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Taxation of assignment of receivables with tax on goods and services in the light of the interpretation by tax authorities of the national and community judicial decisions.

In the doctrine, judicial decisions as well as in practice there exist different opinions as to how treat the assignment of receivables in terms of its taxation. Doubts relating to tax effects of this agreement are already evident in the question whether it may be treated as a service or not. Therefore, the doubts as to whether it is subject to taxation pursuant to the Act of Law on tax on civil law transactions[44], or whether it is subject to the Act of Law on tax on goods and services[45], and if so whether the basic tax rate should be applied or whether this agreement should be covered by exemption from taxation[46]. In case of taxation of the transfer of receivables the disputes concern almost all of the questions related to the transfer agreement. There is no uniformity of opinions, neither among the tax authorities nor among the judicature, nor, finally, among the taxpayers themselves, and the division line does not depend at all on whose interests are represented, the taxpayer's or the Inland Revenue's. There exist both different interpretations of the tax authorities and conflicting decisions of the administrative courts.

In order to decide whether the provision of service by the taxpayer is subject to taxation with a tax on goods and services it is necessary to determine the status of the provider, i.e. whether it is the taxpayer of this tax on account of its provision[47]. Therefore, deciding whether a given action is subject to taxation with a tax on goods and services it should be determined whether it is performed under the business activity conducted by the entity (within the meaning of the Act of Law) and whether it constitutes a service or delivery of goods. The key issue in this case is whether the acts involving sales of one's own receivables or receivables acquired previously will be treated in a different manner.

The transfer of receivables (assignment) is an institution of civil law[48], whose parties to the agreement are an assignor (seller of the receivable) as well as an assignee (buyer of the receivable). Under this agreement, the existing creditor assigns its receivable to a counterparty, that is, it gets rid of the receivable and its place is taken up by the buyer. The assignment does not require either participation or consent of the debtor. Despite the change of the creditor, it is believed that the obligation remains the same as before. It should be remembered therefore, that the assignment of the ownership of the receivable from the assignor for the benefit of the assignor may also occur under a different agreement obliging to assign the receivable then its sale (e.g. contract of exchange, contract of donation, private partnership agreement, factoring contract, etc.).

Three types of assignment[49] are recognized in both the doctrine and practice:

- trust assignment which involves temporary acquisition of the receivable for the purpose of enforcing it
- conditional assignment, whereby the assignor as a result of the conditional assignment obtains from the assignee a conditional obligation to transfer for the benefit of the assignor the equivalent value of the claim set out in the contract from a part of the receivable that has been enforced by the assignor (conditional assignment concerns the transfer of the ownership onto the assignor for the purpose of its execution),

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[44] Act of Law of 9 September 2000 on tax on civil law transactions (Journal of Laws No. 86, item 959, as amended).

[45] Act of Law of 11 March 2004 on tax on goods and services (Journal of Laws No. 54, item 535, as amended), hereinafter referred to as the Act of Law,

[46] Pursuant to Article 43(1) of the Act of Law, the services listed in Appendix No. 4 to the Act of Law, financial intermediation services under general terms, among others, are exempt from taxation.

[47] Pursuant to Article 15(1) of the Act of Law on tax on goods and services, regardless whether the entity has completed the registration for the purposes of goods and services tax, it will have the status of the taxpayer of this tax when it independently conducts the business activity. The purpose of this business activity is irrelevant in this case.

[48] The assignment is governed by provisions set forth in Articles 509 - 517 of the Act of Law of 23 April 1963 Civil Code (Journal of Laws No. 16, item 93, as amended), hereinafter referred to as the CC.

[49] K. Zagrobelny [in] Civil Code Volume I. Commentary to Articles 1-534, edited by: E. Gniewek, Warsaw 2004, p. 1326.

- unconditional assignment involving a definite transfer of the ownership of the receivable for a specified amount for the benefit of the assignor, who from that moment on has assumed the risk of default by the debtor.

It seems that taxation with a tax on goods and services in case of the trust assignment and conditional assignment does not raise any larger doubts anymore. These agreements aimed at recovering the receivable for the benefit of the counterparty should be treated as debt recovery services and taxed with 22% rate of goods and services tax. Whereas, taxation of the unconditional assignment is a disputable question[50].

As far as this question is concerned, in the doctrine as well as in the judicial decisions we can distinguish at least three different positions.

