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MINISTRA FINANSÓW

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GENERAL INTERPRETATION no PT6.8101.4.2019

MINISTER OF FINANCE

of 20 January 2020.

on the application of the appropriate rate of tax on goods and services in the case performing activities consisting in the storage of financial instruments

Acting pursuant to Art. 14 § 1 point 1 of the Act of August 29, 1997. - Tax [1)]
in order to ensure uniform application of tax law by the tax authorities, is explained as follows.

1. Description issues in connection with which it is made interpretation of the law tax

This interpretation concerns the use of the appropriate rate of tax on goods and services when performing activities consisting in the storage of financial instruments.

It should be noted that financial instruments may exist in material form and in uncertificated form. The concept of storing (deposit) financial instruments relates to the financial instruments present in the form of the material, as well as the instruments present in the form of a book entry. Depending on whether the financial instrument is in the form of material, or is it dematerialized, safekeeping of financial instruments is characterized by a range of other benefits that make up for this service.

In the case of financial instruments in the form of material being storage services (deposit) may be taking these instruments to deposit and store them, for example. In a vault, safe or safe-deposit box.

In the case of financial instruments in dematerialized form storage (deposit) may rely on keeping the registers or records (including in electronic form), making entries in the accounts of deposit or registration. Storage service can also be performed with the use of securities accounts (stored on securities accounts).

In connection with the identified discrepancies and interpretive questions submitted on the application of the appropriate tax rates for storage services of financial instruments, it is reasonable to present the principles of VAT taxation of these benefits.

1) Dz. U. of 2019. Item. 900, as amended.

2. Clarify the scope and method of application interpreted the law tax described problems with the legal reasons

In accordance with Article. 41 paragraph. 1 of the Act of 11 March 2004. Tax on goods and services [2] (referred to as "VAT Act"), the tax rate is, in principle, 22%. Under Article. 146a paragraph 1 of this Act, in the period from 1 January 2011. Until 31 December 2018., The tax rate referred to in Article. 41 paragraph. 1 and 13, is 23%. In accordance with Article. 146a paragraph. 1 item 1 of the Law on VAT in the period from 1 January 2019. By the end of the year following the year for which the value of the relationships referred to in Article. 38a Section 4 of the Act of 27 August 2009. Public Finance, is not greater than 43% and the value referred to in Article. 112aa paragraph. 5 of the Act, is not less than 6%, the tax rate referred to in Article. 41 paragraph. 1 and 13, Art. 109 paragraph. 2 and art. 110, is 23%.

In accordance with Article. 43 paragraph. 1 Section 41 of the VAT Act shall be exempt from tax services which are the subject of financial instruments referred to in the Act of 29 July 2005. Trading in Financial Instruments (Dz. U. of 2017. Item. 1768, as amended. d.), with the exception of the instruments storage and management, and brokerage services in this regard.

With the provision of Art. 43 paragraph. 1 Section 41 of the VAT Act that services holding financial instruments have been excluded from the exemption from VAT. Storage of financial instruments are therefore subject to tax basic rate of VAT, which from 1 January 2011. On the basis of Art. 41 paragraph. 1 in connection with art. 146a paragraph 1 and Article. 146a paragraph. 1 item 1 of the Law on VAT is 23%.

The amount of VAT for services holding financial instruments not makes no difference whether storage services related to financial instruments occurring in tangible form or in dematerialized form. Both the European Union legislature, as well as national does not make distinction in this regard.

It is not acceptable derivation legal consequences in terms of VAT services holding financial instruments by reference to the provisions of Article. 835-845 of the Act of 23 April 1964. - Civil Code [3] ie. for a storage contract, which indicate that the subject of a storage contract may only be movable. According to settled case-law of the Court of Justice of the European Union (the "ECJ"), the release referred to in Article. 135 paragraph. 1 Council Directive 2006/112 / EC on the common system of value added tax [4] (hereinafter referred to as "Directive 2006/112 / EC), are independent concepts of EU law, which purpose is to avoid divergences in the application of the VAT system in the Member States. The terms used to specify those exemptions are to be interpreted strictly, since they constitute exceptions to the general principle according to which VAT levied on all services supplied for consideration by a taxable person. [5]

An interpretation that services excluded from the exemption for holding financial instruments include financial instruments held only in material form - due to the regulations contained in the Civil Code would lead to give the notion of the importance of holding financial instruments other than it has in European Union law. This interpretation is not admissible on the basis of the provisions of Directive 2006/112 / EC, and thus the provisions of the VAT Act.

This is confirmed by judicial interpretation. The Supreme Administrative Court stated [6]
that "(...) there is no reason the applicant alleging that the interpretation of the term" storage "used in Article. 43 paragraph. 1 Section 41 of the VAT Act refer to the definition of a storage contract concluded in the art. 835 of the Civil Code, which limits the storage contract only to movables (material objects). It is therefore wrong side of the post

[2] Dz. U. of 2018. Item. 2174, as amended.

[3] Dz. Laws of 2019, item. 1145, as amended.

[4] Dz. Office. EU L 347, 11.12.2006., P. 1, as amended.

[5] See. eg. the ECJ judgment in Case C-5/17 DPAS, paragraphs 28 and 29.

