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Tax Review

Dentons Poland

FEBRUARY / MARCH 2016

Introduction

Dear Sirs,

We are proud to present the next edition of our "Tax Review" which contains a selection of rulings and interpretations that had been issued or published in January and February 2016. I hope you will find the information provided here helpful and of interest.

If you would like to share Dentons' insights with friends or co-workers, please send their name, business position and e-mail address to: dentonstaxadvisory@dentons.com

Sincerely yours,

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Resolution of the Supreme Administrative Court on the Corporate Income Tax effects of a change of party to a leasing agreement with respect to agreements made by 31 December 2012 soon to be expected

Description

On 10 February 2016 the Supreme Administrative Court (NSA) provided a panel of 7 judges with a legal issue raising serious doubts to be settled (case no.: II FSK 3362/13): In light of Art. 17a points 1 and 2 of the CIT Law in the wording effective before 1 January 2013, does a change of a party to a leasing agreement made during the base term of the agreement, with other contractual parameters unaffected, lead to the necessity of re-assessing the terms and conditions of the leasing agreement in terms of their compliance with the criteria listed in Art. 17b sec. 1 of the Law, or is this change unimportant for the classification of the legal relationship, and in consequence – of the tax results of the original agreement.

Comment

Provisions concerning the taxation of an object of leasing allow the lessor (the financing party) to sell the lease object to the lessee for a price below the market value after the lapse of a so-called base lease term (specified in detail in the regulations).

Since 1 January 2013 the CIT Law has envisaged that a change of party or parties to a leasing agreement, with other contractual parameters unaffected, does not make the lease term re-run from the beginning. Therefore, if a new party to a leasing agreement continues its

predecessor's agreement, it will take advantage of the lapse of time – also if its predecessor was a party to the agreement – allowing for the sale of a lease object for a price below the market value (in the case of financial leasing) or below the hypothetical net value (in the case of operational leasing).

Until the end of 2012 there were no specific regulations in this respect, which led to practical controversies, especially bearing in mind that pursuant to transitional regulations, a provision explicitly governing the effects of a change of a party to a leasing agreement is applicable to leasing agreements made on or after 1 January 2013. In the judicial practice two contradictory standpoints have appeared in recent years with respect to leasing agreements concluded before 1 January 2013, i.e. (i) after the change of a party to an agreement the lease term starts running from the beginning, and if the parties do not comply with the above, a tax authority is authorized to determine income from the sale of a lease object in accordance with market prices, (ii) the change of a party to a leasing agreement only implies the continuation of the agreement.

The extended panel of judges shall decide which of the above interpretations is correct.

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A mutual claim set-off is not a form of settling financial accounts allowing taxpayers to benefit from the shortened deadline for processing VAT refund claims.

Description

The Regional (Wojewódzki/Voivodship) Administrative Court in Gliwice ruled (in its judgment of February 10, 2016 (court file No. III SA/Gl 1957/15)), that paying invoices by setting off mutual claims does not provide a basis to request an accelerated refund of surplus input VAT in the shortened deadline of 25 days. An accelerated refund is only possible where a taxpayer has paid for the purchased goods and services in cash or by wire transfer.

Pursuant to Article 87 Sec. 2 of Tax on Goods and Services Act of 11 March 2004 (the "TGSA"), a refund of a surplus of the input over the output VAT is generally handled within 60 days. This deadline can be reduced down to 25 days provided that the taxpayer meets the prerequisites stipulated in Article 87 Sec. 6 of TGSA which provides that upon the taxpayer's request submitted along with taxpayer's filing of VAT return the revenue office is obliged to refund the resulting tax difference within 25 days counted from the date of filing the return containing the settlement provided that the sums of the input tax reported in the return arise in particular from invoices documenting sums payable which have been paid in full, all subject to Article 22 of Act on Freedom of Economic Activity of 2 July 2004 (Journal of Laws of 2010, No. 220, Item 1447, as amended) (the "AFEA"), which provides that in specific instances an entrepreneur (business entity) shall remit or receive payments through a bank account.

In the abovementioned case examined by the Regional Administrative Court the taxpayer was expecting to have the surplus input VAT refunded within the 25-day deadline and they argued that they were settling his liabilities arising from the purchase invoices either by cash or by wire transfer, or by mutual setoff, which means that they were acting in conformity with Article 22 of the AFEA. The taxpayer applied to have the above stance confirmed in a tax ruling and after having obtained a negative tax ruling, they appealed against it to the Regional Administrative Court.