The first of them acknowledges that each type of assignment of receivable constitutes a financial intermediation service taxable with a goods and services tax[51]. This view is based on the fact that, if the receivable that is a property right does not constitute a product within the meaning of the Act of Law, then under no circumstance can it be acknowledged as the delivery of a product. However, based on the wording of Article 8(1) of the Act of Law, the provision of services in the territory of the country, referred to in Article 5(1)(1) of the Act of Law, is understood as each provision of service for the benefit of a natural person, legal person or an organizational unit without legal personality, which does constitute delivery of goods. The aforementioned definition of service is very wide, since it includes in principle each factual situation under which a transaction between two entities is concluded as a result of which one of the entities performs for the benefit of the other that to which the former has undertaken to provide, providing that the performance does not constitute delivery of goods. There is no doubt the receivable is not a product but it is a service, whose objective is to relieve the hitherto creditor (seller) of the burden of enforcement. Proponents of this position argue that the assignment of receivables should be treated as the provision of services under the regime of goods and services tax, pointing out that it is a specific type of service, since in case of the assignment of receivables the service is provided by the buyer of receivables and the beneficiary is the seller. That means that the buyer of receivables performs for the benefit of the seller a service which intention is to relieve the seller from the burden and risk associated with the enforceable receivable that is the subject of the contract. A relation under civil law between the seller and buyer of the receivable ends after completing this legal act and the seller cannot affect its continued existence, and that means that it cannot be assumed that the service ends along with its enforcement or its further sale. In this case, the sale of one's own receivable does not constitute the provision of a service by the seller, thus it does not result in a tax obligation arising on the seller's part[52]. Proponents of this position, by acknowledging the sale of one's own receivable as a financial intermediation service, at the same time acknowledge this service as covered by the exemption under Article 43(1) of the Act of Law[53]. The exclusion of this act from taxation with a tax on civil law transactions[54] is a consequence of the opinion that the assignment of receivables is the provision of financial services and is subject to the Act of Law on tax on goods and services. Based on the Act of Law on tax on civil law transactions[55] those civil law transactions, under which at least one of the parties is taxed on account of completing this transactions with a tax on goods and services or is exempt from this tax, are not subject to this tax. That means

[50] A. Pęczyk-Tofel, M.S. Tofel „ Cesja wierzytelności na gruncie VATU" ("Assignment of receivables under the VAT regime") Monitor Podatkowy (Tax Monitor) of 2007 No. 11, p.

[51] This position is supported by the tax authorities, see the decision of the Head of Tax Office Łódź Śródmieście of 19 October 2006, File Ref. No.: III/443-143/06/EJ

[52] An additional argument supporting this position are to be classification opinions of the Centre for the Interpretation of Classification Standards of the Statistical Office in Łodź, according to which services of acquisition of receivables of a company for the purpose of their use in the legal and business operations fall within the group under the name "financial intermediation services, not elsewhere classified".

[53] Pursuant to Article 43(1) the services specified in Appendix No. 4 to the Act of Law, including, among others, financial intermediation services, are exempt from taxation.

[54] Pursuant to Article 2(4) of the Act of Law on tax on civil law transactions. Such a position is assumed in the decision of the Provincial Administrative Court in Warsaw of 7 March 2007, File Reg. No.: III SA/Wa 2208/ 06 Monitor Podatkowy (Tax Monitor) No.6 of 2007, p. 42

[55] Reference to the wording of Article 2(4) of the Act of Law of 9 September 2000 on tax on civil law transations (Journal of Laws No. 86, item 959).

that in order for a legal transaction is to be exempt from a tax it should be covered by the substantive scope of the tax on goods and services.

A different opinion represented in particular by the tax authorities[56] stipulates that, pursuant to the wording of the Act of Law on tax on goods and services, the receivable is a property right that is an object of trading, and the transfer of the rights to the receivable as intangible property rights constitutes the provision of services within the meaning of Article 8(1)(1) of the Act of Law on tax on goods and services. Therefore, the purchase of receivables in order to recover them by one's own means or for the purpose of their further sale can be included in financial intermediation services[57]. The service understood in that manner contains the civil law institution of transfer of receivables, whereby the buyer of receivables provides for the benefit of the seller a financial intermediation service aimed at relieving the seller from the burden of enforcing that receivable. In such cases the tax authorities claim that we have to do with the service related to the purchase of receivables for the purpose of individual recovery or further re-sale. Therefore, since the transfer of receivable results in relieving the assignor from the burden of enforcing that receivable, then in the opinion of the tax authorities it constitutes the transaction of enforcing debt, which is excluded from exemption from the goods and services tax. In this case for the tax authorities the trading in receivables (regardless of the degree of the assumed risk of solvency of the debtor) falls within the definition of debt recovery services and factoring, which are excluded from exemption from the goods and services tax, and thus are taxed with a basic tax rate. In the opinion of the tax authorities in each case when the intention of the service provider's actions is taking over a debt (receivable) this service should be specified as the activity of a creditor towards recovering that debt.

