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VALUE ADDED TAX ON TRANSACTIONS BETWEEN A GENERAL PARTNERSHIP AND ITS PARTNERS

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The article does not aspire to comprehensively present the issue of tax-related consequences of transactions between partners within a general partnership. Indeed, the issue is too broad. Based on the author's experience, it can be stated that partners of a general partnership, to a great extent, in general appropriately recognise tax obligations in the area of income tax, tax on transactions based on civil law and VAT on transactions between a partnership and its contracting parties. However, in case of transactions between partners themselves, the obligations resulting from the Act on VAT are quite often ignored. Unfortunately, also accountants often have more or less serious problems with that issue.

I. From the point of view of the VAT obligations, setting up a general partnership and increasing its property later is tax-neutral. Contributions of capital (both at the moment of setting up a partnership and in the course of its functioning) cannot be recognised as business operations, which is one of the main conditions for tax obligations with respect to VAT.[1] Contribution of capital, provided it is in the pecuniary form, cannot be recognised as a delivery or provision of services.[2] The fact that, in accordance with Act on personal income tax,[3] the income of a partner of a general partnership is recognised as income from non-agricultural business

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1 Compare the CJEU judgment of 29 October 2009 in the case C-29/08, *AB SKF*; see the judgment of 2009, p. I-10413 concerning the interpretation of Article 2 para. 1(a) and (c) in conjunction with Article 9 Council Directive 2006/112/EC of 28 November 2006, OJ L 347 of 11 December 2006.

2 Within the meaning of Articles 7 and 8 of the Act of 11 March 2004 on tax on goods and services, consolidated text, Dz.U. 2017, item 1221, as amended; hereinafter Act on VAT.

3 Article 5b para. 2 of the Act of 26 July 1991 on personal income tax, consolidated text, Dz.U. 2016, item 2032, as amended; hereinafter Act on PIT.

operations does not have influence on determination of his/her (or a partnership's) obligation within VAT.[4] However, there are exceptions to the rule: (1) a partner making a contribution does business and, as a result, is a VAT payer – this is what most often occurs when a partner is a limited company;[5] (2) a partner makes a contribution in a non-pecuniary form (an in-kind contribution); (3) a partnership will use the object of an in-kind contribution in operations exempt from VAT.

Cases (1) and (2) should be analysed jointly. Theoretically, one can imagine that a taxpayer is involved in a business consisting only in setting up general partnerships or limited companies (for himself/herself). However, even then, contributions made to a partnership only in a pecuniary form cannot be recognised as a delivery (money is not goods[6]), and thus, all the more, it cannot constitute the provision of services[7].

In the first years when Act on VAT was in force, the issue did not cause any controversies. In 2004, nearly two months after Act on VAT was passed, the Minister of Finance issued the Regulation on the exercise of some provisions of the Act on tax on goods and services,[8] which inter alia laid down exemptions from the tax other than those referred to in Articles 43–81 Act on VAT and detailed conditions for the application of those exemptions. The Regulation clearly determined the VAT exemption of non-cash contributions to general partnerships and limited companies.[9] Since 2008, Regulation MF of 2004 has been recognised as repealed due to the fact that a successive regulation with the same title and a similar scope of subject matter was issued.[10] The lack of the exemption that was laid down in Regulation MF of 2004 started a discussion on the status of an in-kind contribution to a partnership from the point of view of the VAT obligation.

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[4] There are many arguments supporting such a stance but the leading one, which others refer to, is the fact that Act on VAT grants legal identity to general partnerships with respect to the VAT obligation, while Act on PIT recognises partners as subjects to tax. The mixed type of a partnership limited by shares and a public company, which is discussed below in the article, is an exception.

[5] It should be noticed, however, that there is an opinion that a partner making an in-kind contribution to a general partnership will be treated as a VAT payer because the act of making a contribution has the features of a business operation referred to in Article 15 para. 2 Act on VAT; individual interpretation of the Director of the Revenue Office in Katowice of 16 July 2016, IBPP2/443-380/14/KO, https://www.podatki.biz/interpretacje/0306549.txt (accessed on 30.11.2017).

[6] Goods means objects, their parts and all types of energy, Article 2(6) Act on VAT.

[7] Many provisions of the Act of 15 November 2000: Code of Commercial Partnerships and Companies (consolidated text, Dz.U. 2017, item 1577), hereinafter Code of Commercial Companies or CCC, indicate that the provision of labour or services is a classical example of an in-kind benefit provision and, moreover, it is not always a non-cash contribution. In accordance with tax law, nobody states it is otherwise. Exceptionally, crediting or giving loans within the scope of business operations is treated as a service, in accordance with Act on VAT. However, based on Article 43 para. 1(38) Act on VAT, it is a service exempt from tax.

[8] Regulation of the Minister of Finance of 27 April 2004 on the implementation of some provisions of the Act on tax on goods and services, Dz.U. 2004, No. 97, item 970; hereinafter Regulation MF of 2004.

[9] § 8 para. 1(6) Regulation MF of 2004.

[10] Regulation of the Minister of Finance of 28 November 2008 on the implementation of some provisions of the Act on tax on goods and services, Dz.U. 2008, No. 212, item 1336.

At the beginning of the next part of the discussion concerning making in-kind contributions to general partnerships, it is necessary to draw attention to two significant issues. It should also be indicated that controversies analysed in the article, in general, do not occur in case of limited companies and, that is why, it seems that conscious (or unconscious) application of an analogy to solutions adopted for limited companies distorts general partnerships' tax obligations resulting from Act on VAT.

II. The first issue is connected with the payment for a delivery and service provision. In general, deliveries paid for are subject to VAT; free deliveries are taxed exceptionally.[11] The taxation of free deliveries is limited under Article 7 para. 2 Act on VAT. According to the provision, although in-kind contributions are not included there, such an act should be taken into account because the provision constitutes an open catalogue.[12] In the case of limited companies, it can be said that a partner acquires specific ownership rights, a stake or shares, for his/her contribution. However, such a statement is a simplification because a partner acquires a stake making an adequate declaration of will and only then backs it with a contribution (or for pecuniary shares, pays the amount). Eventually, he/she acquires ownership rights of a certain nominal or subscription value.

In the case of general partnerships, with the exception of a mixed partnership: a partnership limited by shares and a public limited company, there are no shares within the above-mentioned meaning. Although a partner acquires all the rights and obligations, the concept means participation in a partnership and assumes the nature of a right.[13] A stake (in a limited company) or a share (in a public limited company) basically means the level of participation in a company capital but, in addition, it expresses all the rights and obligations of a partner.[14] Moreover, in general, these are transferable, while all the rights and obligations in a general partnership are not transferable.[15] Eventually, it is easier to approve of the statement that an in-kind contribution to a limited company or a public limited company is a delivery paid for but in the case of a general partnership it would be doubtful. Revenue authorities seem to adopt a similar stance.[16] That is why, the revenue authorities conclude that an in-kind contribution should be treated as a free delivery. However, it should be taken into account that if a partner does not have the right to reduce the amount of due tax by the amount of calculated tax as a result of acquisition or production of the object of an in-kind contribution, the act should be recognised

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[11] Article 7 paras 1 and 2 Act on VAT.

[12] The judgments that refer to the argument of definiteness of the object to tax with a conclusion that a catalogue of free deliveries is closed in nature are isolated; cf. judgment of the Voivodeship Administrative Court in Warsaw of 12 February 2013, III SA/Wa 1995/12, LEX No. 1378952.

[13] G. Kozieł, *Przeniesienie praw i obowiązków wspólników w handlowych spółkach osobowych. Uwagi na gruncie regulacji art. 10 k.s.h.*, Kraków 2006, p. 92.

[14] R. Pabis, [in:] J. Bieniak et al., *Kodeks spółek handlowych. Komentarz*, Warszawa 2014, p. 471.

[15] Articles 10, 180 and 182 CCC.

