

Tax Newsletter

Issue # 24 – March 2012



Dear Sirs,

In the March issue of our Newsletter, just before the finalisation of CIT settlements for last year, you will find practical information about recognition of indirect costs arising from the purchase of goods and services whose delivery was accepted in the previous fiscal year but the invoice was received after year closing. We also recommend reading a commentary on entities which conclude transactions with related parties while incurring a tax loss. We discuss the recent approach of tax authorities and courts to this question and we suggest what aspects should be taken into account when preparing for potential questions or control.

Those of you who provide or purchase complex warehousing services may find our article of interest. Doubts regarding the determination of the place of supply of warehousing services are to be resolved by CJEU. We will keep you informed on this matter.

On this occasion, I would like to invite you to another **tax conference dedicated to VAT** which will be held at Mazars office on **27 March 2012**. You can find a detailed programme of this event at our website www.mazars.pl (News/ Events).

Yours sincerely,
Krystyna Szydłowska

SUMMARY

1. **VAT: Place of supply of services in the case of complex warehousing services**
2. **CIT: Indirect costs at the turn of the year incurred as a result of deliveries for which no invoices were received**
3. **Transfer pricing: tax loss of a business entity vs. settlements with related parties**
4. **PIT: Settlement of shareholder being a natural person in the partnership limited by shares**
5. **Real estate tax: Garages subject to a higher tax rate**
6. **PIT: Kilometrage rates remain unchanged**





1 VAT: Place of supply of services in the case of complex warehousing services

The CJEU is to resolve doubts about the place of taxation of complex warehousing services.

The Act on VAT does not contain any legal definition of warehousing services and articles 28b and 28e of the Act do not apply directly. However, considering the fact that warehousing space available is necessary to carry out this type of services in order to accept and store goods on the warehouse, the storage service is inherently related to the property, i.e. the warehouse building. Therefore, the warehousing services fulfilling the conditions arising from art. 28e should be subject to taxation in the place where the property is located.

However, warehousing services are often provided in a complex manner and encompasses also shopping, logistics, sorting, repacking services, etc. A doubt arises as to whether article 28b of the Act on VAT should apply and hence the service should be subject to taxation in the place of business of the service recipient and in the event that these services are provided for the fixed place of business of a taxpayer that is located in another place – in the fixed place of business of the service recipient.

The question of taxation of complex warehousing services sold or purchased by taxpayers from EU and third countries has been causing controversy for some time already which is reflected in the incoherent position of administrative courts and tax authorities on this matter. Hopefully, this dispute will soon be resolved – the Supreme Administrative Court referred a question for preliminary ruling to the CJEU (resolution of 8 February 2012, ref. no. I FSK 611/11) concerning this issue. The judgement of CJEU should ultimately decide how to interpret articles 44 and 47 of the 112 Directive, i.e. whether complex services of storage of goods are taxable in the place of location of the property or in the place of seat / fixed place of business of the service recipient.

2 CIT: Indirect costs at the turn of the year incurred as a result of deliveries for which no invoices were received

Tax deductible costs other than those directly related to income (indirect costs) include such expenses that cannot be directly assigned to specific income but that are reasonably justified as leading to its earning or maintaining or securing a source of income. They are not in tangible relation with specific earnings of the taxpayer – it is not possible to determine in what period and in what amount the related income arose.

In accordance with article 15 section 4e of the CIT Act the date of incurring tax deductible cost other than cost directly related to income (the day when the cost is deducted) is defined as the date when the cost was recognized in the books of accounts based on the received invoice (bill) or the date when the cost was recognized based on another evidence for lack of invoice (bill). A situation when this refers to provisions or cost accruals disclosed as costs is treated as an exception.

In practice it may happen that invoices for trade liabilities qualified as indirect costs which were accepted by the entity in the previous fiscal year are delivered after the book closing and are not recognized by the entity in the books for the previous year. If such situation occurs, the qualification of cost indirectly related to income but not supported by invoice for tax purposes will depend on its qualification for balance sheet purposes. If a provision was recognized following an expense or if this expense was considered to be a cost accrual, this expense is not a tax deductible cost in the preceding year. Such expense will be considered to be a tax deductible cost in the preceding year if it is disclosed in the books of this year as a so-called uninvoiced liabilities in line with principles set out in the Accounting Act and National Accounting Standard no. 6 "Provisions, cost accruals, contingent liabilities".