However, it seems that this opinion is completely wrong since the unconditional assignment of receivables cannot be treated either as the debt recovery service or factoring. Although these services have not been in the Polish provisions of law and belong in the category of unnamed contracts, but its known that factoring consists in that that the factor practicing this type of profession acquires the receivables due to the creditor on account of completing a sale or service, for a suitable compensation that constitute a difference between the nominal price and sale price of the receivable. As it can be seen, each service of the sale of a receivable falls under the definition of the service of factoring, but such services are in reality only those contracts which are characterized with the permanent, continuous legal relationships between the factorant and the factoree[58]. The purpose of a factoring contract is the provision of financing to the seller and not the recovery of the receivables acquired. The essence of the distinction of these services rests with the provisions of the contracts connecting the parties of the transfer of the receivable[59]. Thus, a single sale of a receivable without additional services on the part of the buyer cannot be treated as a factoring contract. A similar position in that case was also adopted by the Court of Justice of the European Communities[60]. The same applies to the debt recovery service which assumes the existence of two entities, one out of which undertakes to recover a debt in return for a compensations, that is the recipient of services is that entity which benefits from the service provided by the counterparty, and that means that the service provider recovers the debt for the recipient of services and not for itself[61]. The assignment involves selling of a receivable and the buyer acquires it for its own account and as its own risk[62], therefore services of this type should definitely be classified as the financial intermediation services[63] .

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[56] Individual interpretation issued by the Director of Tax Chamber in Katowice of 15 July 2008 No. IBPP2/443-368/08/WN. However, there also are interpretations in which the tax authorities present a radically different opinion, see the Interpretation of the Director of Tax Chamber in Warsaw of 8 February 2008 No. 1401/PV-II/4407/14-24/07/JM www.mofnet.gov.pl

[57] Classified in accordance with the Polish Classification of Goods and Services (PKWiU) under section J ex (65-67).

[58] J. Zubrzycki „Leksykon VAT 2007" ("VAT Lexicon") Wrocław 2010, p.712.

[59] Decision of the Provincial Administrative Court in Gliwice of 20 March 2009, File Ref. No.: III SA/GL 1368/08 SIP LEX 529473.

[60] Decision of the ECJ of 26 June 2003, C-305/01 SIP LEX 158649.

[61] Ditto decision of the Provincial Administrative Court in Warsaw of 3 September 2008, File Ref. No.: III SA/Wa 783/08.

[62] T. Michalik„ VAT – Komentarz rok 2008" ("VAT – Commentary for 2008") Warsaw 2008, pp. 523- 524.

[63] Ditto decision of the Supreme Administrative Court of 18 March 2008, File Ref. No.: II FSK 74/07, www.cbois.nsa.gov.pl

Another position represented by the judicial decisions[64] as well as some tax authorities[65] stipulates that sale of one's own receivable, as not being the provision of services or delivery of goods by its seller, is exempt from taxation with a goods and services tax. Whereas, any further re-sale of the receivable by the buyer is subject to taxation with a tax on goods and services as a transaction of the financial intermediation[66]. In that case, the sale of one's own receivables is not taxed with that tax, since it is not regarded as business activity but only as the execution of a property right which is not taxed with a tax on goods and services. According to this position, the acceptance of a different interpretation would infringe upon the principle of neutrality of the tax on goods and services, and taxation of the assignment of a receivable would lead to the double taxation of the same receivable (firstly, as a result of the concluded transaction or contract, next in connection with the completed assignment). According to proponents of this concept, the double taxation of the same transaction would be inconsistent with the fundamental principle relating to value added taxation (which, according to this concept, does not arise upon transfer of receivables), and additionally, the assignment of one's own receivable cannot be classified as the financial intermediation services since there exists no element of intermediation here.

According to this position, the provision of the assignee (buyer of the receivable) cannot be treated as a service, since its obligation is to pay the price and assume the receivable, and in its activities there is a lack of the element of compensation since it is the assignee itself who is obliged to pay for the service provided by the assignor. This opinion is also based on the position that from both the provisions of IV Direcitve or from the Act of Law itself it cannot be derived that the exclusive payment of the price does not constitute a service. That means that the assignment of one's own receivable is not subject to the Act of Law on tax on goods and services (which means that it is subject to the Act of Law on tax on civil law transactions), and only the subsequent re-sale of the receivable may be classified as the financial intermediation services and as such it is subject to the provisions of the Act of Law (and thus it benefits from exemption from a value added tax and is not subject to a tax on civil law transactions).