[16] Individual interpretation of the Director of the Revenue Office in Warsaw of 23 May 2014, IPPP3/443-179/14-2/KC, LEX No. 231709.

as a free delivery exempt from tax.[17] If the above-mentioned right concerns only a partial deduction of VAT, and this can happen in case of cars, which are often used as in-kind contributions, a delivery should nevertheless be subject to taxation of the whole value of the contribution. There is a possibility of compensating this to a limited extent by correcting the tax calculated at the time when a partner making an in-kind contribution has originally purchased the car.[18]

Thus, if we assume that an in-kind contribution to a limited company is a delivery paid for and to a general partnership is a free one, it is hard not to notice that in the case of a partnership limited by shares-a public company, this simple opposition does not seem to be satisfying. It is connected with a basically different status of partners: general partners and shareholders, which is a characteristic feature of this partnership. In fact, it is a partnership with a mixed personal and capital nature, which in the light of the national regulations, however, is more like limited by shares than a public limited one.[19] This mainly results from the fact that a general partner has a more important voice in matters significant for the partnership than the will of the majority of shareholders expressed in the resolutions of the annual general meeting.[20] General partners as well as shareholders are obliged to make contributions to their partnership,[21] however, the former make contributions in accordance with the rules for a general partnership and the latter in accordance with the rules for a public limited company.[22] In accordance with the Code of Commercial Companies, the status of partners is rather clear.[23]

Since 2008, a considerable increase in the interest in this legal form of business operations has been observed. The number of partnerships limited by shares accounted for 517 in 2008 (mainly in the construction sector and real estate management), which constituted an increase by 100% in comparison with the previous year. The number was 1,513 at the end of 2011, 2,816 at the end of 2012,[24] and over 6,000 at the end of 2013.[25] It is supposed that the increase in the interest in a partnership limited by shares-a public company was connected with the possibility of using its construction to optimise taxes especially in the field of shareholders' income tax. In 2013, the legislator extended the circle of entities classified as CIT payers by adding

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[17] Compare Article 7 para. 2 Act on VAT.

[18] The issue of partial deductions of VAT and the possibility of correcting a calculated tax are thoroughly regulated in Articles 90–91 Act on VAT.

[19] Compare A. Szumański, [in:] S. Sołtysiński, A. Szajkowski, A. Szumański, J. Szwaja, *Kodeks spółek handlowych. Komentarz*, Vol. I, Warszawa 2006, p. 812; A. Kidyba, *Kodeks spółek handlowych. Komentarz*, Vol. I, Kraków 2004, pp. 498–499; although an opposite opinion should be mentioned in T. Siemiątkowski, R. Potrzeszcz (eds), *Kodeks spółek handlowych. Komentarz*, Vol. 1, Warszawa 2010, p. 600.

[20] In particular, compare Article 146 § § 2 and 3 CCC.

[21] Compare Article 3 CCC.

[22] Compare Article 126 § 1(1) and (2) CCC.

[23] The expression "rather" takes into account the fact that many issues are regulated by analogous use (adequate application) of the provisions concerning both a general partnership (a civil one) and a limited company (a public limited one), under Article 126 § 1 CCC.

[24] M. Bieniak, [in:] J. Bieniak et al., *Kodeks*, *op. cit.*, p. 424.

[25] P. Pinior, [in:] J. Strzępka (ed.), *Kodeks spółek handlowych. Komentarz*, Warszawa, 2015, p. 282.

a partnership limited by shares to it.[26] The amendment entered into force on 1 January 2014. Until then, there was not uniform case law concerning tax on shareholders' income (dividend). The situation resulted, as the Supreme Administrative Court adjudicating benches indicated, from the discrepancy between tax regulations and the essence of the regulations concerning partnerships limited by shares-limited companies laid down in the Code of Commercial Companies.[27] It seems that the above-mentioned amendment restored consistency, which does not mean that all doubts were eliminated. Taking into account that the amendment mainly aimed to regulate the issues of shareholders' income tax, it is hard to conclude[28] how partners' in-kind contributions to a partnership should be interpreted based on Act on VAT, in particular what should constitute a tax base.

The issue, not discussed in this article so far, can be best exemplified by a partnership limited by shares-a public limited company. In accordance with the logic adopted, an in-kind contribution to a limited company is recognised as a delivery paid for and to a general partnership as a free delivery. A partnership limited by shares-a public limited company is not subject to autonomous regulations covering the discussed subject matter. That is why, it should be assumed that general partners' and shareholders' contributions should be treated differently.

In case of shareholders, in-kind contributions should be recognised as a delivery paid for and, in accordance with the provisions of Act on VAT,[29] everything that constitutes payment should constitute a tax base. In the case discussed, in general it can mean: (a) the value of the ownership right, i.e. the value of shares or a stake; or (b) the value of an in-kind contribution based on the market prices or ones determined in a different way. The latter possibility should be excluded because the provision making it possible was repealed.[30]

Thus, if it is assumed that the value of the right to a stake is the VAT base, it is necessary to establish what the payment for the acquisition of that right is, in particular whether it should be referred to the nominal value of the right to a stake, its subscription value or any other, e.g. the balance value (in case of the increase in the company's capital). The provisions of Act on VAT do not give a clear answer to those questions but in case law, according to the Supreme Administrative

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[26] Act of 8 November 2013 amending the Act on corporate income tax, the Act on personal income tax and the Act on tonnage tax, Dz.U. 2013, item 1387.

[27] Compare the resolution of the Supreme Administrative Court of 16 January 2012, II FPS 1/11, http://orzeczenia.nsa.gov.pl/doc/3447C0D267 (accessed on 30.11.2017); resolution of the Supreme Administrative Court of 20 May 2013, II FPS 6/12, http://orzeczenia.nsa.gov.pl/doc/F58F52D694 (accessed on 30.11.2017).

[28] The meaning derived from Article 1 para. 3(1) of the Act of 15 February 1992 on corporate income tax, Dz.U. 1992, No. 21, item 26, as amended; hereinafter Act on CIT.

[29] Article 29a para. 1 Act on VAT.

[30] In 2013 Article 29 Act on VAT, including para. 9, which stipulated that the market value of an activity that is subject to tax should be recognised as a tax base if its price is not determined, was repealed. Article 29a, which has been in force since 2014, does not lay down such a solution.

Court,[31] there are no discrepancies. The nominal value of the right to a stake should constitute a tax base.[32]

In case of general partners, an in-kind contribution should be recognised as a free delivery and, in accordance with general rules of Act on VAT, the price of purchase of a given good or a similar one or, in case there is no price of purchase, the cost of its production should be recognised as a tax base.[33] If the object of an in-kind contribution consists in services, these should be treated as free services and the cost of the provision of those services incurred by a taxpayer should be recognised as a tax base.[34]

Apart from a commitment to provide services for a general partnership, an object of an in-kind contribution can consist in the provision of labour.[35] In the literature on the law on partnerships, little attention is drawn to a comparative analysis of those two types of commitments. Eventually, the legislator treats them as in-kind contributions based on the same rules. The search for the criteria for differentiating those contributions from the point of view of VAT does not make it possible to state that, due to the aim of the legal regulation, they should be treated in a different way.[36] Moreover, it should be noticed that a commitment to provide labour for a partnership does not result in an employment relationship within the meaning of employment law, and a partnership agreement is the only basis of its provision.[37] A partner does not acquire any employment rights based on the provision of such a contribution. Social insurance and healthcare insurance contributions are calculated and paid in accordance with the rules for persons involved in business activities. Finally, a partner's income is subject to income tax on business operations[38] and not on income obtained based on an employment relationship. As a result, it should be recognised that the provision of labour for

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[31] Compare the decision of the Supreme Administrative Court of 31 March 2014, I FPS 6/13, LEX No. 1449602, which refused to adopt a resolution concerning the issue and justified its stance by pointing to the lack of considerable differences in case law and confirming the appropriateness of judgments ruling that the nominal value of the share right should be a tax base.

[32] Judgments of the Supreme Administrative Court: of 14 August 2012, I FSK 1405/11, LEX No. 1225141; and of 19 December 2012, I FSK 211/12, LEX No. 1278095.

[33] Article 29a para. 2 Act on VAT.

[34] Article 29a para. 5 Act on VAT, with a reservation that it only concerns services referred to in Article 8 para. 2 Act on VAT.

[35] In case of a partnership limited by shares, the commitment to provide labour as well as services by a general partner for a partnership is recognised as a contribution conditionally admissible. They can be recognised as a contribution to a partnership only in case the value of his/her other contributions is not lower than the amount to which the general partner is liable, cf. Article 107 § 2 CCC.