According to the definition provided in § 2.1. of the National Accounting Standard no. 6, "a liability – is an obligation arising from past events with a reliably determined value which may result in the use of held or future assets of the entity. Past events include for example a purchase of goods, materials or services". Then, in line with § 2.2. of the aforementioned standard „provisions are liabilities whose maturity date or amount are not



certain” and „cost accruals – are provisions related directly to operating activity”. At the same time cost accruals being provisions do not include cost accruals defined in article 39 section 2 item 1 of the Accounting Act (i.e. liabilities arising from performances provided for the entity by its contractors the amount of which can be estimated in a reliable manner). These include in particular liabilities arising from uninvoiced deliveries and services accepted by the entity which are assigned to trade liabilities also if determining of the actual quantity and/or price of the delivery/service may require estimates.

As a result, when a company purchased specific goods and services in a given year and used them, and is able to define the amount due (through estimate) at year-end based on the concluded contracts or other documents despite not having a relevant invoice (or bill) issued by the contractor, it should disclose them **not as provisions or accruals but as uninvoiced deliveries** (trade liabilities). As said above, the costs disclosed as uninvoiced deliveries for balance sheet purposes represent tax deductible costs in line with the principle set out in the above article 15 section 4e of the CIT Act i.e. in the preceding year in which they were recognized for balance sheet purposes as uninvoiced deliveries.

3 Transfer pricing: tax loss of a business entity vs. settlements with related parties

Entities operating as part of groups which recorded a tax loss at the end of 2011 should proceed to a thorough analysis of transactions with related entities and related settlements before they catch tax authorities' attention.

Economic downturn and uncertain market situation entails for many entities a significant deterioration of business conditions and of their financial standing and leads to incurring losses, including a declaration of tax loss. Although such deficits are not unusual currently, the reasons for deterioration of tax condition of a company are subject to analysis and inquiry of tax authorities, in particular if the former massively makes settlements with related parties.

If the company is part of a group, tax control authorities verify particularly whether the current situation of a given entity results from reasonable market factors or whether it is a result of

performing settlements aiming at tax optimisation or transfer of profits to more tax-friendly jurisdictions.

In order to be able to dismiss such allegations the company should verify and prepare appropriate arguments in support of the thesis that the current tax condition of the company is temporary and results from the pursuit of planned strategy regarding for example the investments made, market expansion, etc. A loss reported over a long period does not represent a reasonable factor to continue as a going concern by independent economic entities.

It has to be noticed that tax authorities analyse more and more thoroughly the transactions carried out by companies operating within a group. Considering the functional profile (role) of a given entity in the business model as well as in the added value chain within each transaction they assess the conditions of settlements made also by using market data (i.e. data concerning the profitability of comparable entities). As an example of the aforementioned thorough analysis we may quote the case judged by the Voivodship Administrative Court in Białystok of 12 July 2011 (ref. no. I SA/Bk 217/11).

In the above case what aroused the interest of tax authorities was the fact that the financial results of two related entities (local) alternated over the years, i.e. the loss of one of the companies was matched with income of the other which allowed a reduction of tax burden of this group. The approach of authorities shows that the analysis of transactions with related parties is performed from a broad perspective including among others, the results of other group companies involved in the cooperation and non-price conditions of these transactions which may indicate a non market nature of these settlements, for example very long (unusual for transactions between non related entities) payment dates for purchased goods.

It is to be reminded that if the taxpayer's income arising from transaction with a related local party is questioned and re-estimated by tax authorities, it is impossible to adjust profits of the other party to the transaction.

The quoted judgment can be viewed as an indication for taxpayers on how to prepare for a potential tax control. In the light of more and more detailed analyses of transactions the taxpayers should not only ensure tax documentation but also the analysis of comparable data justifying the application of a given level of prices / achieved



profitability and prepare arguments in support of settlements with related parties having a significant impact on the situation of a given company, especially if it incurred a loss in the given fiscal year. The practice demonstrates that these companies attract tax authorities' attention in the first place.

4 PIT: Settlement of shareholder being a natural person in the partnership limited by shares

Despite the uniform jurisprudence of administrative courts exempting shareholders in the partnerships limited by shares (hereinafter: S.K.A.) from the obligation of paying advances on personal income tax, this issue still causes practical controversy.

