Iu§letter

von Zanthier & Schulz

Issue No. 43 / 21. März 2013

Dear Iu§letter Readers,

Henning von Zanthier
E-Mail: vonzanthier@vonzanthier.com

The newest “Doing Business” report covers regulations measured from mid 2011 through mid 2012, which was prepared by The World Bank and includes a ranking that provides insight into, how difficult it is to do business in 185 assessed countries. Regulations which affect 10 areas of business activities of the 185 economies were assessed, and these were: starting a business, dealing with construction permits, getting electricity, registering property, getting credit, protecting investors, paying taxes, trading across borders, enforcing contracts and resolving insolvency.

Within the assessed period Poland managed to improve its position by 7 places, which means it was ranked 62 in the previous report and now it was placed 55. Poland was called the “global top improver“ due to making it easier to register property, pay taxes, enforce contracts and resolve insolvency. Poland thanks to its further improvements in doing business, became even more attractive for investors. The country was particularly highly ranked in the - getting credits - criteria.

Germany was placed 20 in the “Doing Business” ranking. The country got highest marks in the category - enforcing contacts.

Another interesting survey - The Foreign Direct Investment Index - was conducted by A.T. Kearney. This survey assesses which countries, thanks to activities of managers of big companies, enjoy the highest trust from investors. In this ranking Poland was placed 22nd in 2007, 6th in 2010 and 23rd in 2012. The trust of investors in Germany is obviously very stable but on the other hand it has grown up within the past few years. As a result of that Germany was placed 10th in 2007 and 5th in both: 2010 and 2012.

We hope you will enjoy the reading of our Iu§letter, where we described the chosen amendments in the Polish law on goods and services tax in the years 2013 and 2014.

Yours sincerely,

Henning von Zanthier, LL.M. (legal counsel/Rechtsanwalt)
and Magdalena Stawska-Höbel (lawyer)

top

In this issue

Newsletter

The law firm

The consulting firm von Zanthier & Schulz with offices in Berlin and Poznań provide services within the area of legal advice and tax consultancy as well as audit. Our purpose is to extensively attend to clients judicial and fiscal with their investment plans and exercise of economic activities in Germany and Poland. www.vonzanthier.com

AN AGREEMENT FOR THE USE OF PROPERTY TO CONSTRUCT AND OPERATE A WIND FARM IS NOT A LEASE AGREEMENT

Karolina Barałkiewicz-Sokal
E-Mail: baralkiewicz@vonzanthier.com

The Polish Supreme Court in its sentence dated 5 October 2012, file ref. IV CSK 244/12, ruled that an agreement for the use of property in order to construct and operate a wind farm is not a lease agreement according to the provisions of the Civil Code, however it is an unnamed agreement, to which appropriate provisions of the Civil Code regarding lease apply unless its own provisions do not rule otherwise.

Simply speaking the sentence was passed in the following situation: the parties agreed to sign up a contract, which they called a lease agreement (for the fixed 30 year period since legalization of the construction permit) on the basis of which the defendant as the lessor – the owner of the real estate – leased it out to the plaintiff who was supposed to construct wind farms with an electrical substation, measuring station and transformer station as well as all driveways and paths necessary to operate them, and the plaintiff as the lessee was obliged to pay the rent.

While the agreement was already binding, a conflict between the parties arose, which end up with the defendant claiming that the lease agreement is void due to lack of objectively essential elements, such as the lease subject and lease rent, whereas in case the agreement is considered to be another agreement than the lease agreement for the use of real estate, the plaintiff shall terminate the agreement under article 365^1 of the Polish Civil Code.

The plaintiff filed a lawsuit to confirm the existence of lease between the parties. Courts of both resorts dismissed the lawsuit claiming that the agreement the parties signed is an unnamed agreement, and not a lease agreement as specified in article 693 § 1 of the Polish Civil Code.

The above mentioned opinion was also shared by the Supreme Court. It pointed out that according to article 693 § 1 and 2 of the Civil Code, in case of a lease agreement the lessor leases a thing to use it and collects benefits for a definite or indefinite period, whereas the lessee is obliged to pay the agreed rent to the lessor, which may either be stipulated in money or in other benefits, as well as in fractional part of those benefits.

Moreover, the Supreme Court indicated that the right to construct a wind turbine on the ground together with other necessary buildings – on the basis of the liability relationship – entitles the party to operate them and to use the ground, which is one of the necessary elements (essentialia negotii) of the lease agreement. The second right resulting from the binding agreement is the right to process the free air masses in motion into electricity using the ground-installed wind farms, followed by its resale to an energy company, which undoubtedly means collecting benefits as determined in the Civil Code.