[36] The indication, with some carefulness, that the provision of labour is a commitment of a result and the provision of services is the commitment to act diligently, is not only doubtful but also useless in determination of the status of the obligation based on Act on VAT; compare J.P. Naworski, [in:] T. Siemiątkowski, R. Potrzeszcz (eds), *Kodeks*, *op. cit.*, p. 146.

[37] Compare Article 22 § 1 Act of 26 June 1974: Labour Code (consolidated text, Dz.U. 2016, item 1666), which indicates that an employer commits to pay remuneration for the provision of labour.

[38] Article 5b para. 2 Act on PIT, provided that a partnership is involved in business operations. A partner's income is determined in accordance with Article 8 Act on PIT.

a partnership (or rather a commitment to do this), from the point of view of Act on VAT, should be treated as a type of the provision of services, and from the point of view of the law on partnerships, in the context of the phrase "or the provision of services", downright as lexical contamination.

A contribution to a partnership can be made through a deduction of a partner's liability to a partnership from a partnership's liability to a partner.[39] In case of limited companies, it apparently seems that only a contractual deduction is admissible.[40] However, the obligation to obtain the other party's consent to a deduction is only imposed on a partner. A partnership can also make a statutory deduction, i.e. unilaterally.[41] From the point of view of a partnership, a deduction should be treated as a conversion of a debt into a company's capital, and from the point of view of a partner, it is a conversion of credit into a stake or shares. In case of general partnerships, due to the lack of corresponding restrictions, both contractual and statutory deductions are admissible. From the point of view of a partnership, the act should be recognised as a conversion of a debt into its own capital, and from a partner's point of view, a conversion of credit into a quasi-stake (the entirety of rights and obligations). In case of a partnership limited by shares-a public limited company, it should be assumed that general partners, provided they do not make contributions to cover a company's capital, should be subject to rules for general partnerships,[42] and in case of shareholders, the rules for limited companies (public limited companies).[43]

According to Artur Nowacki,[44] the consequences equal to a deduction can be obtained by the use of other institutions of civil law: a cession (an assignment) of credit[45] or *datio in solutum*,[46] i.e. an obligation to provide a benefit instead of settling a liability. In this case, a partner is obliged. His/her obligation to provide a benefit consists in the transferring of converted liability onto a partnership or releasing a partnership from a debt (in this case paid for). While A. Nowacki's opinion that the solution is theoretically admissible can be approved of, in practice it seems to be a profusion of form over content. Moreover, in case a partner's liability to a partnership is non-pecuniary in nature, A. Nowacki recognises the latter possibility as inadmissible while the former is admissible.

In order to evaluate the consequences of the conversion based on Act on VAT, it is necessary to establish whether it should be treated as a pecuniary or an in-kind contribution. Taking into account the provisions of civil law, a statutory deduction

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[39] The conversion of credit into shares is a commonly used solution in international practice of increasing a limited company's capital; J. Strzępka, E. Zielińska, [in:] J. Strzępka (ed.), *Kodeks*, *op. cit.*, pp. 73–74.

[40] Article 14 § 4 CCC.

[41] In accordance with Article 498 of the Act of 23 April 1964: Civil Code, consolidated text, Dz.U. 2017, item 459; hereinafter Civil Code; K. Oplustil, *Wierzytelność wobec spółki kapitałowej jako przedmiot potrącenia i konwersji*, Przegląd Prawa Handlowego No. 2, 2002, pp. 15–16.

[42] Article 126 § 1(1) CCC.

[43] Article 126 § 1(2) CCC.

[44] A. Nowacki, *Konwersja długu na kapitał*, Przegląd Prawa Handlowego No. 12, 2008, pp. 38–43; http://www.lex.pl/akt/-/akt/konwersja-dlugu-na-kapital (accessed on 30.11.2017).

[45] Articles 509–516 Civil Code.

[46] Article 453 Civil Code.

is possible only in relation to pecuniary liabilities. To tell the truth, it is also admissible to deduct liability in the form of an object of the same quality specified only with respect to a type,[47] but such a case should be treated as exceptional. In the case of the law on partnerships, attention is drawn to the phrase "based on a due payment",[48] which means that a partner is obliged to make a pecuniary contribution and does not prejudge whether the converted liability is pecuniary or in-kind in nature. It is assumed that Article 14 § 4 CCC aims to eliminate situations in which a partner undertakes to make a pecuniary contribution and then uses an institution of a deduction and asks for the so-called hidden in-kind contribution, i.e. non-cash liability.[49] Admissibility of a contractual deduction was intended to be a compromise between a complete ban and a full arbitrariness of compensation. Finally, an opinion was established that if partners adopt a resolution[50] to make pecuniary contributions, the converted liability should also be pecuniary, and if they decide to make non-cash contributions, the converted liability should be an in-kind one. Such a stance was adopted in most cases for a long time,[51] and departures from that were exceptional.[52] Recently, tax authorities have started questioning this approach. Moreover, the judicature does the same.[53] The key argument is that a pecuniary contribution can only take place in the case of cash payment or with the use of bank money. A deeper analysis of this argument referred to in tax authorities' interpellations and in case law seems to indicate that the difference between the nature of a contribution and the method of making it has been blurred. In addition, in case the argument is used instrumentally, it is enough that before a partner makes a contribution, a partnership settles its liabilities to him/her and a partner immediately uses the means to make his/her contribution to a partnership in cash or by money transfer. It is worth proposing a different solution here, one that is in concord with the aim of the regulation: if a partner's credit results from his/her provision of a benefit of a pecuniary nature (let us assume that a partner has provided a loan for a partnership), the liability converted into his/her stake should be treated as a pecuniary contribution. On the other hand, if a partner sells a car

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[47] Article 498 § 1 Civil Code.

[48] Article 14 § 4 first sentence CCC.

[49] M. Tofel, [in:] J. Bieniak et al., *Kodeks*, *op. cit.*, p. 82; J.P. Naworski, [in:] T. Siemiątkowski, R. Potrzeszcz (eds), *Kodeks*, *op. cit.*, p. 160; A. Szumański, [in:] S. Sołtysiński, A. Szajkowski, A. Szumański, J. Szwaja, *Kodeks spółek handlowych. Komentarz do artykułów 1–150*, Vol. I, Warszawa 2001, p. 164

[50] It usually concerns a resolution on the company capital increase because it is doubtful that a partnership is a partner's debtor at the stage of setting it up.

[51] Individual interpretations of: the Director of the Revenue Office in Łódź of 8 May 2014, IPTPB3/423-50/14-2/PM, https://www.podatki.biz/interpretacje/0288666.txt; of the Director of the Revenue Office in Poznań of 15 May 2013, ILPB3/423-78/13-2/EK, https://interpretacje-podatkowe.org/przychod/ilpb3-423-78-13-2-ek (accessed on 1.12. 2017).

[52] Judgment of the Supreme Administrative Court of 28 February 2005, FSK 1434/04, http://www.orzeczenia.com.pl/orzeczenie/l9qp7/nsa,FSK-1434-04,podatek_dochodowy_od_osob_prawnych/ (accessed on 1.12.2017).

[53] Judgments of the Supreme Administrative Court: of 25 June 2014, II FSK 1799/12, http://www.orzeczenia-nsa.pl/wyrok/ii-fsk-1799-12/podatek_dochodowy_od_osob_prawnych/25477b9.html; and of 3 February 2016, II FSK 2648/13, http://orzeczenia.nsa.gov.pl/doc/CC7D17EC57 (accessed on 1.12.2017).

to a partnership with the postponed date of payment (the provision of a benefit is non-cash in nature), the liability converted into his/her stake should be treated as an in-kind contribution. Partners' resolutions should not influence, at least with an effect on tax authorities, the pecuniary or non-cash nature of the converted liability.

Although the above-mentioned issue has been discussed mainly in connection with tax obligations based on Act on CIT, it should be assumed that the evaluation based on Act on VAT will be analogous.