Proponents of this opinion refer to the wording of the First Directive of the Council[67] as well the Sixth Directive[68], where two fundamental principles of the common system of value added tax as well as the common definitions relating to the common system of this tax were provided. Pursuant to Article 2 of the First Directive, the principle of the common system of value added tax includes the application of the general consumption tax, which is exactly proportional to the price of goods or services, regardless of the number of transactions which take place in the production process and distribution before the stage at which this tax is collected. Each transaction will be subject to a value added tax calculated on the price of goods or services at the rate which is applicable to such goods and services after deducting the amount of tax incurred directly in the elements of the costs. For proponents of this opinion, the sale of one's own receivables is not the provision of services by the seller, and thus a tax obligation in terms of the tax on goods and services does not arise on the part of the seller The assignment of one's own receivables, according to this position, does not constitute the financial intermediation services, since it does not constitute an activity that is subject to taxation with a goods and services tax[69]. The Act of Law on tax on goods and services provides for, following VI Directive, the so-called negative definition, where "the provision of services (…) is understood to be each performance (…) which does not constitute delivery

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[64] Decision of the Provincial Administrative Court in Wrocław of 3 April 2007, File Ref. No.: I SA/Wr 89/07 SIP LEX 247985

[65] Interpretation of the Head of II Mazowiecki Tax Office of 17 January 2005, No.US72/RPP1/443 – 33/2005/MK, ***unpublished.***

[66] It is not disputed that the sale of third-party receivables (i.e. acquired before from another entity) constitutes a service exempt from a tax on goods and services; see also J. Martini (ed.) ***„ VAT Direcitve 2006/112EC" Wrocław 2008.***

[67] First Directive of the Council of 11 April 1967 on the harmonization of the regulations of the Member States relating to taxes on business receipts (67/227/EEC Official Journal of EC 071 of 14 April 1967, as amended)

[68] Sixth Directive of the Council 17 May on the harmonization of the regulations of the Member States relating to taxes on business receipts – the common system of value added tax: the uniform basis of assessment (77/388/EEC Official Journal of the EU L No. 145 of 13 June 1977, as amended), referred to as the VI Directive.

[69] Decision of the Provincial Administrative Court in Warsaw of 11 January 2007, File Ref. No.: SA/Wa 2995/06 – unpublished, decision of the Supreme Administrative Court in Wrocław of 18 December 1995, File Ref. No.: SA/Wr 729/95, SIP LEX 27110, decision of the Provincial Administration Court in Białystok of 18 February 2003, File Ref. No.: SA/Bk 877/02, Decisions of the Supreme Administrative Courts ONSA 2004 No. 1, item 31.

of goods"[70]. According to this position, if, however, it is recognized that the sale of one's own receivables is a service that is subject to taxation with a tax on goods and services, it would mean an inconsistency with the material elements of the structure of this tax. Therefore, in this case the sale of one's own receivables is the exercise of the property right, which due to its nature cannot be regards as an act subject to a tax on goods and services[71]. Proponents of this opinion also argue that the recognition of the sale of one's own receivables as a service would constitute an infringement upon the principle of tax neutrality of the value added tax, emphasized in the judicial decisions of the ECJ on many occasions[72]. An additional argument is the fact that the receivables are always a result of the sale of goods or provision of services, and they have already been subjected to taxation in accordance with the general principles. Taxing them for a second time would result in a double taxation with a tax on goods and services. The first time upon the sale or performance of a service, the second time upon the assignment of a receivable. For this reason, according to this position, the sale of one's own receivables is not a service within the meaning of the provisions on the tax on goods and services and is not subject to taxation, nor is it exempt from this tax, which means that neither the seller nor the buyer of the receivable may benefit from the exemption provided for in Article 2 of the Act of Law on tax on civil law transactions[73]. It is also argued, that the sale of one's own receivables cannot be recognized as the provision of services (as a separate taxable act), since sporadic acts associated with the acquisition of receivables cannot be recognized as factoring services or debt recovery services, since no service is provided by the buyer of the receivable. In that case there is no performance on the part of the buyer of the receivable since the performance does not involve the acquisition of the receivable itself and the seller does not perform any separate provision in that situation either[74].

