Important decision from the Supreme Administrative Court [NSA]: Tax Authorities are now required to assess the correctness of the statistical classification in tax rulings.

The Supreme Administrative Court has confirmed that the Director of the National Fiscal Information Bureau will now be required to assess the correctness of the statistical classification when issuing a tax ruling. This change in the tax authorities' approach should translate into better protection for taxpayers.

For many years, taxpayers have been requesting that the tax authorities confirm the classification of goods and services when applying for individual rulings. The correctness of this classification is, in many cases, of utmost importance since it is linked to the application of the relevant tax rate. In 2017, the appropriate classification became very important for the construction industry due to the fact that the majority of the services rendered by subcontractors became subject to the reverse charge mechanism (which meant that VAT was accounted for by the purchaser, and not by the seller). The services subject to this type of settlement (together with their PKWiU classification) were listed in Attachment 14 to the VAT Act.

Even though the appropriate classification of goods and services is important for the purpose of VAT, the tax authorities consistently refused to tackle this issue in their tax rulings. There were numerous instances where issuing of rulings was actually refused. The tax authorities maintained that an adequate classification was the taxpayer's obligation and, consequently, the appropriate code from the PKWiU should be provided as an element of the factual state of the request, and as such, should not be an element of the question asked. According to the tax authorities, their task was only to provide interpretations of tax law, therefore, the determination of the correctness of the classification of goods and services for statistical purposes was beyond the scope of their authority.

The tax authorities also assumed a different approach in that they would request that applicants supplement the description of the factual state with the appropriate (in the taxpayer's opinion) PKWiU classification without having first assessed the correctness of the classification, but would then issue a tax ruling with the reservation that the taxpayer could be liable for any consequences of an incorrectly selected classification. Consequently, the taxpayer would receive a "conditional" ruling, which meant that this ruling would not safeguard the payer should the classification selected by the taxpayer then be challenged during tax audits.

The fast food sector had previously experienced the negative effects of this situation. Numerous sellers (of pizzas, for example) applied a tax rate of 5% in respect of their products on the basis of a previously obtained ruling (issued on the basis of information provided by the applicants) that they actually sell products classified in section 10.85 of the PKWiU, i.e. "the manufacture of prepared meals and dishes." However, in a general ruling issued in 2016, the Minister of Finance explained that the correct VAT rate for these products was 8% because they should have been classified in section 56 of the PKWiU (i.e. as goods and beverage service activities). As a result of this, the tax authorities refused to acknowledge the protection the sellers believed they had based on the previously received individual rulings.

The above practices were questioned by the Supreme Administrative Court in its decision dated 29 September 2017 (file no. II FSK 179/16), the grounds of which were made public in March 2018. The judges were of the opinion that if an additional provision referring to the statistical classification was the condition for the application of a given manner of taxation, the authority issuing the tax rulings could not refuse to assess whether the taxpayer had correctly classified the relevant goods, or services. This was conditional upon the inclusion, in the relevant application, of a detailed description of the given goods or services, for example, by way of providing the composition of a given product, or the manner of its production, etc.

The aforementioned decision should affect the practice of the Director of the KIS [National Fiscal Information Bureau] which should, in turn, translate into obtaining actual protection through the rulings issued, since they would contain the confirmation of the correctness of the applied PKWiU classification. It should be borne in mind, however, that in order to benefit from the new approach, it would be necessary to provide a detailed description of the given goods or services in the description of the factual state as contained in the application.

A precise description is of great importance in the case of so-called complex services, in the situation where the goods or services comprised within them are taxed at different rates. This issue is of special relevance for the construction industry where there very often exist complex services in the form of, e.g. deliveries with specialist assembly/installation. In the situation where, within the framework of rendering building services, there are instances of supplies (goods, equipment, installations, systems, etc) and their assembly/installation, the tax authorities often consider these situations as complex services, provided the assembly/installation services are of a specialist nature. Consequently, if a given building service is listed in the PKWiU classification (attachment 14 to the VAT Act), then this transaction in full is subject to a settlement under the reverse charge mechanism.

From this point of view, it is extremely important to correctly specify the statistical classification of the dominating element of the comprehensive service because this will determine the application of the reverse charge mechanism, i.e. which entity should settle the VAT in respect of a given performance. A detailed description of individual performances comprising one comprehensive service is of great importance since any omissions or irregularities in this respect can result in depriving the given taxpayer of the protection offered by the ruling.

Bearing in mind the above, the analysed decision no. I FSK 179/16 should be regarded as a positive step towards restoring the intended function to individual tax interpretations, i.e. securing the tax interest of the applicants in the situation of unclear or vague tax regulations, as well as in those situations where the issue concerning the interpretation of a tax regulation occurs in connection with regulations from other fields, including statistics.