

TAX NEWSLETTER

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SUMMARY

- **VAT:** Changes to VAT rules from 1 April
- **CIT:** Recognition in time of corrective invoices adjusting direct costs after the preparation of financial statements
- **CIT:** Unfavourable NSA judgment on the assignment of lease agreements
- **VAT:** Doubts about the right to deduct VAT arising from invoices documenting the purchase of a complex marketing service
- **Real estate tax:** Taxation of internal roads – a resolution of the Supreme Administrative Court to be adopted

INTRODUCTION

Dear Sirs,

We would like to remind you of changes in VAT rules from 1 April 2013, and in particular changes concerning giving goods free of charge (a new definition of a sample and introducing the criterion of components parts for VAT calculation), introducing the criterion of VAT deduction using *reverse charge* procedure depending on the correct recognition of output VAT in the declaration.

We would also like to draw your attention to the unfavourable judgment of the Supreme Administrative Court on assignment of lease agreements and the evolving approach of tax authorities to deduction of VAT on invoices documenting the purchase of complex marketing services provided by external suppliers. You will also find an analysis of other current topics.

Enjoy your reading!

Krystyna Szydłowska

VAT:

- Changes to VAT rules from 1 April

We remind that the another part of amendments to the VAT Act became effective on 1 April 2013. These amendments concern VAT rates, margin procedures in tourism industry, tax representative, etc.

CIT:

- Recognition in time of corrective invoices adjusting direct costs after the preparation of financial statements

A judgment was delivered recently which clearly sets the orientation of tax authorities' practice concerning the recognition in time of invoices correcting direct costs incurred in the preceding years. In line with the judgment issued by the Supreme Administrative Court on 26 February 2013 (ref. II FSK 1298/11) costs directly related to income of a given year but incurred after the preparation of financial statements for a given year, must be recognized in tax terms as tax deductible costs of the following reporting period. This judgment calls into question the correctness of the recent jurisprudence according to which the adjustment of direct or indirect costs should be recognized in the same year in which the initial cost was recognized, this being accounted for by the fact that corrective invoices are closely related to the factual situation in the past without modifying the moment of incurring and deducting the cost.

CIT:

- Unfavourable NSA judgment on the assignment of lease agreements

Judgment of NSA of 6 March 2013 (ref. akt II FSK 1332/11)

According to the Supreme Administrative Court, in the legal framework effective until the end of 2012, taking the place of the party to the lease agreement did not entail the succession to rights and obligations of the present party to the lease agreement.

It stemmed from the fact that at the time there was no legal basis which would provide for the succession to tax rights and obligations. The succession could not be derived from other branches of law, i.e. civil law.

Consequently taking the place of the current lessee (or lessor) involved the necessity of re-examining whether the new agreement meets all criteria to be considered a tax lease agreement.

Please note that the tax regulations effective from 1 January 2013 stipulate that the change of the parties to the lease agreement does not affect the rights and obligations of the parties to the agreement.

VAT:

- Doubts about the right to deduct VAT arising from invoices documenting the purchase of a complex marketing service

The right to deduct input VAT disclosed on the invoices issued by marketing agencies for complex promotional services (including fees of marketing agency and cost of goods given free of charge) has been raising more and more doubts recently.

For a long time tax authorities have admitted the possibility to deduct input VAT from invoices received from marketing agencies for complex services related to promotional actions (e.g. the interpretation of the Director of Tax Chamber in Warsaw of 8 September

2011, ref. no. IPPP2-443-675/11-4/AK), being of the opinion that giving promotional items (e.g. prizes or gifts) free of charge constitutes an element of a complex marketing service and hence is related to taxable sale and as such gives right to deduct input VAT.

However, under the influence of CJEU jurisdiction, the above approach of tax authorities started to evolve in a taxpayer-unfriendly direction (compare interpretations of the Director of Tax Chamber in Warsaw of 21 September 2012, ref. no. IPPP3/443-692/12-2/RD and of 30 May 2012, ref. no. IPPP2/443-232/12-2/IG). In these interpretations the Director of Tax Chamber in Warsaw by making reference to the CJEU judgment of 2010 in joined cases C-53/09 Loyalty Management UK Ltd and C-55/09 Baxi Group Ltd, refused the taxpayers the right to deduct VAT on expenses for purchase of goods given for free as part of promotional actions by the marketing agencies arguing that distributing different types of goods or services to the clients of the ordering party as part of promotional actions cannot be considered to be a complex service. According to the tax authority in this case the agent does not acquire the right to dispose of the goods distributed by marketing agencies as an owner but acts as a third party making payment for the supply of goods carried out by the agency for beneficiaries (which consequently leads to a conclusion that in this context the agent does not have the right to deduct VAT on goods purchased by the marketing agency).

A change in the tax authorities' opinion does not mean that the taxpayers using services of marketing agencies will be definitely deprived of the right to full VAT deduction. A body of rulings suggests a completely different approach to the above matter as confirmed by the recent judgment of the Voivodship Administrative Court in Rzeszów of 7 March 2013 r. (ref. akt I SA/Rz 75/13), aligning with the taxpayer-friendly approach. In this judgment the court ruled that the entrepreneurs can deduct in full the input VAT

arising from invoices received from marketing agency for the organization of a complex promotional action even if the service includes giving free gifts to potential clients.

However, due to discrepancies in the approach of tax authorities and administrative courts the entrepreneurs using marketing agency services should pay particular attention to related settlements and consider a potential application for individual tax interpretation in order to confirm the full deductibility of VAT on invoices documenting the purchase of complex marketing services.

- Real estate tax: Taxation of internal roads – a resolution of the Supreme Administrative Court to be adopted

We would like to inform you that in the last days the President of the Supreme Administrative Court proposed to adopt a resolution by seven judges of the Supreme Administrative Court (NSA) on a controversial matter, namely the impact of data contained in the land and property register on the property taxation method.

It seems that NSA should in particular focus on the question whether the roads and structures located on the land which are not classified as roads in the register (not marked with “dr” symbol¹) could be exempt from tax.

The above doubts arose as to the period from 12.2003 to 12.2006 when the previous wording of article 2 paragraph 3 subparagraph 4 of the Act on Local Charges and Taxes was in force. This provision stipulated that right-of-way along with roads and structures connected with road traffic operation, securing and servicing are not subject to taxation.

Currently delivered judgments of administrative courts are contrasting. Some of them refuse to grant the right to exemption if the land on which the right-of-way or

¹ “dr” standing for “droga”, i.e. road in Polish



structures are situated is not classified as road in the register kept by the local government bodies. The others maintain that data included in the register does not decide about the eligibility for tax exemption but what matters is what kind of structure is located on a given land and this criterion is crucial for the possibility of deduction.

The provision which provides the basis for the above-mentioned resolution is of particular importance for entities holding large industrial plants or power distribution companies (with regard to internal roads located within their limits).

The estimated deadline for NSA resolution is the second half of 2013.

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