It seemed that the interpretation divergences will end upon resolution of the Supreme Administrative Court (NSA) of 16 January 2012 (ref. no. II FPS 1/11), in which the Court stated that the income of a company being a shareholder in S.K.A. is subject to taxation on the date of receiving the dividend. Although the factual situation concerned the revenue of a company, the logic behind the rationale can be applied accordingly to natural persons.

This judgment is in line with identical opinions expressed by administrative courts at the beginning of 2011 and at the beginning of 2012, among others, judgments of the Supreme Administrative Court: of 5 May 2011 (II FSK 2126/09), of 19 December 2011 (II FSK 902/10), of 10 January 2012 (II FSK 1326/10). The above judgments referred to the fact that the due revenue does not arise for the shareholder during the year.

According to NSA, the revenue arises only upon claim for payment of dividend. In line with this assumption, a shareholder of S.K.A. should pay an advance on personal income tax only for the month in which he received a payment under profit sharing.

Despite the seemingly regulated situation in the jurisprudence of administrative courts regarding advances for shareholders of S.K.A., tax authorities do not share the view presented by the courts. In line with the interpretation of the Tax Chamber in Łódź of 8 February 2012 (ref. IPTPB2/415-685/11-6/AKr) the shareholder of

S.K.A. who is a natural person is obliged to pay advances on income tax throughout the year in accordance with the rules defined in the PIT Act, and submit a tax declaration after the closing of fiscal year.

Furthermore, tax authorities consider that revenues of S.K.A. shareholders should be treated as derived from non-agricultural activities (for instance interpretation of the Director of Tax Chamber in Łódź of 31 January 2012; ref. IPTPB2/415-737/11-2/KR or interpretation of Director of Tax Chamber in Katowice of 10 January 2012; ref. IBPBI/1/415-1090/11/AP). In their view, the moment of revenue recognition should be determined according to principles set out in article 14 of the CIT Act by taking into account the nature of economic events during the period of carrying out business activity by S.K.A. The revenue should be determined pro rata the shareholder's stake in the profit of the company and advances on personal income tax should be paid each month.

The above standpoint of tax authorities, as extremely disadvantageous for taxpayers, is debatable. In particular, doubts arise as to the plausibility of payment of monthly advances in the event of failure to pay dividend by S.K.A. in a given fiscal year.

Therefore, further solutions regarding the discussed matter are to be expected in the next few months, which will perhaps bring the position of tax authorities closer to the more taxpayer-friendly jurisprudence of administrative courts.

Bearing in mind the importance of the problem, we will keep you informed on a current basis of the tax authorities' approach to this question.



5 Real estate tax: Garages subject to a higher tax rate

In line with verbal arguments in support of the resolution of the Supreme Administrative Court of 27 February 2012 (ref. II FPS 4/11), underground parking lots in multi-family residential buildings which were assigned to a separate land and mortgage register should be subject to tax rate applicable to other buildings or their parts instead of rate applicable to residential buildings.

Following the resolution, parking lots which have separate land and mortgage registers will be taxed at almost tenfold higher rate than those included in the land and mortgage register along with the apartment.

Although it is too early to make definitive conclusions regarding the discussed resolution before the publication of reasons, Mazars experts consider that such a significant differentiation of taxpayers depending on the method of documenting an identical ownership right may raise serious doubts.

6 PIT: Kilometrage rates remain unchanged

In the holiday issue of tax Newsletter no. 7-8/2011 we informed you about the draft amending the regulation of the Minister of Infrastructure on the conditions of determining and methods of refund of costs of use of private cars, motorcycles and motorbikes not being a property of the employer for professional purposes. In line with this draft the costs of use of private vehicles for company purposes should be refunded to the employee by the employer according to higher rates per kilometre than those applied to date.

Unfortunately, based on the recent information communicated by the Ministry of Finance the year 2012, due to public finance condition, is not a period that favours the introduction of the amendments proposed in the draft. However, the Minister of Finance has not indicated the expected date when the amendments to the kilometrage rates could be implemented.

Events Upcoming

We are pleased to invite you to business breakfasts and seminars conducted by tax experts of Mazars:

27 March 2012, 9.30 a.m.- 1:30 p.m., Mazars office in Warsaw, ul. Piękna 18

“Conference on VAT 2012”

For more information and registration: Aneta Sadkowska, Business Development
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