



SELECTED ISSUES OF VAT ANTI-OPTIMIZATION

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ABSTRACT

The methods of dealing with VAT frauds presented by me do not exhaust the problem. The aforementioned principle of abuse of the law was also introduced to prevent abuse of VAT. VAT Law in Article 5 Sections (4) and (5) means performing activities subject to VAT as part of the transaction that, despite the formal conditions laid down in the law, which was intended to achieve tax advantages that would be contrary to the objective pursued by those provisions. The article presents the most important changes introduced in 2017 to the VAT Act. The introduction of a reverse charge mechanism aims at shifting the economic burden of the tax to the buyer. It is the buyer that pays and deducts VAT, so the transaction with the VAT flow is clear to the tax authority. In the absence of restrictions on the buyer side to deduct input tax, this transaction should be neutral for the buyer.

ARTICLE INFO

Available online: 25 April 2017

Keywords:
 VAT,
 anti-optimization.

INTRODUCTION

At the beginning of 2017, the legislator introduced a number of provisions aimed at fighting against VAT fraud. Changes are vast and very important. As early as 2016, the principle of abuse of law was introduced to the VAT Law aimed at fighting against entities that create artificial structures for the sole purpose of obtaining a tax advantage. 2017 is the next time period dedicated to the fight against tax evaders. The main goal of the changes is to fight the entities that fraudulently levy taxes or avoid paying them. These regulations are designed to improve the collection of taxes.

The amendments to the VAT Law are particularly significant in terms of anti-optimization measures. The law of December 1, 2016 amending the Law on VAT and certain other acts (Act of December 1, 2016 on the amendment of the law on value added tax and some other acts) changed some rules, such as the principles of joint and several liability of the purchaser for the tax arrears of the entity supplying certain goods, an additional VAT liability was introduced and changes in VAT registration were introduced. On the other hand, a joint and several liability of the proxy was introduced to Tax Ordinance.

One should also mention the changes related to the reform of the tax administration, which will be introduced by the Act on National Tax Administration (hereinafter: KAS).

The purpose of this law is to combine the tax, customs and treasury administration into a single tax system. Under this law, new bodies/authorities will be established, such as Head of the National Tax Administration, director of the treasury department and director of the National Tax Information. A head of the customs and tax office will also be appointed to carry out tasks related to detecting and combating large-scale irregularities where the magnitude and complexity of deficiencies may seriously jeopardize the financial security of the state. Supervision of the tasks performed by heads of tax offices and heads of customs and tax offices will be performed by the director of the tax office.

CHANGES IN VAT REGISTRATION

As of January 1, 2017, the tax authorities have the right to verify the data provided in the registration application and the right to remove the entity from the VAT register. Tax authorities have the right to refuse to register an entity as a VAT payer if:

- The data provided in the registration application is not true or
- The entity does not exist or
- Despite the documented attempts, it is not possible to contact this entity or its proxy/agent or
- The entity or its proxy/agent fails to appear at the request of the head of the tax office.

Under Article 96 (9) of the VAT Act, the head of the tax office will delete the taxpayer from the VAT register, in the cases when:

- The taxpayer does not exist
- Despite the documented attempts, it is not possible to contact the taxpayer or its proxy/agent or
- The data provided in the registration application is not true or
- The taxpayer or its proxy/agent fails to appear at the request of the head of the tax office or
- The taxpayer issued invoices or corrective invoices, documenting activities that were not done (the head of the tax office will not remove the taxpayer from the VAT register when the invoice was issued by mistake or without the knowledge of the taxpayer) or
- When conducting a business activity, the taxpayer knew or had reasonable grounds to believe that the suppliers or purchasers participating directly or indirectly in the delivery of the same good or service participate in submitting dishonest tax returns for the purpose of filthy lucre.

The law does not specify how many documented contact attempts should be made by an employee of the tax body to deem it impossible to contact the taxpayer. Removing a taxpayer from the register of active VAT taxpayers will have negative consequences for the debtor's counterparts (VAT Act). The buyer of the goods or services will be deprived of the right to deduct tax on the purchase invoices received (Rzeczpospolita Daily, January 2017).

ADDITIONAL TAX LIABILITY

As of January 1, 2017, the so-called VAT penalty was reinstated, that is, an additional VAT liability (VAT Act, Article 109 Section 4-8). From the justification of the draft amending the Act of December 1, 2016, it follows that "additional tax liability is a preventive instrument whose primary purpose is to make taxpayers aware of the importance of honest and careful filing of the tax return, which will ensure correct tax collection (especially that penalties will not be determined in certain cases, such as accounting errors or mistakes as to the correct period of proof of tax calculated on tax due)." The amount of additional tax liability depends on the reason for its occurrence. The legislator envisaged three penalties, namely, 30%, 20% and 100% of the amount of the tax liability or the overstatement of the tax difference or the return of input tax.

