



The treasury is tracking VAT carousels, but it breaks the law

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For tax authorities, empty invoices and sham transactions are the same concepts. While pursuing VAT fraud, the tax authorities use two different legal bases in the same facts. According to experts, the tax office simply wants to refuse to deduct VAT, and the specific provision is not relevant to her. Administrative courts have started to stand on the side of companies.

A recent judgment of the Provincial Administration (801/19) shows that tax authorities cannot build out that the manifestation of such behavior is intermediation in issuing invoices, while referring trading. In the opinion of the Provincial Administration



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tax proceedings or an administrative court that controls the legality of a tax decision, choosing one of the two versions (options) to challenge the deduction of input tax on goods and services by tax authorities. Meanwhile, as experts indicate, such situations occur commonly.

An empty invoice and the apparent appearance are not the same

Grzegorz Keler, lawyer at SPCG, explains that **the tax authority's challenge to the right to deduct VAT can be justified by, among others the fictitious nature of the transaction (so-called empty invoices) or its appearance**. The first case occurs when the transaction does not occur at all, while the second case can be talked about when it occurs, but its purpose is to commit tax fraud. This difference is important because in the case of apparent turnover it is possible that the taxpayer took part in it unknowingly. In such a situation, if the taxpayer shows that, despite due diligence, he did not know and could not know that he was involved in the fraud, his right to deduct VAT should not be questioned.

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

The tax authorities confuse the legal bases

- However, in practice tax authorities often confuse these two legal bases with each other. They often see both empty invoices and apparent turn in one factual state. One can get the impression that the tax authorities simply want to refuse the right to deduct VAT and the specific legal basis is not relevant to him. **However, the taxpayer has limited defense options because he does not know what he is accused of** - says the expert. It is one thing to prove that the transaction actually took place, and one thing is to show that the taxpayer has due diligence. In both cases, the taxpayer may raise other arguments and evidence.

See also: NSA: Surplus VAT may expire >>

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The right judgment of the Gliwice court

Grzegorz Keler points out that the Provincial Administrative Court in Gliwice rightly emphasized that one cannot factually question the right to deduct VAT due to empty invoices and apparent carousel turnover. Since the authority concluded that there was no actual transaction, it cannot indicate the taxpayer's participation in apparent trade. **If, on the other hand, he was convinced that the taxpayer had participated in the carousel, he should examine whether the taxpayer had exercised due diligence to avoid participation in the tax fraud.** As the Gliwice court

pointed out, the justification of the dimension of tax proceedings require the tax authority to consider the taxpayer's behavior it bases its decision.

Check in LEX: Can increasing the exchange of goods to create more turnover indicate the fictitious nature of the transaction?

- Of course, you can imagine a situation where a taxpayer participates in a carousel. However, this does not change the fact that the right to deduct VAT can be only one. In the example given



about the lack of real nature of the transaction – the expert notes.

Check in LEX: Is it possible to deduct VAT if the invoice was paid and the contractor did not deliver the goods? >

The treasury enjoys great freedom

– Media coverage of the fight against the VAT gap gave some tax authorities a sense of fairly large freedom in questioning transactions carried out by taxpayers. **One example of this is the unreflective questioning of the right to deduct and reliability of invoices issued in an alternative way** – comments Andrzej Nikończyk, tax advisor, partner at KNDP.

Check in LEX: Does a company that is not an active VAT taxpayer that issued an invoice with VAT due have the right to correct VAT after two months? >

The expert points out that reading the justification, it is often difficult to know what the actual state of the authority has established, because there are also theses regarding empty invoices and statements confirming the existence of the goods, but the fictitiousness or apparentity of this turnover. In his opinion, the authority is not at all interested in how it actually was, it is only important that all alternative versions result in questioning the correctness of the accounts.

However, the authority is required to establish the facts on the basis of all evidence. – Here we meet with a second serious violation, i.e. the omission of some evidence – the authority inconvenient evidence at all omits in the decision, but this is another issue. The facts so determined, regardless of whether the taxpayer agrees with it, must be clearly reconstructed. Only on the basis of the unequivocal factual state can one apply the relevant provisions matching it – the expert notes. His alternative presentation not only prevents the taxpayer from undertaking defense, but also prevents judicial review.

– How should the court assess the correctness of applying the provisions, since it has two factual states to choose from? It is not the role of the court to choose the facts, so it remains for him to overrule such a decision. **It can be said that the court has no choice.** The most worrying, however, is that such structured decisions go to court in general – this means the weakness of the instance control, because the authority of the second instance is obliged to carry out the procedure again and then compare its result with the issued decision and on that basis assess its correctness – emphasizes Andrzej Nikończyk.

Check in LEX: Is it possible to deduct VAT from the invoice issued by the entity that registered for VAT purposes 2 months after issuing the invoice, submitted VAT declarations for the entire period from the start of operations and paid the tax?

The principle of two instances of procedure

He also points out that sometimes the authority **themselves to reviewing the issued decision, in proceedings**. If the decision based on an alter



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both the lack of conducting the procedure again (because the authority should establish one specific facts) and the lack of basic control of the decision, since the director of the tax chamber maintains the decision based on the undetermined facts.

- I am glad that the courts are here on the side of taxpayers, although, in truth, the authorities in such a situation leave them no other choice - sums up Andrzej Nikończyk.

This problem is unfortunately not the only one. January changes in documenting sales, 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>](#)



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