

Kalendarz najważniejszych zmian w podatkach w 2020 r.

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An incorrect invoice rate does not block the deduction of VAT

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Source: iStock

The issue of tax rate is of secondary importance. If the general conditions are met and the expenditure is related to taxable business, the buyer of the good or service may deduct VAT. This is confirmed by the latest interpretation of the director of the National Treasury Information. However, the case-law shows the opposite conclusion. So experts advise you to be careful.

Interpretation of February 4 this year, No. 0113-K taxpayer has the right to deduct the amount of documenting goods or services rendered to him. The authority also confirmed that the application of the law does not deprive the buyer of the right to deduct input VAT. A negative premise preventing the deduction of VAT is not a condition for the right to deduct input VAT.

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VAT deduction only if the conditions are met

The tax authority explained that for the existence of the right to deduct input tax resulting from the invoice, the issue of rate is of secondary importance. Therefore, **since the other conditions for exercising the right of deduction are fulfilled, the taxpayer has the right to deduct the tax on goods and services, which is shown on the invoice issued by the contractor at an inflated rate.**

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According to Agnieszka Bieńkowska, a tax advisor, a partner at Gekko Taxens, what constitutes the amount of input tax is defined in the Act. In accordance with art. 86 section 2 of the VAT Act, the amount of input tax is the sum of the amounts of tax resulting from invoices received by the taxpayer for the purchase of goods and services. – **As a rule, therefore, the taxpayer cannot determine the amount of input tax in isolation from the amounts indicated on the invoices he received from suppliers – he cannot overstate these amounts, and if the general conditions for deduction are met – he should not underestimate them.** Although the VAT Act indicates cases in which the right to deduct input VAT from erroneously issued invoices is suspended, none of these cases, however, relates to an error consisting in overstating the rate – emphasizes Agnieszka Bieńkowska. In her view, it cannot be argued that an invoice showing a tax calculated at a higher rate than the applicable rate is prohibited from deducting input tax on the basis of Art. 88 clause 3a point 4 lit. b of the VAT Act as a document in which amounts are not provided in accordance with reality. If the invoice documents the actual business operations and the transaction value shown in it is correct, then there is no situation in which the invoice would indicate amounts that are not in line with reality.

See the procedure in LEX: Invoices that are not a basis for deduction>

– Situations in which an invoice is issued at an incorrect (inflated) VAT rate are not uncommon – confirms Małgorzata Militz, tax advisor, partner at GWW. The expert explains that the taxpayer has the right to deduct the entire amount of tax, also in a situation where a higher amount of tax on the invoice results from the application of an inflated VAT rate. This is also confirmed by tax interpretations.

– **For VAT taxpayers this is very good news, but only for those who have such an interpretation.** Because the analysis of CJEU judgments (e.g. C-35/05 para. 23 and C-342/87 para. 15) as well as national court judgments (NSA case ref. I FSK 669/15 and I FSK 505/16) lead to a different of the application – in such a situation the amount indicated on the invoice, above the amount calculated at the correct rate – notes Małgorzata Militz.

See also:

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This problem is unfortunately not the only one

issuing receipts and invoices or exercising due diligence still raise many doubts. However, this is not all. April and July also require solid preparation. [Read more>](#)

Refusal of the right to deduct

The refusal of the right to deduct is somehow justified by the content and interpretation of Art. 108 of the VAT Act (in the case of domestic judgments) or Art. 203 of the VAT Directive (in the case of CJEU judgments). **These provisions impose an obligation to pay the amount shown on the invoice, thus creating an inherent obligation to pay the tax shown in the invoice, when the content of the invoice does not fully correlate with the actual economic event (both when the invoice issued does not document the transaction and an incorrect, higher VAT rate was applied).** Małgorzata Militz explains that an invoice within the meaning of art. 108 section 2 of the VAT Act is any invoice in which the tax due was increased, regardless of the reason for this. He emphasizes that only the part of the tax indicated in the invoice corresponding to the actual size (value) of the transaction documented with that invoice is considered to be the tax due. The remainder of the amount indicated on the invoice as tax, i.e. the excess over the tax due, is in fact not tax.

[Read in LEX: Responsibility for issued VAT invoices>](#)

- Since it is not a tax due, it cannot reduce the amount of input tax. Such an opinion was also expressed by the Advocate General (file reference number C-8/17, point 52), indicating that if an excessively high tax rate was incorrectly applied, this amount is due, despite the fact that the recipient is not entitled to deduction, since tax has been shown higher than due according to the law - notes the expert.

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Therefore, the arguments of the courts and the CJEU, refusing the right to deduct, are based on a completely different basis. As Małgorzata Militz explains, it is sufficient for the Minister of Finance to meet material requirements and no negative premise, arising from art. 88 of the VAT Act, and the case of an invoice with inflated VAT is not indicated there.

- I advise taxpayers that - while it is still possible - they get a favorable interpretation regarding the right to deduct VAT. You can always request the contractor to correct the invoice - says Małgorzata Militz.

Check in LEX: Is it possible to deduct VAT from the invoice if the invoice contains only the name and surname, but the name of the company is not indicated?



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