In conclusion, the existence of a financial service can be undoubtedly demonstrated upon the assignment of a receivable already at the moment of the acquiring of the receivable, since this acquisition is a necessary condition for performing the service for the benefit of the seller. In the light of the definition provided for in the Act of Law[75], the receivable as a property right cannot be classified as goods, whereas the wording of Article 5(1) of the Act of Law does not leave any doubts that the delivery of goods and provision of services for consideration in the territory of the country are subject to taxation with this tax, whereas the Act of Law does not provide for an independent and positive definition of the service, stating only[76] that the provision of services is understood to include each performance for the benefit of a natural person, legal person or an organizational unit without legal personality, which does not constitute the delivery of goods within the meaning of Article 7 of the Act of Law. It should be emphasized that the term of trading in receivables is most often understood as the acquisition of receivables aimed at their recovery by one's own means, or for their subsequent resale. It seems that the argument of a lack of trading at the stage of acquiring the receivable is completely wrong. It is true that the clear benefit occurs on the part of the beneficiary, and it is difficult to demonstrate trading on the part of the service provider, but such is a nature of financial services, therefore the legislator desisted from imposing a tax upon each act subjecting it to an exemption. It transpires from analysing the wording of the provisions of Article 8(1) of the Act of Law that the sale of one's own receivable cannot be recognized as the provision of a service by the seller for the benefit of the entity acquiring the receivable. Despite that fact that a receivable is not classified as goods nor is it a service

[70] Definition of services is provided for in Article 8(1) of the Act of Law.

[71] The judicial decisions of the ECJ are quoted in support of this opinion, e.g. in Case C 155/94 concerning the question of acquiring financial interests by capital group, where it was decided that „ the definition of business activity within the meaning of Article 4(2) should be interpreter in such a way so that it does not include the activity (…) involving the purchase and sale of shares and other securities by the trustee under the management of assets of a charitable foundation" as well as in Case C-77/01, where the Court decided that "the enterprise which conducts its business involving the sale of its own shares and other marketable securities, such as shares in investment funds, should be regarded in terms of the scope of this activity, as being restricted to the management of the investment portfolio in the same manner as it is done by a private investor. That means that the exercise of the property right cannot be acknowledged as business activity and thus it is not subject to taxation with a tax on goods and services.

[72] Decision of 15 January 1998 in Case C-37/95, decision of 21 March in combined cases from C -110/98 to C-147/98 as well as decision of 8 June 2000 in Case C-98/98.

[73] Decision of the Provincial Administrative Court in Wrocław of 3 April 2007, File Ref. No.: I SA/WR 89/07 SIP LEX 247985

[74] A. Bartosiewicz , R. Kubacki „ Komentarz VAT" ("Commentary on VAT"), Warsaw 2009, p. 571

[75] Reference to Article 2(6) of the Act of Law.

[76] In Article 8(1) of the Act of Law

either, its acquisition by the entity involved in buying receivables and recovering them from the debtors constitutes the provision by the buyer of the receivable and for the benefit of the seller a compensation for the receivable acquired, as a result of which the seller does not need undertake any action aimed at recovering the payment from the debtor. In connection with the above, the performance itself of the entity acquiring the receivable should be recognized as an act that is subject to taxation with a tax on goods and services, whereas the act of the seller whose object is the transfer to the buyer the right to the receivable is neutral under the VAT regime. However, the fact that the sale of one's own receivable is not a service on the part of the seller does not mean that this act is not an element of the service. The difference consists in the fact that this service is provided by another entity – the buyer of the receivable[77]. Following in that case on the negative opinion of the Statistical Office does not yet prejudge that this is not the service within the meaning of the Act of Law and the service that is not subject to taxation either[78]. Since the legislator entered in the Act of Law the principle that the services specified in the statistical classifications are identified by them, that means that the services that are not classified statistically are identified without the application of the classification and are subject to taxation if the requirements set forth in the Act of Law are fulfilled[79]. It should also be pointed out that the Directive[80] does not refer to any statistical classifications either, and yet its provisions always take precedence over the national legislation.

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[77] J. Zubrzycki „ Leksykon VAT 2005" ("VAT Lexicon 2005"), Wrocław 2005 p. 574 and subsequent.

[78] A. Bartosiewicz R. Kubacki „ Komentarz VAT" ("Commentary of VAT"), Warsaw 2009, p.159; decision of the Provincial Administrative Court of 16 December 2008, File Ref. No.: I SA/Bd 668/08 Monitor Podatkowy (Tax Monitor) No. 4 of 2009, p.43

[79] Reference to Article 15 of the Act of Law.

[80] Reference to Directive 2006/112/EC of the Council of 28 November 2006.

- Decision of the Provincial Administrative Court in Gliwice of 20 March 2009, File Ref. No.: III SA/GL 1368/08 SIP LEX 529473

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Other materials

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