Moreover, due to the exemption from the provisions of Act on VAT, an in-kind contribution to a partnership in the form of a company or its organised part will not be subject to taxation.[54]

The exclusion of the application of the provisions of Act on VAT to a transaction of selling a company or its organised part[55] is justified in various ways. It is mainly highlighted that it can be difficult to determine a tax base due to the complexity of this legal interest or to collect the due VAT from the seller (who usually disposes of his considerable property).[56] One can argue whether it is really a problem, especially as the collection of VAT from a seller has not been an absolute rule for a long time now. The procedure of inverted obligation introduced in 2011, at the beginning in relation to the supply of scrap metal, gradually extended to cover other goods and services,[57] can also be successfully applied to a company. However, in fact, the European Union regulations allow such exclusion.[58] In such a situation, the justification consists in granting a special characteristic feature to the act of selling a company (including a direct in-kind contribution to a partnership). Article 19 Directive on VAT stipulates exemption from tax provided that the person to whom the goods are transferred is the successor to the transferor. In accordance with the provisions of the Polish tax regulations,[59] this type of succession is not applicable. It should be added that in accordance with the above-mentioned regulations, any transformations of partnerships are not treated as legal successions, either, although they produce the same legal effects as in case of natural persons' legal succession.[60] That is why, it should be recognised that Act on VAT creates a special case of legal succession or, within the scope analysed, is in conflict with Directive on VAT.[61]

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[54] Article 6(1) Act on VAT. The delivery or provision of services cannot be taxed if they are not subject to a legally effective agreement: Article 6(2) Act on VAT. The other exemption is only signalled and is not analysed in the article. Its significance for the issue seems to be marginal and, in addition, the problem is so broad that it can be the subject matter of a separate analysis.

[55] Within the meaning of Article 2(27e) Act on VAT.

[56] A. Bartosiewicz, *VAT. Komentarz*, Warszawa 2017, p. 128.

[57] Article 17 para. 1(7) and (8) Act on VAT. The complete list of goods and services that are subject to the procedure of inverted obligation is contained in annexes to Act on VAT: Annex No. 11 (goods) and Annex No. 14 (services).

[58] Article 19 Council Directive 206/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347, p. 1, as amended; hereinafter Directive on VAT.

[59] Articles 93–106 of the Act of 29 August 1997: Tax Ordinance, consolidated text, Dz.U. 17 January 2017, item 201.

[60] It results from the title of Chapter 14 of Tax Ordinance.

[61] Eventually, case law is for the first solution and sometimes an opinion is expressed that, within the scope analysed, the provisions of Directive on VAT should be applied directly; compare judgment of the Supreme Administrative Court of 28 October 2011, I FSK 1660/10, http://www.orzeczenia.com.pl/orzeczenie/e5y5d/nsa,I-FSK-1660-10,podatek_od_towarow_i_

In case of the provision of services, there are formally no free services envisaged. Even if such services took place, they should be treated as services paid for,[62] but the above-mentioned reservations also in this case are applicable to a great extent.

III. The second issue concerns a beneficiary of a delivery or service. It does not raise any doubts that a delivery or a service cannot be provided to a non-existent addressee. In case of limited companies, initially a limited company in organisation granted legal capacity, which after registration obtains legal identity, is the beneficiary of a contribution.[63]

In case of general partnerships, the situation is different. From the very moment the partnership agreement is entered into until its registration in KRS (National Court Registry), it is not clear what kind of entity it is. The legal doctrine representatives and commentators are not able to give it a name. Different terms are used, e.g. "a general pre-partnership",[64] "a partnership *in statu nascendi*", "a general partnership at the initial stage"[65] or "a partnership at the stage of organisation"[66]. There is also no consensus on what provisions should be applied towards such an entity. The use of the provisions applicable to a target company and a general partnership by analogy raises many reservations. The use of the provisions applicable to a limited company at the stage of organisation is even taken into consideration, although by means of careful analogy.[67] It is undoubtedly easier to approve of the stance that if a partnership is eventually registered, it is admissible to use the provisions applicable to a target partnership to it in the period before registration. However, the problem is that such a partnership can fail to be set up and then there are no normative grounds to use the provisions applicable to a target partnership to it.[68] Should the provisions applicable to a general partnership be used in such a case?

A civil partnership is a VAT payer based on Article 15 para. 1 Act on VAT. It is due to the fact that it is an organisational unit that is not a legal entity. General partnerships are also organisational units that are not legal entities, however, they are granted legal capacity.[69] Formally, these are two different types of organisational units, although it can be said that the latter term is contained in the former. However, one speaks about fully formed entities. An unformed partnership based on commercial partnerships law is not such an organisational unit as a formed civil partnership because entering into a partnership agreement based on commercial partnerships law is just a legal act, a *sine qua non* of the entity development

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uslug/ (accessed on 4.12.2017); judgment of the Voivodeship Administrative Court in Wrocław of 13 March 2012, I SA/Wr 1767/11, LEX No. 1126932.

62 Compare Article 8 para. 2(2) Act on VAT.

63 M. Trzebiatowski, *Spółka z o.o. w organizacji*, Lublin 2000, p. 477.

64 A. Kidyba, *Handlowe spółki osobowe*, Vol. I, Kraków 2005, p. 157.

65 S. Włodyka, *Problem osobowych spółek w organizacji,* Rejent No. 6, 2003, p. 262.

66 A. Szumański, [in:] W. Pyzioł, A. Szumański, I. Weis, *Prawo spółek*, Bydgoszcz–Kraków 2004, p. 169.

67 S. Sołtysiński, [in:] A. Szajkowski (ed.), *System Prawa Prywatnego*, Vol. 16: *Prawo spółek osobowych*, Warszawa 2008, pp. 793–794.

68 J. Strzępka, E. Zielińska, [in:] J. Strzępka (ed.), *Kodeks*, *op. cit.*, p. 104.

69 This way Article 33^1 Civil Code corresponds to Article 8 CCC.

process. Any attempts to determine the status of this transitional organisation aim to reasonably interpret Article 25[1] § 2 CCC (in relation to general partnerships), Article 109 § 2 CCC (in relation to partnerships limited by shares) and Article 134 § 2 CCC (in relation to a mixed type incorporating a partnership limited by shares and a public limited company),[70] the provisions of which lay down the principles of liability in the period between entering into an agreement and registration. It is hard to realise that no type of partnership exists in the above-mentioned period. The problem is that there is no "substitute" entity that may be subject to VAT imposition. It is indirectly confirmed in case law.[71]

The above comments concern only partners who are VAT payers and as such make an in-kind contribution to a general partnership. Thus, it should be assumed that it concerns a relatively small circle of entities. Unfortunately, also in such a case, there is a certain threat of the application of broadening interpretation. Following the judgments of the Court of Justice of the European Union,[72] it is possible to assume that a partner is not a VAT payer but due to the type of his/her in-kind contribution, in particular because of the fact that such a contribution, by its nature, can only serve business operations, such an activity will be subject to VAT. In the Polish case law, the indications of this stance can be observed, however, it should be highlighted that adjudicating benches carry out a thorough assessment of the entirety of circumstances of a given activity.[73]

Two aspects of making contributions to a general partnership have been discussed above, i.e. (1) the subjective one: whether a partner making a contribution acts as a VAT payer, and (2) an objective one: what the object of a contribution is (an in-kind contribution or money) with a brief mention of exemption from VAT in case of an act of contribution (a delivery) when a partner is not entitled to settle VAT on purchase, import or production of the in-kind contribution being made.

IV. The third aspect of an in-kind contribution to a general partnership is connected with the nature of the operation of the partnership being set up, i.e. whether a partnership is going to use the contribution made within its operations being subject to VAT or not. In general, the following possibilities should be

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[70] Although a mixed type of a partnership limited by shares-a public company is subject to CIT, it remains a general partnership even in accordance with tax law. In case of a general partnership, the legislator omitted an analogous, although unfortunate, provision.

[71] Compare judgment of the Supreme Administrative Court of 17 April 2013, I FSK 214/12, LEX No. 1366155. The Court decided that an excluded and organised unit within another entity (a healthcare institution within the structure of a general partnership) is not a VAT payer. However, in this case, there was another entity that could be recognised as a VAT payer, which was the general partnership.

[72] CJEU judgments of: 26 September 1996 in the case C-230/94, *Renate Enkler v. Finanzamt Homburg*, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61994CJ0230; of 19 July 2012 in the case C-263/11, *Ainārs Rēdlihs v. Valsts ieņēmumu dienests*, http://curia.europa.eu/juris/liste.jsf?num=C-263/11&language=PL (accessed on 2.12.2017).