The Regional Administrative Court dismissed the taxpayer's complaint. The Court acknowledged that Article 87 Sec. 6 of TGSA was an exemption to the general principle concerning the refund of the surplus of the input over the output tax within 60 days. If we are dealing with an exception, the regulation (i.e. Article 87 Sec. 6 of the TGSA) should be interpreted strictly. Consequently, due to the fact that Article 22 of the AFEA contains no reference to the legal concept of setoff it needs to be recognized that settling accounts in this way will not allow benefitting from the accelerated processing of VAT refund claims.

Comment

Omawiany wyrok należy ocenić negatywnie. Wykładnia The ruling at issue should be assessed negatively. The interpretation followed by the Court is inconsistent with the literal reading of the legal regulations, the principles of systemic interpretation and the assumption of reasonableness of the legislative authority. Article 22 of the AFEA only provides for the situation where an entrepreneur (business entity) remits or receives payments via their bank account. A reference to this regulation in Article 87 Sec. 6 of the TGSA should be read so that a taxpayer who is settling an obligation by physically paying cash should, in the instances indicated in the AFEA, pay through a bank account. However, there are no grounds to conclude that a taxpayer regulating an obligation by setoff is acting contrary to or ignoring the provisions of the AFEA. A set-off is a legally admissible form of regulating obligations which gives an effect that is analogous to paying in cash or by wire transfer. Therefore, there are no legal or functional arguments to believe that a taxpayer performing set-off cannot benefit from the accelerated refund of input VAT.

The judgment in question is another ruling which is negative for taxpayers in this kind of situation. This approach adopted by the court may influence the standpoint taken by the fiscal authorities in individual taxpayer cases. We recommend it to those of our clients who structure transactions in a way that takes into account accelerated VAT refunds, that they avoid the set-off as a method of settling obligations, since there is a significant risk that the fiscal authorities will deny the right to an accelerated VAT refund in such a situation.

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Definition of ‘first occupancy’ in VAT regulations inconsistent with EU laws?

Description

On February 23, 2016 the Supreme Administrative Court (NSA) decided in case no. I FSK 1573/14 to submit a preliminary question to the Court of Justice of the European Union to establish whether the definition of ‘first occupancy’ of a building or structure or any part thereof provided in Poland’s VAT Act is compatible with EU laws.

The NSA issued its decision in a case concerning a taxpayer who sold a building less than two years after having made improvements to it worth more than 30 percent of the initial value of the building, without declaring any VAT liability in connection with this action. Importantly, having made the improvements, the taxpayer used the building exclusively for his own needs, without making it available to any third party (prior to the sale) under a transaction subject to VAT.

The Polish VAT Act defines ‘first occupancy’ of a building or structure or any part thereof as requiring the said space to be handed over for use “in performance of taxable acts”. It follows from this definition that the use of the property by the taxpayer subsequent to the improvements made to it did not amount to the first occupancy of the building. The tax authorities and the Provincial Administrative Court (WSA) which reviewed the taxpayer’s appeal against the decision finding him in arrears with VAT concluded therefore that the first occupancy of the building took place only upon the sale of the property and that it was this latter transaction that was subject to VAT. The NSA was, however, uncertain as to whether the definition of ‘first occupancy’ in the Polish VAT Act is consistent with Directive 2006/112/EC on the common system of value added tax.

Comment

The ruling referred to above comes in the wake of several precedential rulings handed down recently by the NSA which found the definition of first occupancy adopted in Polish law to be inconsistent with EU laws and refused to apply it in the cases brought before it (cf. e.g. the judgment of the NSA of May 14, 2015, case no. I FSK 382/14). The main objection voiced by the NSA in these cases was against the explicit precondition laid down by the Polish legislator whereby the first occupancy of a building or structure or any part thereof may take place only if these spaces are handed over for use “in performance of taxable acts”. It follows from this precondition that if a taxpayer commences to use a real property it had developed or improved for its own purposes, this will not amount to the first occupancy of the property. The NSA holds that EU laws do not provide any grounds for Poland’s legislator to impose a condition of this kind.

The Court of Justice of the European Union may be expected to rule on this issue in 2017 at the earliest, although the Advocate General may get around to issuing an opinion often correctly anticipating the Court's eventual judgment already before 2016 is out. If the Court finds the Polish regulations to be inconsistent with EU laws, the consequences for real property taxation with VAT would be substantial. To begin with, the definition of 'first occupancy' in the VAT Act would have to be amended. Secondly, although the tax authorities cannot, in principle, rely directly on VAT-related EU Directives to find against taxpayers, transactions that have already been completed would need to be subjected to detailed reconsideration, including those that were the subject of tax rulings (although in the case of the transactions covered by such rulings risks would be much less significant).