The additional tax liability is determined in several enumerated cases, namely, when the taxpayer:

1. In the filed tax return, showed the amount of tax liability lower than the amount due.
2. In the filed tax return, showed the amount of return of the tax difference or the return of input tax higher than the amount due.
3. In the filed tax return, showed the amount of tax difference to reduce the tax due for subsequent periods higher than the tax due.
4. In the filed tax return, showed the amount of tax refund, the amount of input tax paid or the amount of tax difference to reduce the amount of tax due for the next accounting periods, rather than the amount of the tax liability to be paid to the tax office.
5. Has not filed a tax return and has not paid the amount of the tax liability.

The additional tax liability will not be determined in three situations:

1. When the taxpayer, before tax inspection initiated by the head of the tax office or the inspection procedure by the tax inspection authority, submits a declaration or correction of the VAT return and pays the amount resulting from the declaration or correction of the declaration.
2. When the irregularities are the result of mistakes made in the declaration of accounting errors or obvious mistakes or misrepresentation of amounts due or accrued in settlement periods, provided that this occurred prior to the date of tax audit initiated by the head of the tax office or tax authorities.
3. When the natural persons are already liable for the fiscal offense for the same act. Exclusion of additional tax liability is intended to prevent double penalties for the same offender for the same offense: once for a fiscal offense or act or offense and the second time in the form of imposing a VAT penalty.

The legislator envisaged three additional tax liabilities that depend on the nature of the misconduct. The basic amount of additional tax liability is 30% and applies when:

1. In the submitted tax declaration, the taxpayer provided:
 - The amount of the tax liability lower than the amount owed.
 - The amount of the tax difference or the return of input tax higher than the amount due.
 - The amount of tax difference to reduce the tax due for subsequent periods higher than the amount due.
 - The amount of tax difference or the amount of tax paid or the amount of the tax difference to be reduced for the subsequent periods, while he should have provided the amount of tax liability to be paid to the tax office.
2. The taxpayer failed to submit a tax return and failed to pay tax amount due.

The lower amount of the additional tax liability is 20% of the understatement of the tax liability or of the overstatement of the tax difference refund, the refund of input tax or the difference of tax to reduce tax due for subsequent accounting periods, and applicable when the tax audit is completed or in the course of the audit procedure:

- The taxpayer made a correction in the declaration taking into account all the irregularities found and paid the amount of the tax liability or refunded the unreasonable amount of the refund.
- The taxpayer filed a tax return and paid the amount of the tax liability.
- The legislator also introduced tightening of the additional tax liability up to 100% in cases where irregularities arise from invoices that:
 - Were issued by a non-existent entity.
 - State the actions that have not been taken - in respect of those activities.
 - Provide amounts that are not in line with the reality - in the section regarding those items for which amounts are not true.
 - Confirm actions that pursuant to Articles 58 and 83 of the Civil Code are contrary to the Act, aiming to circumvent the Act or document counterfeit activities in respect of those activities.

SINGLE STANDARD AUDIT FILE

Single Standard Audit File is an audit method introduced in 2016, wherein selected taxpayers are required to transfer data from VAT tax registers to tax authorities in electronic form (in the form of SAF). Starting in 2017, small and medium-sized enterprises (SMEs) joined the group of entities required to transfer VAT purchase and sale records as SAFs¹.

Small entrepreneur is an entrepreneur who in at least one of the last two financial years:

1. Employed an average of fewer than 50 employees a year and reached an annual net turnover from the sales of goods, products and services and financial operations not exceeding the PLN equivalent of EUR 10 million or the sum of its balance sheet

¹ The microenterprises will have such an obligation as of January 2018.

assets at the end of one of these years will not exceed the PLN equivalent of EUR 10 million.

A medium-size entrepreneur is an entrepreneur who has employed fewer than 250 employees a year on average and has achieved an annual net turnover from the sales of goods, products and services and financial operations not exceeding the PLN equivalent of EUR 50 million or the sum of its balance sheet assets at the end of one of these years did not exceed the PLN equivalent of EUR 43 million.

Data in the SAF should be sent for monthly periods up to the 25th of the month following each subsequent month. The SAF should include not only turnover documented with VAT invoices but also receipts and accounting notes. VAT records must include details of suppliers and buyers, their TIN numbers and EU TIN numbers. This will allow the tax authorities to quickly verify the status of suppliers and buyers as active VAT taxpayers and their status for intra-Community transactions. Tax authorities will be able to easily detect tax evaders/frauds issuing, for example, blank invoices. The purpose of these regulations is to fight tax fraudsters who want to extort VAT. Unfortunately, honest taxpayers may also suffer if they find that they have deducted the VAT charged on the empty purchase invoice, which is empty within the meaning of Article 88 of the VAT Act². If the tax authority finds that the purchase invoice has been issued by an entity that is not registered as an active VAT taxpayer, it will contest the right to deduct the input tax resulting from such invoice.