[73] Compare judgment of the Voivodeship Administrative Court in Szczecin of 26 February 2014, I SA/Sz 1335/13, LEX No. 1440453; judgment of the Voivodeship Administrative Court in Łódź of 18 August 2015, I SA/Łd 503/15, LEX No. 1992081.

considered: (a) whether a partnership is going to get involved in domestic operations referred to in Article 43 Act on VAT; (b) whether a partnership is going to import goods referred to in Articles 45–81 Act on VAT and in accordance with the rules laid down in the above-mentioned provisions; and (c) whether a partnership is going to make use of special exemptions granted by the Regulation issued based on Article 82 para. 3 Act on VAT.[74]

The analysis of the exemptions mentioned in the former paragraph goes beyond the framework of this article and undoubtedly it can be the subject matter of an extensive monograph. It is even hard to make generalisations because the exemptions are subjective, objective and since 2011 also subjective-objective in nature.[75] The reasons for introducing those exemptions are also varied. The most important ones include: (a) ethical and moral causes, for example, the delivery of blood, plasma or human organs;[76] (b) difficulties in the establishment of a tax base, for example, of financial services,[77] including financial intermediation;[78] (c) reference to public interest or the good of the public, in general when non-governmental organisations take steps that should be taken by the state, for example, services provided by independent groups of people to their members;[79] social aid[80] or care of people who need it.[81]

In general, all tax rebates or exemptions, not only applicable to VAT, constitute an exception to the rule of common taxation. However, in case of Act on VAT, which follows the logic "you consume, you pay", a big number of exemptions considerably defy it. Moreover, due to the specificity of VAT, the conception adopted is that the calculated tax on the delivery aimed at performing activities exempt from tax cannot be deducted from due tax. So, it increases the price of this service or delivery, which is, on the other hand, so useful socially.

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[74] It concerns the Regulation of the Minister of Finance of 20 December 2013 on exemptions from the tax on goods and services and conditions for the application of those exemptions, consolidated text, Dz.U. 2015, item 736.

[75] A. Bartosiewicz, *VAT*, *op. cit.*, p. 631.

[76] Article 43 para. 1(5) and (6) Act on VAT, but in general additional services accompanying the delivery of blood and organs, especially their transportation to laboratories and hospitals is not subject to exemptions; compare the CJEU judgment of 2 July 2015 in the case C-334/14, *État belge v. Nathalie De Fruytier*, http://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX:62014CJ0334 (accessed on 29.11.2017).

[77] Article 43 para. 1(37)–(41) Act on VAT.

[78] Compare judgment of the Supreme Administrative Court of 26 June 2013, I FSK 922/12, LEX No. 1383099, concerning the provision of services of intermediation in the acquisition of banking and insurance services via the internet; judgment of the Supreme Administrative Court of 3 March 2015, I FSK 2135/13, LEX No. 16493999, concerning online services of banking loans comparison; CJEU judgment of 22 October 2015 in the case C-264/14, *Skatteverket v. David Hedqvist*, http://curia.europa.eu/juris/document/document.jsf?docid=170305&doclang=PL (accessed on 29.11.2017).

[79] Article 43 para. 1(21) Act on VAT, with a reservation that an exemption cannot create a real probability of interfering in competition on a given goods and services market; compare judgment of the Supreme Administrative Court of 14 November 2013, I SA/Wr 1304/13, LEX No. 1710180.

[80] Article 23 para. 1(22) Act on VAT.

[81] Article 43 para. 1(23) and (24) Act on VAT.

V. Financing current operations of a general partnership by partners generally takes place in two ways: by making successive contributions (in-kind or pecuniary ones), discussed above, or by crediting it. Special forms of financing envisaged for other types of partnerships, especially extra contributions to limited liability companies, do not produce expected effects. Making extra contributions to a limited liability company and withdrawing them is neutral from the point of view of income tax[82] and VAT[83]. Extra contributions are only subject to tax on civil-law transactions.[84] Unfortunately, in case of general partnerships, there is also a term "extra contribution" used in Act on tax on civil law transactions[85]. In the Code of Commercial Companies, the term is used in relation to a mixed type of a partnership limited by shares-a public limited company,[86] which is treated as a limited company and is subject to CIT. However, in this case the meaning of the concept is different from a limited liability company.[87] Tax authorities, in some interpretations, go beyond the meaning established based on the Code of Commercial Companies and perceive extra contributions (or making them) as any pecuniary payments made to a partnership by its partners, which are not contributions or loans and which aim to increase a partnership's capital.[88] However, in other interpretations, tax authorities are more restrained and exclude money payments to a partnership from the meaning of an extra contribution if they are to cover losses, unless such steps are laid down in a partnership agreement.[89]

The broadly interpreted concept of "financing" a partnership and "increasing its capital" should also take into account partners' non-cash contributions, which at the same time constitute the provision of benefits not paid for, provided that they consist in the provision of goods or ownership rights (with the exception of the provision of services).[90] Such goods or rights can be contributed to a partnership as a fulfilment of the commitment to make a contribution as well as a fulfilment of another commitment. It will usually be a commitment resulting from a commodate

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[82] Article 12 para. 4(11) Act on PIT.

[83] Extra contributions can only be pecuniary in nature: Article 177 § 1 CCC; compare R. Pabis, [in:] J. Bieniak et al., *Kodeks*, *op. cit*., p. 548.

[84] Because they are considered to be a change in a partnership agreement: Article 1 para. 3(2) in conjunction with Article 1 para. 1(2) of the Act of 9 September 2000 on civil-law transactions tax, Dz.U. 2000, No. 86, item 959, as amended; hereinafter Act on CLTT.

[85] Article 1 para. 3(1) Act on CLTT.

[86] Article 396 § 3 in conjunction with Article 126 § 1(2) CCC.

[87] In case of a mixed type of a partnership limited by shares-a public limited company and only with regard to shareholders, an extra contribution is a specific remuneration for special rights granted to their shares.

[88] Individual interpretations of: the Director of the Revenue Office in Bydgoszcz of 11 December 2014, ITPB2/436-226/14/DSZ, https://www.podatki.biz/interpretacje/0320825.txt; of the Director of the Revenue Office in Bydgoszcz of 26 July 2013, ITPB2/436-81/13/TJ, https://www.podatki.biz/interpretacje/0255658.txt (accessed on 29.11.2017).

[89] Individual interpretations of: the Director of the Revenue Office in Bydgoszcz of 11 December 2014, ITPB2/436-226/14/DSZ; of the Director of the Revenue Office in Warsaw of 17 September 2014, IPPB2/436-389/14-2/MZ, https://interpretacje-podatkowe.org/podatek-od-czynnosci-cywilnoprawnych/ippb2-436-389-14-2-mz (accessed on 29.11.2017).

[90] Such differentiation takes into account the wording of Article 1 para. 3(2) *in fine* Act on CLTT.

agreement (in the case of movables)[91] or an indefinite contract similar to a commodate agreement (in the case of ownership rights).[92] Such performance for the benefit of a partnership is envisaged in the provisions of the Code of Commercial Companies.[93] As a matter of fact, it is assumed that such provision of benefits usually constitutes the fulfilment of a commitment to make a contribution but it is the will of the parties to a given legal act that decides what the legal title is.[94] All the above-mentioned partners' contributions will be in general treated as the change in a partnership agreement and subject to tax on civil-law transactions. However, the tax can be avoided when movables or ownership rights are provided to usufruct (not just use), i.e. with the right to earn profits.[95]

In the case of a civil partnership, while making a contribution is downright expected,[96] crediting a partnership by a partner can turn out to be controversial.[97] The controversy mainly results from the fact that a civil partnership is not a legal entity. It should be highlighted, however, that the argument of the lack of legal identity should also concern the contributions to a partnership,[98] and nobody raises any doubts in relation to those acts. It is true that a civil partnership has a very limited legal identity, nevertheless a certain property mass is distinguished and formally it constitutes the partners' collective property[99] subject to joint ownership, which results in fractional "indefiniteness" of shares[100]. It may happen that an initial capital will never be collected, however, it does not lose its potential characteristic features.[101] In business practice, it is admissible to finance the operation of a civil

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[91] Article 710 et seq. Civil Code.

[92] S. Bogucki, A. Dumas, W. Stachurski, K. Winiarski, *Podatek od czynności cywilnoprawnych. Komentarz dla praktyków*, Gdańsk 2014, p. 82.

[93] Compare Articles 48 and 49 CCC.

