regulation. The civil law procedures and regulations binding the contracting parties will not affect the determination of the tax point for the construction and assembly service.

CIT

The Supreme Administrative Court (NSA), in the judgment of 4 November 2014 (case no II FSK 3078/12) held that in a situation where an in-kind contribution is made in the form of an organised part of undertaking, there is no general succession with respect to taxation.

Since there is no tax succession, the company to which the organised part of undertaking is contributed, cannot recognize the tax costs relating to the contributed liabilities. Additionally, interest on loans and credits incurred by the company making the contribution are assigned to this company only, so the company to which the contribution is made cannot recognize them as tax costs. The FX differences relating to the receivables or liabilities should be determined as of the date of the contribution in line with Article 15 (1s)(2) of the CIT Act which provides that assets are measured at the date the contribution is made. Thus, the transfer of FX differences is excluded, and they cannot be accounted for by the acquiring company. Therefore, the acquiring company will not be eligible to recognize the FX differences on future currency liabilities taken over as part of the contribution in the form of an organized part of undertaking.

The Supreme Administrative Court, in the judgment of 13 November 2012 (case no II FSK 1768/12), addressed the issue of settlement of a loss on business activity in a Special Economic Zone after the permit to operate in the zone was forfeited. The NSA held that an entrepreneur who lost the permit to operate in Special Economic Zone was not eligible to settle the loss incurred as a result of the business activity in SEZ in accordance with the general rules. This conclusion was justified by the absence of clear regulations in this respect.

The Director of Katowice Tax Chamber, in an individual interpretation of 13 October 2014 (case no IBPBI/2/423-830/14/MO) held that payments made to a German entity for rental on the territory of Poland of a fork lift truck and telescopic boom man lift were to be classified as royalties in the light of the double taxation avoidance agreement between Poland and Germany.

The tax authority held that a receivable paid to the German entity was, in accordance with Article 21(1)(1) of the CIT Act, a fee for the right to use the industrial equipment. Thus, pursuant to Article 12(3) of the Double Taxation Avoidance Agreement between Poland and Germany, the fee is a royalty. With respect to the fees, the preferential 5% CIT rate applies provided that the German entity's place of business is documented for tax purposes with a certificate of residence.

Real Estate Tax

The Supreme Administrative Court in the judgment of 4 November 2014 (case no II FSK 2967/14) held that an underground garage was a building within the meaning of the act on local taxes and charges.

The case involved taxation of an underground parking lot used by a company with the real estate tax. The court held that the tax authority was right in claiming that the underground garage was a building and as such was subject to taxation. The Court held that such classification was determined by the qualities of the garage, as described in the technical expertise, such as permanent attachment to the ground, separation of

space with walls, foundations and the roof. The court further held that the term "separation from space" did not apply to free space only. Thus, a facility in the form of an underground garage, due to its technical qualities, was to be considered a building within the meaning of the act on local taxes and charges.

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