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INTRODUCTION

Dear Sirs,

In the current issue we focus on tax problems which will be the subject matter of the Supreme Administrative Court resolutions. One of them is the treatment of expenses incurred for meetings with clients which has been raising interpretation doubts for a long time. Furthermore, the NSA will pronounce (another time) on the taxation of shareholders in partnerships limited by shares.

In addition, we write about some facilitation measures introduced by the legislator from 2013 – lease of perpetual usufruct of land and possibility of granting a loan to the VAT payer if the input tax exceeds output tax.

I hope you will find it interesting.
Krystyna Szydłowska

PIT/CIT: company paid lunches – tax implications based on the judgments of the Supreme Administrative Court (NSA)

The Supreme Administrative Court decided to file the case regarding qualification of business meeting expenses as tax deductible costs – raising interpretation doubts for a long time - to be examined and settled by resolution.

At the beginning of 2012 the Supreme Administrative Court adopted a position (judgment of 25 January 2012 – ref. no. II FSK 1445/10) that the expenditures for buying beverages and food were entertainment-related costs whether they show ostentation or not.

The doubts over this matter intensified after the NSA issued two divergent judgments in May/June 2012 (judgments of 25 May 2012 – ref. no. II FSK 2200/10 and of 1 June 2012 – ref. no. II FSK 2438/10) with respect to an identical case in factual and legal terms. In the first one the administrative authority gave a ruling in favour of the taxpayer stating that the costs of coffee, lunch, dinner or supper with contractors can be classified as tax deductible costs. On the other hand, the second judgment issued by a different judicial panel considers the above expenses to be entertainment costs which aim at promoting a positive image of the company; hence they are not tax deductible costs.

In a similar case, in further judgment of 27 September 2012 (ref. no. II FSK 392/11) the authority stipulated that the classification of the discussed restaurant expenses as tax deductible costs depend on circumstances in which they were incurred. Such circumstances occur for example if during the business meeting the taxpayer discusses cooperation rules with the contractor, etc.

It should be underlined that upon issuance the resolution will become binding for the next judicial panels deciding on analogous cases and can be taken into account by the minister of finance for issuance of

individual interpretations. However, the resolution cannot be the basis for taxpayers for reopening of the proceedings that were previously settled in a different way.

The NSA resolution to be adopted by the panel of 7 judges is expected in the first half of 2013.

VAT: Invoices raised by fuel card issuers documenting the fuel supply do not give the right to deduct the VAT

Changes allowing tax settlement of the land lease according to the same rules whatever the legal title to the property (ownership or perpetual usufruct) became effective on 1 January 2013.

Before this date the subject matter of lease contract were the fixed assets or intangible assets subject to depreciation/amortization as well as land. However, the tax regulations did not allow concluding lease contracts the subject of matter of which would be the right of perpetual usufruct of land.

Until the entry into force of new regulations, the entities applying leasing were forced to conclude two separate contracts: lease of building and lease of the right of perpetual usufruct of land on which the building was situated.

The necessity of concluding two separate contracts, in the legislator's opinion, was not grounded especially that under civil law regulations the usufructee has the right to use land with the exclusion of others, hence he can freely dispose of this right. It means that the right of perpetual usufruct can also be the object of trade (including sale).

Another problem were tax consequences arising from the lessee taking up the option of buying the property at the end of lease. In the case of sale of land along with the building/construction situated thereon, the price should be in line with market conditions. In case of long-term lease contracts, the problem was that

there was no possibility to define the residual value of land due to a very long duration of such contracts (most often 10 years).

In the current legal framework the right of perpetual usufruct has been subject to the same tax regime as the lease of land. The exemption (from costs in the case of lessee and from revenues in the case of the lessor) is applied to the value corresponding to the repayment of the price of acquisition of the right of perpetual usufruct. There is also a possibility of sale to the lessee after the end of lease contract at the price that may differ from the market price.

It should be underlined that the new regulations shall apply to lease contracts concluded following this date. Contracts concluded prior to 1 January shall be settled in line with the former rules.

The above information may concern in particular the real estate firms for which the analysed change should be of significant importance in practice.

CIT: Taxation of individuals being shareholders of the partnership limited by shares (SKA) will be subject to the NSA resolution

In January 2012 the Supreme Administrative Court in panel of 7 judges adopted a resolution ruling that an enterprise being a shareholder in SKA does not carry out business activity and hence is not obliged to pay advances on tax. It was argued that only upon receiving the dividend such entity earned revenue and was obliged to pay tax.

After the adoption of the above-mentioned resolution the Minister of Finance issued a general interpretation (interpretation of 11 May 2012; ref. no. DD5/033/1/12/KSM/DD-125), aiming at harmonizing the positions of local tax chambers. In the above-mentioned interpretation he extended the scope of changes to PIT and CIT taxpayers. However, the NSA in its judgments rendered at later dates stated that a

SKA shareholder being an individual is not in a similar situation to businesses and hence should pay advances on personal income tax.

Passing the NSA resolution on advances on PIT is expected in the second half of 2013. If the extended judicial panel of the NSA confirmed the settlement unfavourable to individual taxpayers, a possibility that the Minister of Finance would modify the general interpretation issued in May 2012 would occur.

VAT: Facilitation of bank credits for entrepreneurs who declared reimbursable VAT in their VAT declaration

From 1 January 2013 it will be easier to obtain bank credit if the taxpayer discloses reimbursable VAT in the declaration.

In line with general tax provisions the deadline for VAT refund is 60 days. However, in practice, tax offices frequently verify the settlements made by taxpayers, which additionally extends the payment dates.

In accordance with the current regulations, if a given entrepreneur has a certificate from the tax office confirming the disclosure of VAT refund, it is possible to obtain a credit for which the expected money refund from the tax office will serve as collateral. It is also essential that the above certificate also shows information about settlements and amounts and dates of refunds to be made.

Apart from the certificate, the entrepreneur is obliged to authorize the tax office to transfer the due amount to the indicated bank account in order to secure the credit granted.

It is also crucial that upon lodging the declaration the taxpayer cannot be subject to any proceedings aiming at identification or determination of tax liability.



Proceedings: delay in introducing changes in court fees in respect of complaints filed to the Voivodship Administrative Court (WSA) and Supreme Administrative Court (NSA)

In line with the initial assumptions the increase of fee for filing a complaint to the WSA and cassation appeal to the NSA was to become effective at the beginning of 2013.

However, due to the prolongation of legislation works aiming at harmonization of the regulation with amendments of other acts the Ministry of Justice estimates that the expected regulation should enter into force in March/April this year.

The fees for filing complaints remain unchanged as compared to initial assumptions. Currently the complaint to WSA costs PLN 100 whereas the cassation costs PLN 200.

As a result of changes, for each of the above complaints the party will have to pay PLN 750. Therefore, from the second quarter of 2013 the cost of appeal against the individual interpretation issued will increase fivefold.

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