[94] It is necessary to highlight the judgment of the Voivodeship Administrative Court in Warsaw of 26 March 2013, III SA/Wa 2356/12, http://www.orzeczenia-nsa.pl/wyrok/iii-sa-wa-2356-12/podatek_od_czynnosci_cywilnoprawnych_oplata_skarbowa_oraz_inne_i_oplaty_interpretacje_podatkowe/1df0e38.html (accessed on 28.11.2017), which indicates that partners of a civil partnership tried to convince tax authorities that beside things and property rights, money can also be the object of use (that does not increase a partnership's property). However, in most cases, pecuniary benefits provisions with the similar characteristic features (whether they are finally recognised as an inappropriate deposit: Article 845 Civil Code, or inappropriate use: Article 264 Civil Code) will be treated as the provision of ownership, and thus increasing the property of the beneficiary.

[95] However, there is no full consensus; for the views for, see M. Waluga, *Ustawa o podatku od czynności cywilnoprawnych. Komentarz*, Warszawa 2009, pp. 99–100; against: A. Mariański, D. Strzelec, *Ustawa o podatku od czynności cywilnoprawnych. Ustawa o opłacie skarbowej. Komentarz*, Gdańsk 2005, p. 89.

[96] Article 860 § 1 Civil Code.

[97] M. Jamroży, P. Karwat, [in:] H. Litwińczuk (ed.), *Opodatkowanie spółek*, Warszawa 2016, p. 334.

[98] In accordance with Article 861 § 1 Civil Code.

[99] Compare Article 863 Civil Code.

[100] J. Jezioro, [in:] E. Gniewek, P. Machnikowski (eds), *Kodeks cywilny. Komentarz*, Warszawa 2016, p. 1559.

[101] Partners' collective property will not be created if partners' contributions to the partnership aim to provide services or the right to use particular property components; K. Pietrzykowski, [in:] K. Pietrzykowski (ed.), *Kodeks cywilny. Komentarz*, Vol. II, Warszawa 2013, p. 649. The admissibility of the existence of "contributionless" partnerships is another issue, usually

partnership with its partners' loans. Tax authorities do not question such a possibility, either. However, in such cases, some tax consequences should be taken into account, mainly in accordance with the Act on CLTT[102] and also Act on PIT[103].

Due to the fact that the increase in financing general partnerships operations, regardless of the method and legal title, almost always constitutes a change in a partnership agreement and results in a tax liability imposed on civil-law transactions,[104] it should be considered whether the burden of a civil-law transaction excludes the possibility of imposing VAT. Such a possibility seems to be natural in the light of the principle that tax burdens should not be cumulated.[105] Thus, if one of the parties acts as a VAT payer, civil-law transactions that he/she is a party to should not be subject to tax on civil-law transactions. However, in the area here analysed, the principle is limited because it does not apply to a partnership agreement and its change, even if a given transaction is subject to VAT or is made exempt from this tax (one of the parties is made exempt from tax).[106] Thus, in case of general partnerships, double taxation can occur: VAT and tax on civil-law transactions. However, it is only possible in the case extra financing is provided in a non-cash form. In case of limited companies, such problems most often do not arise.[107]

VI. Extra financing of partnerships usually results from the lack of resources to carry out current operations or investment. Excess resources usually result from profits earned. The distribution and payment of profits to partners, in accordance with the rules they have agreed upon, are, at least formally, neutral in relation to income tax, also for partners. As it has already been mentioned, a monthly income earned by each partner is tax-significant, regardless of the fact whether it has been paid to them or not. The attribution of such income to particular partners results in the necessity of paying income tax and does not result in any VAT consequences. However, there is an important exception to this rule, which is the provision of the so-called in-kind dividends in limited companies.

The basic doubt concerning the payment of in-kind dividends is connected with their admissibility. It can turn out to be doubtful in the light of the provisions of the

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discussed in connection with an unclear stance of Stefan Grzybowski, compare S. Grzybowski, [in:] S. Grzybowski (ed.), *System prawa cywilnego*, Vol. III, part 2, Wrocław 1976, p. 808.

[102] Compare individual interpretation of the Director of the Revenue Office in Łódź of 24 September 2012, IPTPB2/436-79/12-4/KK, https://interpretacje-podatkowe.org/wspolnik/iptpb2-436-79-12-4-kk (accessed on 29.11.2017), indicating that the provision of a loan to a civil partnership is recognised as the change in a partnership agreement and subject to 0.5% tax on the amount or value of the loan.

[103] Compare individual interpretation of the Director of the Revenue Office in Bydgoszcz of 23 March 2010, ITPB1/415-1006/09/TK, http://interpretacje24h.pl/page/read/219253 (accessed on 29.11.2017), indicating whether and to what extent interest on the loans can be recognised as the cost of earning a partnership's revenue.

[104] Compare Article 1 para. 3(1) Act on CLTT.

[105] A. Goettel, M. Goettel, *Podatek od czynności cywilnoprawnych. Komentarz*, Warszawa–Kraków 2007, p. 229.

[106] Article 2(4)(a) and (b) Act on CLTT.

[107] The expression "most often" used in this case means that the commonly used method of increasing the capital of a partnership by partners, i.e. a loan, is subject to exemption from CLTT; Article 9(10)(i) Act of CLTT.

Code of Commercial Companies, which regulate the "amounts",[108] "payment"[109] and "advance payment"[110]. However, neither the legal doctrine nor case law has confined itself to the linguistic interpretation of the provisions of the Code of Commercial Companies concerning dividends. An in-kind dividend has been recognised as a substitute for cash payment and it has been indicated that this form of participation in the profits of a partnership is not prohibited.[111] Coming back to the issue of VAT, it is necessary to notice that a partnership providing an in-kind dividend most often acts as a VAT payer because its assets assigned for a dividend are part of a company. Still, a question must be answered whether a partnership paying a dividend provides a free delivery or one paid for. The opinion dominating case law at present is that a partnership provides a free delivery of goods, or possibly provides a free service.[112] Such classification results from the rejection of arguments stating that a lack of VAT would be justified by the title of the payment and focusing on the meaning of the concept of "dividend" in the light of the provisions of commercial partnerships law. In-kind benefits provided in advance of the profits due to partners of a general partnership should be treated by analogy. In accordance with the established case law, they are classified as a free delivery (or possibly free provision of services, on condition that the provision of benefits is not in-kind in nature).[113]

Consequences similar to the payment of the profit in the in-kind form will occur in the case of the provision of other benefits for partners if they involve objects or consist in the provision of services. The legal title for the provision of such benefits may include, e.g. the remuneration for managing the affairs of a partnership.[114] If a partner managing the affairs of a partnership is paid a pecuniary remuneration, in general the service he/she provides is not subject to VAT. However, another partnership can be a partner and it is usually a limited company. Then, the pay for the service of managing the affairs of a partnership should be subject to VAT. This stance is confirmed in case law, especially with respect to a mixed type of a partnership limited by shares-a public limited company, where a public limited

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[108] Article 192 CCC.

[109] Article 193 § 4 CCC.

[110] Articles 194, 195 CCC.

[111] Compare judgments of the Supreme Administrative Court: of 8 February 2012, II FSK 1384/10, http://orzeczenia.nsa.gov.pl/doc/4613E28174; and of 22 February 2013, II FSK 1771/11, http://orzeczenia.nsa.gov.pl/doc/6BFA829D43 (accessed on 1.12.2017).

[112] Within the meaning of Article 7 para. 2 and Article 8 para. 2 Act on VAT. Compare judgments of the Supreme Administrative Court: of 23 October 2013, I FSK 1503/12, http://orzeczenia.nsa.gov.pl/doc/7C47534E34; of 23 January 2014, I FSK 202/13, http://www.orzeczenia-nsa.pl/wyrok/i-fsk-202-13/podatek_od_towarow_i_uslug_interpretacje_podatkowe/1889f53.html; of 3 June 2014, I FSK 956/13, http://www.lexlege.pl/orzeczenie/33010/i-fsk-956-13-wyrok-naczelny-sad-administracyjny/ (accessed on 2.12.2017).

[113] Some representatives and commentators of the legal doctrine express doubts concerning such classification, although they do not provide convincing arguments; compare A. Bartosiewicz, *VAT*, *op. cit.*, p. 151.

