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VAT Exemption for Insurance Services Re-invoiced by the Lessor to the Lessee in the Light of the Judgment of the Court of Justice of the European Union

In this article the authors present the recent judgment of the Court of Justice of the European Union in the Polish case – BGŻ Leasing, related to the tax treatment applicable to the insurance of the leased items offered by leasing companies. Due to the lack of uniformity in the administrative courts' decisions and the disputes between the lessors and tax organs in Poland, the Supreme Administrative Court referred to the CJEU with prejudicial questions related to the connection between leasing and insurance services and the VAT exemption of the latter. The Court of Justice of the European Union stated that insurance service of leased goods and the leasing operation should in principle be regarded as separate and independent services from a VAT perspective. Despite the fact that any insurance transaction has, by nature, a link with the subject of insurance, such a connection is not sufficient in itself to determine that the leasing service and the insurance service constitute a single complex transaction for VAT purposes. According to the Court, the presented reasoning applies only in the situation, when the lessor invoices the lessee for the exact cost of the insurance.
Consequently, the CJEU has decided that a transaction whereby the lessor insures the leased goods, re-invoicing the exact cost of the insurance to the lessee under circumstances as in the present proceedings, represents an insurance transaction and is VAT exempt.
The above analysis, together with a historical review presenting the current standpoint of Polish administrative courts in the subject matter enables a full understanding of this issue.
To sum up, having appreciated the positive overtone of the judgment, the authors notice a range of possible problems that may regard both leasing companies and their clients in connection with the change of taxation applicable to insurance services offered by lessors.

Keywords: insurance of the leased items, lessor, lessee, VAT exemption, Court of Justice of the European Union

The taxation of insurance services of the subject of a lease offered by lessors in cooperation with insurance companies has been the reason for numerous disputes between lessors and tax organs in Poland. What is more, the administrative court judgments related to this issue have not been uniform. In order to clarify the doubts in this matter the Supreme Administrative Court (NSA) submitted the prejudicial question to the composition of seven judges. In its resolution of 8 November 2010 (I FPS 3/10), the extended composition of the Supreme Administrative Court decided that the lessor should include the insurance costs of the leased goods into the tax base for these services. In the light

of the NSA's opinion the insurance service re-invoiced by the lessor to the lessee should be taxed by the same rate as a leasing service, namely 23% rate[1].

This resolution issued by the NSA has had an impact upon the uniformity of court decisions but at the same time has not dispelled all the doubts. The controversies have been caused by the standpoint presented by the Court of Justice of the European Union, whose opinion in several similar cases has differed from that of NSA. It is worth mentioning that CJEU's decisions exert a significant influence upon the condition of Polish tax payers. According to Article 240 § 1 point 11 of the Tax Ordinance in case which ended with a final decision the proceedings are re-opened, if the judgment of the European Court of Justice has an influence upon the contents of the issued decision. More importantly, it is commonly acknowledged that the re-opening of proceedings should take place not only as a result of the judgment made in the Polish case, but also if it follows from the CJEU's decision in the case submitted to this court by a member country other than Poland (or against other member country) that Poland has infringed community regulations.

Considering the fact that CJEU in its judgments has presented a view different from the standpoint expressed in NSA's resolution, one of the NSA's compositions decided to refer the questions to CJEU for a preliminary ruling (the decision issued on 7 April 2011, sign. I FSK 460/10). On the other hand, other compositions of administrative courts started to suspend proceedings waiting for the relevant judgment.

The Supreme Administrative Court referred to the Court with the following prejudicial questions:

a) Must Article 2 (1) (c) of the [VAT] Directive be interpreted as meaning that the service providing insurance for a leased item and the leasing service are to be treated are separate services or as one comprehensive composite leasing service;
b) If the answer to the above question is that the service providing insurance for a leased item and the leasing service are to be treated as separate services, must Article 135 (1) (a) in conjunction with Article 28 of the [VAT] Directive be interpreted as meaning that the service providing insurance for a leased item is to be exempt from tax if the lessor insures that item and charges the costs of this insurance to the lessee?

In the case C-224/11 BGŻ Leasing company supplied leasing services to its clients. One of the lessee's duties provided for in the leasing contract was the insurance of the leased item. The lessees had freedom in the choice of an insurer of leased goods, but they could also use the insurance offered by BGŻ Leasing. In the latter case, BGŻ Leasing subscribed to the corresponding insurance with an insurer and re-invoiced to the lessee the premiums paid. Besides, BGŻ Leasing took the view that re-invoicing of the insurance costs was exempt from VAT taxation.

[1] A. Dębiec, J. Fiema, Opodatkowanie podatkiem od towarów i usług kosztów ubezpieczenia przedmiotu leasingu, Prawo Asekuracyjne 2011, nr 2, s. 70.

Having regard to the specific circumstances of the case the Court of Justice of the European Union decided that in principle, for VAT purposes every supply must normally be regarded as distinct and independent, which follows directly from the union directive regulating the principles of VAT taxation. Nevertheless, any insurance transaction has, by nature, a link with the subject of insurance, but such a connection is not sufficient in itself to determine that the leasing service and the insurance service constitute a single complex transaction for VAT purposes. In such a situation, if any insurance transaction was subject to VAT depending on whether the services relating to the item it covers was subject to this tax, the very aim of the tax exemption of insurance transactions would be undermined.

Furthermore, the Court, citing the earlier decisions, claimed that the supply may be regarded as ancillary to the principal service, if it does not constitute for the customers an aim in itself, but a means of better enjoying the principal service supplied. Taking these considerations into account, CJEU decided that the insurance service provided to the lessee through the lessor facilitates the enjoyment of the leasing service, and constitutes essentially an end in itself for the lessee, and not only the means to use the leasing service under the best conditions.

