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Transaction with a Contractor Removed from the Register of Taxpayers

Tax Alert

Dear Readers,

The tax authorities question the right to deduct VAT due from invoices issued by entities not registered for the VAT purposes. Does the right to deduct VAT depend on the contractor's registration?

REGISTER OF TAXPAYERS AND SAF-T VAT FILES

At the beginning of the year, tax authorities gained the right to remove an entity from the register of VAT payers without issuing a decision, and the number of removed entities now has almost reached 50,000. At the same time, from the beginning of the year, the obligation to transfer monthly SAF-T VAT files has begun to apply to small and medium-sized enterprises. The files are analysed by the tax authorities on a regular basis.

The above-mentioned changes have a significant impact on the risk of the business. At any time now it may turn out that our contractor has been removed from the register of VAT payers (e.g. as a result of submitting "zero" declarations for 6 months, or a dispute with the tax authority in the field of issuing "empty" invoices). At the same time, the tax authority in a simple way – on the basis of the SAF-T VAT file – may decide that in our statement we have included an invoice received from such a contractor and recognize that we did not have the right to deduct the VAT indicated in the invoice, referring to the lack of the right to deduct VAT on the basis of invoices issued by a fictitious entity. Some taxpayers have already received summons concerning this issue.

NON-EXISTENT AND NON-REGISTERED ENTITY

In refusing to recognize the right to deduct tax on the purchase of goods or services from a non-registered for VAT, tax authorities refer to Article 88 Section 3a Item 1 Letter a of the Act on Tax on Goods and Services (hereinafter: "ATGS"). Under this provision, invoices and customs documents do not constitute grounds for reducing the tax due as well as the return of the tax difference or the return of the tax accrued in the case when the sale was documented by invoices or corrective invoices issued by a non-existent entity.

The reference of the tax authorities to this provision is incorrect, since it arises from its content that no right to deduct the tax exists if the invoice was issued by a non-existent (fictitious) entity. It does not include a situation in which the sale was carried out by an entity that exists but has been removed from the list, or has not been registered as a VAT taxpayer at all.

ECJ JUDGMENT

The issue of the right to deduct VAT from invoices issued by a non-registered entity will soon be resolved by the European Court of Justice (hereinafter: "ECJ") in the case C-101/16 SC Paper Consult SRL. The proceedings concern a Romanian taxpayer who deducted VAT based on invoices issued by an entity removed from the register of VAT payers due to not submitting the declarations of income. In the preliminary ruling question, the ECJ will examine the compliance of the refusal to grant the right to deduct VAT tax when the invoice has been issued by an inactive taxpayer with the EU Directive. The outcome of the case will significantly affect the situation of Polish taxpayers.

For the time being, the opinion of the Advocate General Paolo Mengozzi in the case has been presented on 31 May 2017, according to whom the solutions adopted by the Romanian law are too restrictive and violate the principle of neutrality. Failure to meet the formal requirements should not result in severe consequences in the form of the revocation of the right to deduct the tax. The measures stipulated in the Romanian legislation are aimed at discouraging entities from making transactions with an inactive entity, since the likelihood of being involved in a tax fraud is greater in the case of such entities. In the Advocate's opinion, the suspension of the right to deduct the tax and not its total loss would better serve the purpose.

Although the Advocate's opinion is not binding on the ECJ judges, it can be anticipated that the judgment will coincide with the opinion.

OBLIGATION TO VERIFY THE CONTRACTOR

The Advocate General pointed out that the failure to meet the formal requirements can result in the revocation of the right to deduct the tax in only two cases, namely:

- when the breach of formal requirements would make it impossible to determine whether the transaction actually took place;
- when the company knew or suspected that a tax fraud might have occurred.

In the case of a tax fraud committed by the contractor, in order to prove the company's innocence and retain the right to deduct the tax, it is necessary to document acting in "good faith" while complying with the principles of "due diligence". The lack of caution may result in questioning the taxpayers' right to deduct VAT by the tax authorities.

Therefore, we suggest that you prepare and implement appropriate procedures for the verification of contractors, the implementation of which will greatly reduce the risk of questioning your VAT settlements by the tax authorities.

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Should you wish to discuss the above mentioned amendments in detail, feel free to contact us:

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