The Supreme Court claimed that: “The air masses in motion over the ground, which is the subject of the agreement (…) setting in motion the mechanism of wind turbines and producing electricity, are not a component of the ground (…) and neither a natural benefit (…). On the other hand, electricity produced by wind energy processing may not be determined as a natural benefit, since it does not come from the ground itself but from the technical ground buildings, moreover the profits from selling this electricity may not be determined as civil benefits, since (…) it is the sale of electricity and not the real estate that will be the object of the legal relationship with the energy company.”.
According to the Supreme Court the agreement between the parties lacks the essential element (essentialia negotii) of lease, which is the right to collect benefits from the real estate. The air masses in motion, electricity and benefits resulting from the sale thereof are not benefits of a real estate under article 693 § 1 of the Civil Code.

The Supreme Court’s opinion is that this agreement is one of the unnamed agreements – concluded within the freedom of contract as regulated in article 353^1 of the Civil Code – where appropriate provisions of the Civil Code regarding lease may apply within the scope it is not regulated by its own provisions.

The above mentioned ruling of the Supreme Court is very important for the wind energy investors. Particularly crucial is that the Supreme Court has not defined this agreement as tenancy agreement (pol. umowa najmu). Such agreement may be terminated already after 10 years when it is not entered into by entrepreneurs, even though it was concluded for a longer period of time.

Karolina Barałkiewicz-Sokal, legal counsel

top

SELECTED AMENDMENTS TO THE LAW ON GOODS AND SERVICES TAX IN 2013 AND 2014

Łukasz Dachowski
E-Mail: dachowski@vonzanthier.com

The law dated 23 November 2012 **amending the law on goods and services tax and other laws** contains a number of changes, some of them entering into force on 1 April 2013, others on 1 January 2014. Some of them will be described below, regarding mainly the moment VAT obligation arises, which moment will be connected in most cases with the time of delivery of goods and services, and not with the time the invoice is issued, as it was ruled in the current legal situation.

Since 1 January 2014 the principle will be that the tax obligation will come into existence when goods and services are delivered with reservations resulting from articles 5, 7-11, article 6, article 20 and 21 section 1 (on the basis of article 19a section 1 of the amendment law). The currently binding rule that the tax obligation comes into existence when goods or services are delivered, will in fact be widely modified on the basis of article 19 section 4, which provides that the obligation arises when invoice is issued (that is 7 days after the sale). The current regulation allows postponing this moment until the

next billing period (in case of sale which took place at the end of the month). After abrogation of article 19 section 4 it will no longer be possible – tax obligation will, as a rule, come to existence at the end of the month during which the service was done (or when the good was sold). The amendment maintains the current rule (article 19 section 11) that at the moment part of the amount due is delivered (inter alia prepayment, advance of money (pol. zaliczka), earnest money (pol. zadatek) tax obligation comes into existence within the scope of the part of the payment which was delivered (article 19a section 8 of the amending agreement).

The amendment will also abrogate the article 19 section 10 of the Law, which foresees that tax obligation comes into force at the moment either parts of premises or buildings; or their payment (the total sum or its part) is delivered, however not later than 30 days after the product's delivery. General rules will apply to such situation after the amendment law comes into force.

Changes also regard delivery of electricity, heat and telecommunication services. Under the current article 19 section 13 point 1 the moment tax obligation arises is determined by the end of payment period if it has been defined in the agreement on payment for its execution. The amendment law specifies when the service of energy and media supply (as well as it determines the following payment periods for them) is done, which is the moment of expiry of every period for which these payments were determined, until the last service. It means that currently the tax obligation arises when the payment is due, and after the amendment it will arise (article 19 section 5 point 4 of the amending law) when the invoice is issued, but no later than after the payment period, to which particular payment applies.

Łukasz Dachowski, legal counsel, tax consultant

top

SHAREHOLDER OF A LIMITED LIABILITY COMPANY (SP. Z O.O.) MAY DEDUCT HIS LIABILITY TOWARDS THE COMPANY

Sabina Guzenda
E-Mail: guzenda@vonzanthier.com

The Supreme Court in its resolution dated 12 January 2010, file ref. III CZP 117/09, ruled that: "A shareholder of a limited liability company (sp. z o.o.) may deduct his liability towards the company with the company's liability towards him resulting from extra charge."

The issue of extra charges paid by shareholders to the company is regulated by the Polish Companies' Law (KSH).
Under article 177 section 1 KSH, articles of association may oblige partners to pay extra charges to the amount defined in relation to their shares. Moreover, such extra charges shall be paid by partners evenly to the height of their shares. The amount and deadlines of the extra charges are ruled by shareholders resolutions (article 178 § 1 sentence 1 KSH).