[6] See. judgments of the Supreme Administrative Court dated 20.04.2016 ref. Act I FSK 2027/14 and dated 10.04.2017 ref. Act I FSK 1911/15.

the applicant, that the exclusion from the exemption does not cover securities in dematerialized form. Agreeing with the position of the Bank, the term "storage" nadalibyśmy different meaning than it has in Community law. " The Supreme Administrative Court pointed out that "(...) the interpretation of Article. 43 paragraph. 1 Section 41 of the VAT Act, using the definition of a storage contract with the art. 835 of the Civil Code would lead to the clarification of concepts used in the Directive 112 and taken over by the national legislation on tax on goods and services, using the definitions contained in the internal law of the Member State. Such an interpretation of the concepts contained in the provisions of Directive 112 due to destroying what regulations Directive should achieve. (...) the remuneration of storage assets of the Fund in the form of securities in dematerialized form, under the custody business of the Bank, is not exempt from tax on goods and services as the services of custody of securities, as in uncertificated form are excluded from the tax exemption provided for in Article. 43 paragraph. 1 Section 41 of the VAT Act. Both the provisions of the Directive 112 and Article. 43 paragraph. 1 Section 41 of the VAT Act do not make the exemption from the relief services of custody of securities, whether the securities are in the form of material or are dematerialized. ".

It should be noted that Article. 43 paragraph. 1 Section 41 of the VAT Act is the implementation into national law of art. 135 paragraph. 1 point f) of Directive 2006/112 / EC, under which Member States shall exempt transactions, including negotiation, but excluding the storage and management, in shares, interests in companies or associations, bonds and other securities, excluding documents establishing title to goods, and the rights or securities referred to in Article. 15 paragraph. 2.

According to the case law of the ECJ [7] in interpreting a provision of EU law must take into account not only its wording but also its context and the objectives of the regulation, which is part of the recipe. Interpretation of the terms used to specify the exemptions should be consistent with the objectives of the exemptions provided for in Article. 135 paragraph. 1 Directive 2006/112 / EC, and shall meet the requirements of the principle of fiscal neutrality, which is inherent in the common system of VAT [8].
In particular, apparent from that case that the exemption provided for in Article. 135 paragraph. 1 point d) f) of Directive 2006/112 / EC are addressing the difficulties associated with determining the tax base and the amount of deductible VAT. Transactions exempted from VAT under those provisions are, by their nature, financial transactions, even though they do not necessarily have to be made by banks or financial institutions. [9]

As follows from well-established case law of the ECJ [10] trading in securities associated with actions that change the legal and financial situation between the parties and are comparable to the activities occurring in the case of transfer of ownership or payment. Provision of services of ordinary physical, technical or administrative provisions which do not alter the legal or financial situation should not be covered by the exemption referred to in Article. 13B (d) (5) of the Sixth Directive (Articles. 135 paragraph. 1 letter f) of Directive 2006/112 / EC). According to the ECJ, management and storage of shares - transactions that generally do not involve a change in legal or financial positions of the parties - they are expressly excluded in Article. 13B (d) (5). By introducing an exception to the exemption provided for in Article. 13B (d) (5) for transactions in securities the phrase "with the exception of management and storage" in that provision places the management and storage of shares in the general framework of the Directive, under which VAT is charged on all taxable transactions, except in the cases expressly provided for redundancy. It is thus clear from the above that the provision of common services of an administrative nature which do not alter the legal or financial situation is not covered by the exemption set out in Article. 13B (d) (5) (respectively Art. 135 paragraph. 1 letter f) of Directive 2006/112 / EC). that the provision of common services of an administrative nature which do not alter the legal or financial situation is not covered by the exemption set out in Article. 13B (d) (5) (respectively Art. 135 paragraph. 1 letter f) of Directive 2006/112 / EC). that the provision of common services of an administrative nature which do not alter the legal or financial situation is not covered by the exemption set out in Article. 13B (d) (5) (respectively Art. 135 paragraph. 1 letter f) of Directive 2006/112 / EC).

[7] See. eg. the ECJ judgment in Case C-605/15 Aviva, paragraph 24 and the case-law cited.
[8] See. eg. the ECJ judgment in Case C-264/14 Hedqvist, paragraph 35 and the case-law cited.
[9] See. eg. the ECJ judgment in Case C-264/14 Hedqvist, paragraphs 36-37, and case-law cited.
[10] See. ECJ judgment in Case C-235/00 CSC, paragraphs 28-30 and Case C-2/95 SDC, paragraph 73.

Considering the above, safekeeping of financial instruments in book-entry form does not alter the legal and financial situation between the parties, there are also activities comparable to the activities occurring in the case of transfer of ownership or payment. There is thus no basis for differentiating the tax effects of the provision of services for holding financial instruments in VAT depending on the form in which there are financial instruments.

In accordance with Article. 217 of the Constitution imposing taxes and other public imposts, the specification of those subject to the tax and tax rates, as well as the principles for granting tax reliefs and remissions, along with categories of taxpayers exempt from taxation by law. Consequently, the overall interpretation can not impose obligations on the taxpayer and is not for him to act directly binding. Adherence to it will have a protective value in accordance with Article. 14k-14m Tax Ordinance. Thus, the taxpayer may, but is not obliged to apply to this general interpretation.

On January 1, 2017. Under the Act - Tax Ordinance introduced legislation on consistent practice of interpretation. In accordance with Article. 14n § 4 point 2 of the Tax Code: "In the case of application by the taxpayer during the tax period to the established practice of interpretation authorities of the National Fiscal Administration - the provisions of Article. 14k-14m. " It should be noted that even before the normalization rules in the Tax institutions established practice of interpretation, based on expressed in art. 121 § 1 of the Tax Code of the principle of trust, the application by the taxpayer to the prevailing approach in the practice of interpretation of the tax authorities, as a rule, should not harm him.

Minister of Finance: the up. L. Skiba