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In a situation where all the data of the seller or purchaser of a specific good (or service) is wrongly stated in a given invoice, it is not admissible for the purchaser to correct the data with a correcting note.

Description

In its ruling of 4 February 2016 (case no. I SA/Po 1270/15), the Provincial Administrative Court in Poznan (hereinafter the "WSA") held that it is inadmissible for the issuance of a correcting note to actually result in the change of the entity being a party to a sale contract. Consequently, in a situation where all the data of the seller or purchaser of a specific good (or service) is wrongly stated in a given invoice, the entity issuing the invoice is required to issue a correction invoice.

A company moved for a tax ruling to be provided in a matter regarding the tax on goods and services. In its motion, the company stated that it as an acquiring company which, in connection with a demerger of another capital company, would receive an organized portion of an enterprise spin off from the company being a subject to the demerger. In connection with the planned acquisition, the Company asked whether in relation to the invoices, correction invoices, duplicates of invoices and correcting notes received by the Company, which indicated the demerged company as the purchaser, the Company was entitled to change the purchaser data in such a way that it reflected the fact that the acquiring company was a party to the transaction, by way of issuing a correcting note.

According to the Company, Art. 106j and 106k of the Tax on Goods and Services Act (hereinafter the "VAT Act") stipulates the possibility to have any errors contained in an invoice, which pertain to either purchasers or sellers, eliminated also by the purchaser with the use of a correcting note. The Company held that the errors that may be subject to correction may also include the errors that result in an erroneous indication of a natural person or legal person that was not a party to a sales contract since Art. 106k (1) of the VAT Act stipulating that a purchaser may issue a correcting note does not impose any limitations in that regard.

The Company received a negative tax ruling and challenged it before the WSA. When considering the case, the WSA did not share the Company's position and dismissed the Company's appeal by holding that a correcting note was a specific type of document issued by the purchaser (instead of the seller) and the use thereof cannot be fully unlimited. In the opinion of the WSA, there are certain limits as regards the scope of correcting notes and they should be applied in the case of petty errors, such as, among others, errors in the relevant name, address or tax ID number (NIP).

That said, invoices must indisputably indicate that the entity specified in the documents issued by the sellers is definitely the entity purchasing the relevant goods. However, if a totally different entity is the purchaser, then the change within that scope is a material one and such a change may only be made by the seller, as the source of the documents issued, thus eliminating the incorrect document.

Comment

Tax acts do not regulate in a direct manner the issue of handling a situation where a wrong entity was indicated in an invoice. However, it should be pointed that the WSA ruling falls within the prevailing views on the use of correcting notes that have been expressed by both administrative courts and tax authorities.

The view should be regarded to be a positive one. The purchaser data changed by way of issuing a correcting note would actually result in the change of the entity being the recipient of the service or good(s) since the identity of the purchaser would not be preserved. It was pointed out on numerous occasions by administrative courts that it would result in the creation of a document being an alternative to the invoice since one entity would be recorded as the purchaser of good(s) in the original invoice and a completely different one would be indicated in the contents of the correcting note, which would undermine the purpose for which the whole concept was devised. Potentially, it might also trigger some risk of a practical nature in a situation where both the entity named as the purchaser in the invoice and the entity indicated in the correcting note were attempting to deduct VAT under one and the same invoice.

Additionally, the adoption of a contrary assumption would entail the issue of a practical nature when trying to resolve which purchaser should issue the correcting note to change the purchaser. Should it be issued by the entity receiving the invoice or rather by the actual purchaser? Art. 106k of the VAT Act regulates the issuance of a correcting note by way of authorizing the purchaser who received an invoice containing errors to issue one. However, when interpreting the aforementioned provision literally, we would arrive at a doubtful conclusion that an entity not involved in a transaction would be supposed to participate in the accurate documentation of such a transaction.

The use of a correcting note to change the entire part of the purchaser's data may be potentially considered with respect to certain restructuring measures. In the case where a given entity acquires the enterprise of another entity whose data was disclosed in the original invoice, there would be no risk of a double VAT deduction since the acquiring entity as the sole entity being in existence upon the completion of the restructuring would be the only entity authorized to deduct the same.

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CS29229-Warsaw Tax Report-ENGLISH-March 2016-V3 — 05/04/2016