In the evaluation of the connection between the leasing and insurance services in the CJEU emphasized that in the circumstances at issue the lessees had the option of insuring goods with an insurance company of their choice. The lessees could either take advantage of the lessor's offer or insure the items in question on their own. The Court acknowledged that under these circumstances the obligation of insurance cannot mean that insurance service provided through the lessor is of indivisible or ancillary nature towards leasing. Besides, in CJEU's view the separate invoicing and different contractual stipulations indicating their separation argue for the existence of separate services.

All the circumstances presented above have led the Court to the conclusion that, in the presented factual state insurance service of leased goods and the leasing operation in principle constitute separate and independent services from a VAT perspective. Therefore, insurance covering leased goods cannot be under analysed conditions treated differently depending on whether the insurance service is provided directly for the lessee or through the lessor. More importantly, the Court of Justice of the European Union in its announcement has stated that the presented reasoning may apply only in the situation, when the lessor invoices the lessee for the exact insurance cost (i.e. does not charge any margin).

Consequently, the CJEU has decided that a transaction whereby the lessor insures the leased goods, re-invoicing the exact cost of the insurance to the lessee under circumstances as in the present proceedings, represents an insurance transaction and is exempt from VAT taxation.

The present judgment, although seems to be favourable at first glance, may create quite a turmoil in the leasing industry. Whereas leasing companies, which added VAT to insurance services re-invoiced to their customers would

be able to demand the re-opening of proceedings and return of the tax paid, from the perspective of lessees the present decision may mean that they were not entitled to deduct VAT from these invoices. It is possible that tax organs will require the clients of leasing companies to make tax corrections and return deducted tax along with interest.

Moreover, it must be stated here that the Court's judgment refers to a specific case and has been issued under clearly determined circumstances. Consequently, it may still raise doubts about taxation principles to be applied in similar but not identical situations. For instance, it is not clear which tax should be levied on the recharged insurance costs, if the leasing contract imposes an obligation to use the insurance provided by the lessor (i.e. the lessee is not free to choose the insurance). Furthermore, the CJEU has explicitly stated that the argumentation presented in its decision cannot be applied if the lessor imposes a margin on the recharged cost of insurance. Accordingly, the question arises whether the resolution of seven judges of the Supreme Administrative Court would be applied to the above-mentioned cases, as de facto it imposes the 23% tax rate applicable to leasing services upon the insurance service.

Taking into account the above-mentioned doubts, it would be advisable for the Ministry of Finance to take an explicit stand, since it has at its disposal appropriate means to unify the application of tax law (issuing the general interpretation of fiscal legislation). ■

Zwolnienie z VAT dla usług ubezpieczenia refakturowanych na leasingobiorców przez firmy leasingowe w świetle orzeczenia Trybunału Sprawiedliwości Unii Europejskiej

W artykule autorzy przedstawiają niedawno wydane orzeczenie Trybunału Sprawiedliwości Unii Europejskiej w polskiej sprawie BGŻ Leasing, dotyczące opodatkowania usług ubezpieczenia przedmiotów leasingu oferowanych przez firmy leasingowe. Z uwagi na brak jednolitego orzecznictwa sądów administracyjnych oraz spory między firmami leasingowymi i organami podatkowymi w Polsce, Naczelny Sąd Administracyjny skierował do TSUE pytania prejudycjalne dotyczące powiązania usług leasingowych i ubezpieczeniowych oraz zwolnienia tych drugich z podatku VAT. W swoim orzeczeniu Trybunał Sprawiedliwości Unii Europejskiej stwierdził, że usługa ubezpieczenia przedmiotu leasingu i usługa leasingu co do zasady stanowią usługi odrębne i niezależne dla potrzeb ich opodatkowania podatkiem VAT. Mimo iż każda transakcja ubezpieczeniowa z natury pozostaje w związku z przedmiotem ubezpieczenia, taki związek sam w sobie nie jest wystarczający, aby uznać, że dla potrzeb opodatkowania podatkiem VAT usługa leasingu i usługa ubezpieczenia stanowią jedno świadczenie złożone. Zdaniem Trybunału, przedstawione rozumowanie ma zastosowanie jedynie w sytuacji, jeżeli leasingodawca przenosi na leasingobiorcę dokładny koszt ubezpieczenia.

W efekcie Trybunał orzekł, że jeżeli leasingodawca ubezpiecza przedmiot leasingu, obciążając dokładnym kosztem tego ubezpieczenia leasingobiorcę, w okolicznościach takich jak w przedmiotowym postępowaniu, to czynność taka stanowi transakcję ubezpieczeniową i podlega zwolnieniu z opodatkowania VAT.

Przeprowadzona analiza, połączona z opisem historycznym prezentującym dotychczasowe stanowisko polskich sądów administracyjnych w omawianej kwestii, pozwala na pełne zrozumienie zagadnienia.

Doceniając pozytywny wydźwięk orzeczenia, autorzy zauważają szereg potencjalnych problemów, które mogą powstać zarówno po stronie firm leasingowych, jak i ich klientów w związku ze zmianą sposobu opodatkowania usług ubezpieczenia oferowanych przez firmy leasingowe.

Słowa kluczowe: ubezpieczenie przedmiotu leasingu, leasingodawca, leasingobiorca, zwolnienie z VAT, Trybunał Sprawiedliwości Unii Europejskiej