REVERSE CHARGE MECHANISM

One of the important elements of the so-called sealing packet is a reverse load mechanism or reverse charge mechanism. This mechanism involves transferring the obligation to settle VAT from the supplier of goods and services to the buyer. In 2016, this mechanism was primarily concerned with goods (as an exception to the transfer of greenhouse gas emission allowances). As of January 1 this year, the list of goods and services covered by this mechanism has been extended to certain construction services, processors and certain commodities in the categories of gold, silver and platinum. In the explanatory memorandum of the bill amending the necessity to include this mechanism for construction services, it was stated that “the reason for such a solution is introduced in the provisions of the VAT Act are the irregularities observed in this market, in particular the problem of VAT fraud.” The reverse charge mechanism for construction services applies only to subcontractors of construction services and not to main contractors and only if two parties to the transaction are active VAT payers. The purpose of the introduced mechanism is to reduce VAT fraud in transactions involving goods susceptible to fraud.

² The right to reduce the tax due or return the tax difference and return the input tax is not granted for invoices when:

- The sale was documented by invoices issued by a non-existent entity.
- An invoice-documented transaction is not taxable or is exempt.
- Invoices indicate activities that have not been made or state amounts that do not match reality.

JOINT AND SEVERAL LIABILITY OF THE PURCHASER

Institution of joint and several liability was introduced on October 1, 2013 as a method to combat VAT extortion fraud. Annex 13 to the VAT Act introduced a list of so-called sensitive goods or those that are susceptible to use in the procedure of VAT fraud. Due to the scale of fraud with these goods, the legislator decided to introduce a joint and several liability for the purchaser of these goods. This mechanism consists in the fact that the active VAT payer is jointly and severally liable with the entity performing the goods in question for its tax arrears (in proportion to the tax payable on the supply made to that taxpayer) if:

- The value of the goods listed in Annex 13, purchased from one entity delivering them, without tax exceeded the amount by PLN 50,000 in a given month, excluding the tax, and
- At the time of delivery of the goods from the aforementioned annex, the taxpayer knew or had reasonable grounds to believe that the entire amount of tax payable on the delivery of the goods or part thereof would not be paid to the tax office's account.

In some situations, the purchaser's liability is excluded. The most important criterion for excluding the liability of the purchaser is the situation where, on the date of delivery, the entity delivering the goods was listed in the list of entities that have submitted a guarantee bond. The amount of this bond must correspond to at least 1/5 of the amount of tax due on supplies of goods made in a given month to a taxpayer, or is at least PLN 3,000,000 (in the case of delivery of goods other than those specified in items 10 and 11 of Annex 13 of the VAT Act) or PLN 10,000,000 (in the case of delivery of goods specified in items 10 and 11 of Annex 13, namely fuel oils and fuels. As of 2017, two new premises are in place that exclude the liability of the purchaser of the goods. In the case of entities supplying fuel, the entity delivering the goods must have at the date of delivery the concessions required for the delivery of those goods. Another new requirement is the obligation imposed on the purchaser of the goods listed in Annex 13 to pay for the goods purchased into the seller's account given in the identification declaration.

Based on Article 105b Section 1 of the VAT Act, the entity supplying the goods listed in Annex 13 to the VAT Act may submit a guarantee bond with the tax office, guaranteeing the payment of tax together with interest for late payment in connection with the delivery of those goods and the resulting tax arrears in the taxes constituting State budget revenue. Placing a guarantee bond in the appropriate amount is one of the conditions that exclude the liability of the buyer of sensitive goods for the tax arrears of the supplier of those goods. As of January 1, 2017, in addition to the condition that existed until the end of 2016, i.e., lack of arrears in taxes constituting the revenue of the state budget, the legislator introduced three new conditions. Currently, the taxpayer who deposits the guarantee bond:

1. Cannot be undergoing the process of restructure, bankruptcy or liquidation proceedings,
2. In the case of supplies of goods specified in items 10 and 11 of Annex 13 to VAT, must hold the concessions required for the performance of business activities.
3. Must authorize the bank domiciled in the country or the cooperative savings and credit institution of which he/she is a member, which maintain the account

specified in the identification declaration to which the payment for the delivery of those goods is made, to provide information to the tax authorities on all transactions carried out on that account. The obligation to communicate applies to all information, not just to sensitive goods.

