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Will there be a breakthrough with respect to deliveries and services provided on a continuous basis?

Tax Alert

Dear Readers,

Recently, the reasons for the judgement of the Supreme Administrative Court (SAC) of 11 April 2017, case file No. I FSK 1104/15, concerning the provision of supplies of goods on a continuous basis have been published. The said judgement is even more interesting because it stands out from a series of previous decisions in this respect, by stating that continuous deliveries are also deliveries provided partially, in settlement periods determined by the parties to the transaction. This issue was approached in the same way also by the SAC in the judgement issued on 12 July 2017 (case file No. I FSK 1714/15).

The In its judgement of 11 April 2017, the SAC heard the case of a company supplying its customers with printing paints and varnishes, which issues invoices for them for all deliveries performed within the settlement period (ten days or a month), agreed between the parties (based on the freedom of contracts) and not for individual releases from the warehouse (goods transports). The company requested the issuance of an individual interpretation concerning the recognition of the deliveries performed by the company as deliveries performed continuously, pursuant to Art. 19a(4) in connection with Art. 19a(3) of the Act on Tax on Goods and Services.

Both the interpreting body and the Provincial Administrative Court in Łódź decided that the position of the company is incorrect, indicating that a continuous delivery is only a delivery performed in such a manner that it is impossible to distinguish its individual elements.

The SAC did not agree with such interpretation of regulations. The court decided that although the result of linguistic interpretation is not clear in this case, the use of the pro-EU interpretation of this provision and – additionally – the systemic interpretation must lead to the conclusion that "the concept of delivery provided in a continuous manner, as referred to in Art. 19a(4) in connection with Art. 19a(3) of the Act on Tax on Goods and Services, should be understood as a delivery that is performed in a continuous manner by means of partial services, for which consecutive terms of payment or settlement are determined".

The SAC confirmed that in case when facts determined based on a meticulous analysis of the contractual relationship between the parties suggest that the delivery is performed in a repetitive manner (constituting partial service) in settlement periods determined by the parties, we are dealing with delivery of a continuous nature.

In a similar vein, the SAC spoke also in the aforementioned judgement of 12 July 2017 concerning a company in the chemical industry (we are still waiting for the written justifications for the judgement).

Are we then witnessing the formation of new jurisprudence? Well, we still have to wait for that. We only draw your attention to the fact that the definition of both services provided in a continuous manner and deliveries of continuous nature is still controversial. At present, two main approaches collide – according to the commented judgement, a continuous delivery means:

- delivery of countable goods,
- delivery composed of successive partial deliveries,
- delivery performed within a single (the same) contractual relationship, i.e. for instance, a specific permanent agreement,
- delivery settled in settlement periods agreed between the parties.

Courts and some commentators also present a different view, according to which continuous deliveries mean such deliveries that:

- consist in deliveries that can be countable only by a unit of time or in case of which unit settlement is significantly difficult in objective terms,
- constitute a service performed in specific time, for which only the beginning and end of deliveries can be clearly identified on a current basis (e.g. after termination of cooperation).

In the judgement of April, the Court decided that the assumption of the countability of deliveries with a unit of time is irrational, as these are very rare cases and they are governed separately (e.g. for power supply a separate tax point is provided for). Therefore, the provision of Art. 19a(4) of the Act on Tax on Goods and Services would be – in the Court's opinion – void. It is difficult not to agree with the adjudication panel that there are many doubts concerning deliveries of a continuous nature, nevertheless, it is a pity that not all arguments were taken into account:

- the pro-EU interpretation does not prejudge that continuous deliveries are simply deliveries repetitive in time – the provision of Art. 64 of Directive 2006/112/EC in Polish wording is extremely imprecise; the very comparison to the English and German versions shows that the Polish wording "transactions related to the payment of instalments" does not fully correspond to the wording "where it gives rise to successive statements" or to German "Geben Lieferungen (...) zu aufeinander folgenden Abrechnungen Anlass",
- it is not true that in Polish realities, deliveries of a continuous nature, which are not countable in a manner other than by time, do not exist – utilities constitute such goods, and the fact that the Polish legislator decided to introduce specific principles of tax liability settlement is not decisive in any manner; e.g. perpetual usufruct is still settled based on continuous delivery services,
- intra-community deliveries of goods of continuous nature can be identified, for instance, in case of using a consignment warehouse under the principles provided for in the Member State of destination,
- the criterion for the determination of the tax point should be objective, irrespective of the desire or will of the involved taxable persons – and the analysis of whether the supplier performs one delivery in a continuous manner, by means of performing partial services, or several separate deliveries will certainly be as difficult as burdened with subjectivity,
- the Court failed to conduct a thorough analysis of the phrase "consecutive terms of payments or settlements are determined" from the Polish Act, which should be understood as the need to determine such terms (i.e. that given circumstances give reason for such settlements), and not the possibility used by taxable persons based on the principle of contractual freedom – by using this unfortunate grammatical structure the Polish legislator further complicated the interpretation of regulations.

Thus, in practice, the closure of settlements of continuous deliveries within one month will not be especially risky. However, the extension of settlement periods for more than a month will bring onto the taxable person the risk of permanent tax arrears. Therefore, still, each case must be approached carefully and needs to be analysed thoroughly. So far, only a few adjudicating panels of the SAC present the position that takes into account the advantage for taxable persons because of facilitating the settlements; tax authorities and provincial courts tend to approach this subject in a more restrictive manner.



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

Przemysław POWIERZA

Tax Partner

Tax advisor (11204)

E: przemyslaw.powierza@rsmpland.pl

M: + 48 600 335 610

RSM Poland

Droga Dębińska 3b
61-555 Poznań, Poland

www.rsmpland.pl
office@rsmpland.pl

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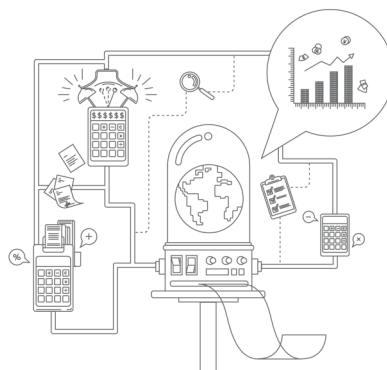
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