The doubt whether it is possible to deduct the liability of the

shareholder towards the company with the liability of a shareholder towards him with regard to the extra charge, arose during a discussion on article 14 § 4 KSH, according to which a shareholder of a limited liability company or of a joint-stock company is not allowed to deduct his liabilities towards the company with the company's liability towards the shareholder with relation to the payment for shares, however, statutory deduction is still possible.

Supreme Court in his ruling pointed out that extra charges are legally similar to contributions (pol. wkład) which are payments for shares, since – just as payments for shares – they in fact increase the company's assets. Such financial means are allocated to subsidize the back-up capital and may be spent on the planned investments, to complete current activities, to increase credibility or to cover expenses. Extra charges increase the company's means at the same time not increasing the shares, which results in rise of the share capital. According to the jurisprudence, extra charges are services defined as something between a loan and a share. The basic feature of extra charges is their temporary character, since under article 179 § 1 KSH, those charges may be returned to the shareholders, if they are not necessary to cover expenses as indicated in the financial statement. Extra charges are not the source of financial means assigned to company's activity fixed subsidizing. As a result charges, though similar to payments for shares, are different from them, since they are not strictly non-returnable and they do not increase the share capital of the company.

As underlined by the Supreme Court, the back-up capital – compared to the share capital – is not obligatory, and its height does not have to be registered. Its aim is to cover expenses, which may take place during the company's activities. Both the share and back-up capitals play the guarantee role, which is understood in this situation in a different way: as regards the share capital it means maintenance of spare assets in the amount of this capital, as regards the back-up capital it is only the possibility to use the assets to cover the expenses.

The Supreme Court has also indicated that the statutory deduction was regulated in articles 498-505 of the Polish Civil Code (KC). According to article 499 KC: deduction takes place by a declaration to the other party, which is a unilateral legal action of one of the mutual creditors. Due to that feature, which makes it possible to intervene into the other party's legal sphere, the legislator excluded usage of this institution in particular cases. The aim was to protect the creditor's interests, to whom this declaration is announced, as regulated in article 499 KC. Article 505 lists cases when deduction shall not be used, whereas the last case regards such liabilities to which the deduction is excluded by particular provisions. According to the Supreme Court, article 505 should be interpreted strictly, which is why such exclusion should be expressed clearly.

The Resolution of the Supreme Court dated 12 January 2012, file ref. III CZP 117/09 has a big practical meaning, since it accepts the deduction of limited liability company's shareholders liability towards the company with the liability of the company towards the shareholder resulting from extra charge. Therefore it is possible to deduct the liability of the shareholder from a loan which this shareholder gave to the company with the liability of the company towards the shareholder as to extra charges, which accelerates the mutual satisfaction of liabilities though their extinction. However, it is important that deduction of shareholder's liability towards the limited liability company with the liability of the company towards the shareholder as to the due payment for shares (in case of share capital rise) is not possible under article 14 § 4

KSH.

Sabina Guzenda, legal counsel

top ⬆

POLISH COURTS JURISDICTION

1. The Supreme Court in 1. (in composition of 7 judges) resolution dated 20 November 2012, file ref. III CZP 58/12 ruled that: “Civil status record drafted abroad is a proof as to the facts stated in this document, also when it was not entered into any Polish civil status books (article 73 section 1 of the Law dated 29 September 1986 on civil status records, Journal of Laws dated 2011, no. 212, item 1264 as amended).”

2. According to the Supreme Court resolution dated 11 October 2012, file ref. III CZP 52/12: “Contracting parties of a lease (pol. dzierżawa) may exclude the obligation of the lessor to give the lessee an additional deadline to pay the overdue rent (article 703 second sentence of KC).”

3. The Supreme Court in its resolution dated 20 December 2012, file ref. III CZP 84/12 ruled that: “Shareholders’ meeting resolution of a limited liability company which is contrary to laws of social intercourse violates good customs as regulated in article 249 § 1 KSH.”

4. According to the Supreme Court resolution dated 28 November 2012, file ref. III CZP 66/12: “The basis to determine the fee for execution of a provision on pledge establishment, is the value of the pecuniary claim as indicated in the application (article 45 section 1 of the Law dated 29 August 1997 on court bailiffs and execution, Journal of Laws dated 2011, no. 231, item 1376 as amended).”

Compiled by Sabina Guzenda, legal counsel

top ⬆

This newsletter is published by
von Zanthier & Schulz
Rechtsanwalt Steuerberater Wirtschaftsprüfer
Partnergesellschaft
BERLIN – POZNAŃ
Kurfürstendamm 217 – 10719 Berlin
Fon: +49 30 88 03 59 0
Fax: +49 30 88 03 59 99
Web: www.vonzanthier.com
Email: iusletter@vonzanthier.com