JOINT AND SEVERAL LIABILITY OF THE PROXY/AGENT

As of January 1, 2017, the proxy registering the taxpayer for VAT purposes, is jointly and severally liable with his whole property together with the taxpayer for the tax arrears of the taxpayer arising from the actions performed within 6 months of the date of registration of the taxpayer as active VAT taxpayer up to PLN 500,000.

This liability is limited only to the situations where the tax arrears involve a taxpayer's participation in an unjustified settlement for the purpose of monetary benefit. Thus, the emergence of tax arrears resulting from a manifest error or error of accounting will not result in joint and several liability of the proxy.

The aim of the implemented solution is undoubtedly the punishment of entities registering taxpayers who want to fraudulently extort VAT. Introducing the joint and several liability of a proxy registering a VAT payer is a failed idea. The agent registering the entity for VAT purposes does not know the entity that he registers nor does he affect the activities of this entity after registration. Treating each proxy as the so-called *Advocatus diaboli* who registers the so-called dead wood is an exaggeration. It is very easy to avoid this provision because it is enough that the tax payer will sign and submit documents prepared by a professional tax advisor. Sealing a tax law is a great goal, but legislation should be created in such a way as to be able to enforce the proposed solutions.

SUMMARY

The methods of dealing with VAT frauds presented by me do not exhaust the problem. The aforementioned principle of abuse of the law was also introduced to prevent abuse of VAT. VAT Law in Article 5 Sections (4) and (5) means performing activities subject to VAT as part of the transaction that, despite the formal conditions laid down in the law, which was intended to achieve tax advantages that would be contrary to the objective pursued by those provisions. In the event of a misuse of the law, the taxable transaction results only in the tax effect that would have occurred if the situation had arisen which would have existed in the absence of acts of abuse of law. The principle of VAT abuse is similar to the anti-tax avoidance clause in the tax law. It should be noted, however, that the rule of law on VAT is not applicable to the amount of the tax advantage reached (PLN 100,000), which is in effect under the provisions of the Tax Ordinance. Before applying the principle of abuse of law, the taxpayer will not be protected by the safeguards that are effective but only with respect to the clause governed by the tax law.

The article presents the most important changes introduced in 2017 to the VAT Act. The introduction of a reverse charge mechanism aims at shifting the economic burden of the tax to the buyer. It is the buyer that pays and deducts VAT, so the transaction with the VAT flow is clear to the tax authority. In the absence of restrictions on the buyer side to deduct input tax, this transaction should be neutral for the buyer. Of course, not all provisions are perfect. I negatively evaluate introducing the joint and several liability of

the proxy for the VAT arrears of the client whom he helped to register. The proxy is unable to verify the reliability of his client and therefore should not suffer the consequences of client's actions. Removing a taxpayer from the VAT register without informing him about it should also be negatively evaluated. The consequences of the deletion of the taxpayer from the register will impact its counterparty in the form of no right to deduct input tax from the invoice issued by a non-existing entity. In general, the direction of change is good, as the state budget is losing huge amounts of VAT fraud. The tax laws for their effectiveness should be more precise. The quality of the application of these rules will depend on the judgment of a tax official who has acquired a vast array of possibilities in prosecuting tax fraudsters. The hope is that the tax authorities will focus on prosecuting real criminals and will allow honest taxpayers to keep their businesses running smoothly.

References:

- Klauzula przeciw unikaniu opodatkowania, R. Kubacki, Infor 2016.
- Ordynacja podatkowa, H. Dzwonkowski, 2014, Edition 5, Legalis.
- Ordynacja podatkowa, H. Dzwonkowski, 2016, Edition 6, Legalis.
- Optymalizacja podatkowa, Legalne zmniejszanie obciążeń podatkowych, Józef Wyciślik, Beck 2013.
- Podatki pośrednie w praktyce, K. Janczukowicz, W. Kieszkowski, ODDK 2015.
- Podatki 2016, Dziennik Gazeta Prawna, Edition 1/2015.
- Prawo podatkowe, H. Dzwonkowski, Beck 2012.
- Stanowienie i stosowanie prawa podatkowego w Polsce, Edited by M. Munnich, A. Zdunek, KUL 2012.
- VAT, komentarz dla praktyków, K. Judkowiak, H. Lebrand, J. Pomorska, Rodl&Partner 2015
- VAT Martini, 2014, Edition 1, Legalis
- VAT Michalik, 2016, Edition 12, Legalis.

Acts:

- Act of December 1, 2016 on the amendment of the law on value added tax and some other acts (Journal of Laws of 2016, Item 2024).
- Act of November 16, 2016 on National Tax Administration (Journal of Laws of 2016, Item 1947).
- Act of March 11, 2004 on tax on goods and services (Journal of Laws of 2016, Item 710).