[114] As a matter of fact, Article 46 CCC excludes the possibility of getting remuneration for managing the affairs of a partnership but, due to the wording of Article 37 § 1 CCC, the regulation should be recognised as dispositive.

company is a general partner,[115] and for a partnership limited by shares, where a limited liability company is a general partner[116]. While in the above case there are no doubts that the service of managing the affairs of a partnership that is paid for should be subject to VAT, such doubts can occur in the case of a free service of managing the affairs of a partnership. In other words, the problem is whether free provision of the service of managing the affairs of a partnership can be recognised as a free service within the meaning of Article 8 para. 2 Act on VAT, and as a result be subject to VAT. Such a possibility exists but the subject-related criterion will be decisive. If a partner managing the affairs of a partnership is a VAT payer, which means that his/her operations consist in managing partnerships, usually for remuneration, although in one or some partnerships he/she does it without remuneration, his free service should be treated as an operation that is subject to VAT.[117]

VII. The legal existence of a general partnership ends the moment it is dissolved. The dissolution of a limited company takes place when it is struck off the registry.[118] In case of the dissolution of a general partnership, which usually takes place independently the moment a reason for that occurs, the non-share-based co-ownership of a partnership's property changes into fractional co-ownership.[119] On the other hand, if the reason for dissolving a limited company occurs, the rule is that liquidation proceedings must be started and, as a result, receivers[120] must be appointed, and the liquidation must be reported to the registry.[121] It is also possible to stop a partnership's operations (and to end its existence) without the need to carry out liquidation proceedings.[122]

From the point of view of Act on VAT, in general it does not matter whether the liquidation proceedings are carried out or not. What is important is the dissolution of a partnership, which is preceded by abandoning business operations.[123] However, just the fact that a partnership stops business operations is not essential. It is different in the case of natural persons for whom the institution of dissolution or self-dissolution would not make sense. In such a situation, withdrawing from business operations matters. If a natural person is registered as a VAT payer and stops operations that are subject to VAT, he/she should notify the head of the revenue

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[115] Judgment of the Supreme Administrative Court of 9 December 2014, I FSK 1908/13, http://orzeczenia.nsa.gov.pl/doc/A7CF336DA2 (accessed on 2.12.2017).

[116] Judgment of the Supreme Administrative Court of 6 March 2015, I FSK 40/14, http://orzeczenia.nsa.gov.pl/doc/1F69B70A1E (accessed on 2.12.2017).

[117] A similar stance in P. Karwat, [in:] H. Litwińczuk (ed.), *Opodatkowanie*, *op. cit.*, p. 363.

[118] Article 84 § 2 CCC in the case of a civil partnership. With respect to a partnership limited by shares, the same rule is in force in accordance with Article 103 CCC, and for a mixed type of a partnership limited by shares and a public company, partly also the provisions applicable to a public company, i.e. Article 150 CCC. In the case of a general partnership, exceptionally, the dissolution can take place in accordance with Article 98 § 2 CCC.

[119] Compare Article 875 § 1 Civil Code.

[120] Article 70 CCC.

[121] Article 74 § 1 CCC.

[122] Article 67 § 1 CCC.

[123] Article 14 para. 1(1) Act on VAT.

office, who shall strike the person off the VAT payers registry.[124] Coming back to the issue of general partnerships, it is necessary to add that if after the dissolution one or more partners continue business operations, the circumstance will not matter.[125] Although it will be unimportant to a partnership, it may be important to the former partner. If the partner delivers goods that were provided to him within 12 months from the date of the dissolution, the delivery will be exempt from VAT, provided that the partnership itself fulfils its VAT obligations.[126] The solution constitutes the manifestation of the principle of VAT neutrality.

While the dissolution of a limited company can be precisely determined as the day when it is struck off the registry, partners of a civil partnership are exposed to a greater risk. Regardless of the occurrence of the grounds for a partnership's dissolution, it will continue to exist upon all partners' agreement. Eventually, doubts can be raised whether a partnership continues to exist or not. The objection to the existence of a partnership should be clear and unambiguous but it does not require any particular form. On the other hand, agreement can be assumed based on partners' silence.[127]

The above comments will be unimportant if, having terminated business operations, partners have to divide money. However, the situation will be different in case a partnership fails to sell its property and decides to divide it between partners.

The grounds for VAT on non-cash components of a dissolved general partnership divided between partners are based on the principle of imposing tax on consumption (beside the principle of common taxation), which is correlated with another principle, i.e. of VAT neutrality.[128] It is connected with the assumption that the property components divided between partners stop serving operations that are subject to VAT (they are divided between partners and serve their needs and finally they will be "consumed"), so a partnership that has purchased the components and deducted due VAT should simply return the deducted VAT. Thus, as a result, if a partnership divides components purchased without the exemption from VAT, their transfer to partners should not be subject to VAT.[129]

The dissolution of a general partnership requires that physical inventory,[130] also known as liquidation inventory, be made. Goods are subject to that inventory. It should be highlighted that there are at least three scopes of the concept meaning: (1) only trade goods, i.e. those that have been purchased for the purpose of reselling them;[131] (2) other goods but with the exception of tangible assets;[132] and (3) any

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[124] Article 96 para. 6 Act on VAT.

[125] A. Bartosiewicz, *VAT*, *op. cit.*, p. 244.

[126] Article 14 para. 7 Act on VAT.

[127] J. Gudowski, [in:] G. Bieniek (ed.), *Komentarz do Kodeksu cywilnego. Księga trzecia. Zobowiązania*, Vol. II, Warszawa 2002, p. 631.

[128] J. Matarewicz, *Ustawa o podatku od towarów i usług*, Warszawa 2017, p. 190.

[129] The confirmation of this conclusion can be found in Article 14 para. 4 Act on VAT.

[130] Article 14 para. 5 Act on VAT.

[131] Compare T. Michalik, *Ustawa o VAT. Komentarz*, Warszawa 2003, p. 170.

[132] Compare C. Pieńkosz, *Środki trwałe a remanent likwidacyjny. Artykuł dyskusyjny*, Doradca Podatkowy No. 4, 2005, p. 11.

goods, including equipment and tangible assets[133]. The opinion of tax authorities is established. The physical inventory must also take into account tangible assets.[134] The CJEU judgments indirectly confirm the stance.[135]

Therefore, in general, the goods that are included in a physical inventory should be subject to VAT paid by a partnership. However, a former partner can "regain" the VAT paid by a partnership if he/she delivers the goods within his/her own business operations within the period of 12 months. Unfortunately, the possibility of "regaining VAT" constructed in this way eliminates automatic exemption from calculating the value of those goods as income that is subject to PIT. It is because such an exemption excludes the possibility of selling those goods within business operations.[136]

As far as the liquidation of a general partnership is concerned, the correlation between the provisions of Act on VAT and Act on PIT limits the possibility of tax optimisation but does not eliminate it. Partners should determine priorities in their future decision-making. If they want to do business separately, they should consider purchasing goods before they are listed in the physical inventory. The move involves a higher income tax and VAT paid by a partnership. On the other hand, the possibility of "regaining" VAT, in general without any restrictions, is an advantage. The value of the goods acquired by partners is not included in the income subject to tax. Just the opposite, the cost of purchasing them is the cost of earning income. And money that is divided between partners after the dissolution of a partnership does not constitute income that is subject to tax.[137]

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[133] Compare J. Martini (ed.), *Ustawa o VAT. Komentarz*, Warszawa 2003, p. 110.

[134] Compare individual interpretation of the Director of the Revenue Office in Łódź of 10 April 2013, IPTPP1/443-50/13-2/MW, https://interpretacje-podatkowe.org/srodek-trwaly/iptpp1-443-50-13-2-mw (accessed on 3.12.2017).

[135] CJEU judgment of 16 June 2016 in the case C-229/15, *Minister of Finance v. Jan Mateusiak*, http://curia.europa.eu/juris/document/document.jsf?text=&docid=180321&pageIndex=0&doclang=PL&mode=lst&dir=&occ=first&part=1&cid=464748 (accessed on 3.12.2017).

[136] Article 14 para. 3(12)(b) Act on PIT.

[137] Article 14 para. 3(10) Act on PIT.

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VALUE ADDED TAX ON TRANSACTIONS BETWEEN A GENERAL PARTNERSHIP AND ITS PARTNERS

Summary

The article aims to present the tax-related consequences (with respect to VAT) of typical, and also less common, legal and physical transactions between partners of a partnership and a partnership itself. From the perspective of commercial partnerships and companies law or, in the broadest approach, civil law, these are in general activities that are very well defined by the representatives and commentators of the legal doctrine. However, the performance of the said activities quite often results in tax consequences, in particular in the sphere of income tax, tax on civil-law transactions as well as VAT. In the case of VAT, it seems, the consequences are the least predictable. Thus, the conclusion is obvious: in many situations, steps that partners take at the stage of setting up a partnership, in the course of its operations and liquidation can result in unsatisfactory effects if the obligation with regard to VAT is not properly recognised.

Keywords: general partnerships, VAT, non-cash contributions, in-kind benefits, dissolution of general partnership

OPODATKOWANIE VAT CZYNNOŚCI DOKONYWANYCH POMIĘDZY SPÓŁKĄ OSOBOWĄ I JEJ WSPÓLNIKAMI

Streszczenie

Celem niniejszego artykułu jest przedstawienie konsekwencji podatkowych (w zakresie podatku VAT) typowych, a także rzadziej spotykanych, czynności prawnych i faktycznych dokonywanych między wspólnikami spółki osobowej a samą spółką. Z perspektywy prawa spółek handlowych czy, w najszerszym ujęciu, prawa cywilnego są to czynności zazwyczaj bardzo dobrze zanalizowane przez przedstawicieli doktryny. Ich dokonywanie nierzadko jednak skutkuje konsekwencjami podatkowymi, w szczególności w sferze podatków dochodowych, podatku od czynności prawnych, a także podatku VAT. W tym ostatnim przypadku, jak się wydaje, skutki te jawią się jako najmniej spodziewane. Konkluzja jest zatem oczywista – w wielu przypadkach czynności wspólników, zarówno na etapie zakładania spółki, w toku jej działalności, jak i w fazie jej likwidacji, mogą nie przynieść satysfakcjonującego ich rezultatu, o ile obowiązek w zakresie podatku VAT nie zostanie prawidłowo rozpoznany.

Słowa kluczowe: spółki osobowe, podatek VAT, wkłady niepieniężne, świadczenia rzeczowe, rozwiązanie spółki osobowej

IMPOSICIÓN DEL IVA A ACTIVIDADES ENTRE SOCIEDAD PERSONAL Y SUS SOCIOS

Resumen

El presente artículo presenta las consecuencias fiscales (en cuanto al IVA) típicas, pero también poco recuentes de los actos jurídicos y de hecho entre los socios de una sociedad personal y la sociedad en sí. Desde la perspectiva de derecho de sociedades mercantiles, o bien – en el ámbito más amplio – derecho civil, son actos generalmente muy bien analizados por los representantes de la doctrina. Su práctica produce frecuentemente consecuencias fiscales, sobre todo en cuanto a los impuestos sobre la renta, impuesto de actos jurídicos documentados, y también – el IVA. En el último supuesto, las consecuencias parecen lo menos esperadas. La conclusión por tanto es obvia – en muchos casos los actos de los socios, tanto en la fase de constitución de la sociedad, durante su actividad o en la fase de liquidación pueden no traer resultado satisfecho para ellos, siempre que la obligación en cuanto al IVA no se cumpla correctamente.

Palabras claves: sociedades personales, IVA, aportaciones no dinerarias, prestaciones materiales, disolución de sociedad personal

НАЛОГООБЛОЖЕНИЕ НДС ПО СДЕЛКАМ МЕЖДУ ПАРТНЕРСТВОМ И ЕГО ПАРТНЕРАМИ

Резюме

Целью данной статьи является представление налоговых последствий (с точки зрения НДС) типичных, а также редких юридических и фактических сделок, совершаемых между партнерами по партнерству и самой компанией. С точки зрения права коммерческих компаний или, в широком смысле, гражданского права, эти действия обычно очень хорошо анализируются представителями

доктрины. Однако их осуществление часто приводит к налоговым последствиям, в частности в сфере подоходного налога, налога на юридические операции, а также НДС. В последнем случае кажется, что эти последствия являются наименее ожидаемыми. Следовательно, вывод очевиден – во многих случаях деятельность партнеров, как на этапе создания компании, так и в ходе ее деятельности, а также на этапе ее ликвидации, может не принести удовлетворительного результата, если обязательство по НДС не будет должным образом признано.

Ключевые слова: партнерства, НДС, взносы в натуральной форме, выплаты в натуральной форме, расторжение партнерства

BESTEUERUNG DER MEHRWERTSTEUER AUF TRANSAKTIONEN ZWISCHEN EINER PERSONENGESELLSCHAFT UND IHREN PARTNERN

Zusammenfassung

Ziel dieses Artikels ist es, die steuerlichen Konsequenzen (im Rahmen der Mehrwertsteuer) typischer sowie seltener rechtlicher und tatsächlicher Transaktionen darzustellen, die zwischen den Partnern einer Personengesellschaft und der Gesellschaft selbst durchgeführt werden. Aus Sicht des Handels- oder im weitesten Sinne des Zivilrechts werden diese Tätigkeiten von Vertretern der Doktrin in der Regel sehr gut analysiert. Wenn sie jedoch häufig eingeführt werden, ergeben sich steuerliche Konsequenzen, insbesondere im Bereich der Einkommenssteuern, der Steuer auf Rechtsgeschäfte sowie der Mehrwertsteuer. Im letzteren Fall scheinen diese Effekte am wenigsten zu erwarten zu sein. Die Schlussfolgerung liegt daher auf der Hand – in vielen Fällen können die Aktivitäten der Partner, sowohl in der Phase der Unternehmensgründung als auch in der Phase der Liquidation, nur dann zu einem zufriedenstellenden Ergebnis führen, wenn die Mehrwertsteuerpflicht ordnungsgemäß anerkannt wird.

Schlüsselwörter: Personengesellschaften, Mehrwertsteuer, Non-Cash Beiträge, Sachleistungen, Auflösung einer Personengesellschaft

TAXATION DE LA TVA SUR LES TRANSACTIONS ENTRE UN PARTENARIAT ET SES PARTENAIRES

Résumé

Cet article a pour but de présenter les conséquences fiscales (au sens de la TVA) des transactions juridiques et factuelles typiques mais aussi rares, effectuées entre les associés du partenariat et la société elle-même. Du point de vue du droit des sociétés commerciales ou, au sens le plus large, du droit civil, ces activités sont généralement très bien analysées par les représentants de la doctrine. Cependant, ces activités entraînent souvent des conséquences fiscales, en particulier dans le domaine des impôts sur le revenu, de la taxe sur les transactions juridiques, ainsi que de la TVA. Dans ce dernier cas, ces effets semblent être les moins attendus. La conclusion est donc évidente: dans de nombreux cas, les activités des partenaires, tant au stade de la création d'une société que dans le cadre de ses opérations, et au stade de sa liquidation, peuvent ne pas aboutir à un résultat satisfaisant, si l'obligation de TVA ne soit pas correctement reconnue.

Mots-clés: partenariats, TVA, contributions en nature, avantages en nature, dissolution d'un partenariat

ASSOGGETTAMENTO ALL'IVA DELLE OPERAZIONI TRA UNA SOCIETÀ DI PERSONE E I SUOI SOCI

Sintesi

L'obiettivo del presente articolo è la presentazione delle conseguenze tributarie (nell'ambito dell'IVA) delle tipiche operazioni giuridiche e materiali, e anche di quelle incontrate di rado, eseguite tra i soci di una società di persone e la società stessa. Nella prospettiva del diritto delle società commerciali, o in senso più largo del diritto civile, queste sono operazioni solitamente analizzate molto bene dai rappresentanti della dottrina. La loro esecuzione non di rado tuttavia genera conseguenze tributarie, in particolare nell'ambito delle imposte sul reddito, dell'imposta sui contratti e anche dell'IVA. In questo ultimo caso, sembrerebbe che tali conseguenze siano le meno attese. La conclusione è quindi evidente: in molti casi le operazioni dei soci, sia in fase di costituzione della società che durante la sua attività, così come nella fase della sua liquidazione, possono non condurre a un risultato soddisfacente se l'obbligo nell'ambito dell'IVA non viene correttamente individuato.

Parole chiave: società di persone, IVA, contributi in natura, prestazioni in natura, scioglimento di società di persone

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