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Redemption of Shares or Stocks and Their Influence on Tax Obligation in Value Added Tax

Umorzenie udziałów lub akcji i ich wpływ na obowiązek podatkowy w podatku od towarów i usług

Introduction

The issue that will be analyzed in this article is the tax consequences of the redemption of shares or stocks on the grounds of value added tax. One of the main features of capital companies, and in particular a joint stock company, is their structural adaptation to the accumulation and management of significant financial resources and assets. This leads to situations in which the reduction of share capital by the redemption of shares or stocks combined with the payment of remuneration, results in significant property flows that may be relevant under the provisions of the cited law. The issue of recognizing the payment of remuneration for redeemed shares or stocks as taxable under the value added tax can be analyzed on several levels. Two basic concepts, which can be observed in the case law of administrative courts, interpretations of tax authorities and views of science, are to treat, for tax purposes, the redemption of shares or stocks for remuneration as a single legal action or to separate only the phase of payment of remuneration.

It is worth mentioning that the jurisprudence of administrative courts in this case is characterized by great heterogeneity. The discrepancies in jurisprudence led to the adoption of a resolution of a panel of seven judges of the Supreme Administrative Court (Naczelny Sąd Administracyjny; hereinafter: the SAC; Resolution of the SAC, 2015, I FPS 6/15), the purpose of which was to sort out the lines of jurisprudence. However, it was also met with criticism and did not unquestionably clarify all the relevant legal issues. The purpose of this article

is to try to show which of the existing concepts corresponds to the law more closely, what the structural principles of the value added tax are, and whether it is possible to find a solution that is acceptable both from the point of view of the science of corporate law and tax law.

The main research method used for the purpose of the article is the method of dogmatic analysis. The basic normative act to be analyzed is the Act of March 11, 2004 on Value Added Tax (consolidated text, Journal of Laws [Dziennik Ustaw Rzeczypospolitej Polskiej] of 2022, item 931 as amended; hereinafter: the VAT Act). Due to the practical importance of the described issues, numerous court decisions and publications by academics have been analyzed. An auxiliary method used is the method of analysis and criticism of the literature. The appropriate starting point for further considerations is the aforementioned concept of separate treatment for tax purposes of the institution of redemption of shares or stocks and payment of remuneration for redeemed shares or stocks. The article will address the issue of recognizing the redemption of shares or stocks and the payment of remuneration itself as business activities. This will make it possible to determine whether these activities are carried out by taxpayers within the meaning of the value added tax. Subsequently, the issues related to the payment of remuneration for redeemed shares or stocks and the possibility of its recognition as a supply of goods for consideration has been analyzed. Particular attention has been paid to the issue of the supply of goods and the premises proving its chargeability.

1. Redemption of shares or stocks as a business activity

Redemption of shares or stocks is a special tool used to make changes in a company regarding its financial and ownership structure. It is an act carried out within a company to extinguish the subjective right arising from the ownership of a share (Orlik, 2001). The Commercial Companies Code (Act of September 15, 2000 – Commercial Companies Code, consolidated text Journal of Laws of 2024, item 18 as amended; hereinafter: the CCC), due to the significant role of share capital in the functioning of the company and the postulate to ensure correct ownership relations, specifies in detail the redemption procedure. The norms concerning this institution are contained in the provision of Article 199 of the CCC. Commercial Companies Code, with regard to a limited liability company, in the provisions of Articles 30044–30046 of the CCC, with regard to a simple joint-stock company, and in the provision of Article 359 of the CCC with regard to

a joint-stock company. It should be noted that the institution of share redemption is also present in the case of a partnership limited by shares, in relation to which, in matters not regulated separately by virtue of the provision of Article 126 § 1 item 2 of the CCC, the provisions concerning joint-stock companies apply accordingly. All the discussed remarks concerning the tax consequences of share redemption in a joint-stock company will therefore also apply to a partnership limited by shares.

When analyzing the provisions indicated above, three types of share or stock redemption may be distinguished: voluntary redemption, compulsory redemption and conditional redemption, also referred to as automatic redemption (Koch, 2002; Sójka, 2002). Voluntary redemption, both in a limited liability company and a joint-stock company, takes place with the consent of the shareholder through the acquisition of the shares or stocks by the company. The issue is regulated differently in the case of a simple joint-stock company, where consent is a factor conditioning the admissibility of voluntary redemption, but the provision does not explicitly indicate a requirement that such redemption be by way of acquisition of stocks by the company (Jara, 2023). Indirectly, the method of redemption through the acquisition of stocks of a simple joint-stock company is indicated by the provision of Article 30047 of the CCC, which, in the catalogue of exceptions to the prohibition on the acquisition of treasury stocks, indicates that this prohibition does not apply to the acquisition of stocks for the purpose of redemption. The second type of redemption is compulsory redemption, so defined because of the exclusion of the condition of obtaining the shareholder's or stockholder's consent. The protection of their rights is ensured in this case by the obligation to include provisions in the company's articles of association concerning the permissibility and procedure for redemption. A special type of compulsory redemption is conditional, or otherwise automatic redemption. Automatic redemption is conditional upon the occurrence of an event specified in the articles of association resulting in the redemption of shares or stocks without the need to pass a relevant resolution. If this event occurs, the provisions on compulsory redemption apply. Therefore, the analysis of the legal and tax consequences of compulsory redemption will also apply to automatic redemption.

The redemption of shares or stocks consists of a series of legal and factual actions, which together produce the effect of annihilating the legal existence of the shares or stocks (Sołtysiński, Szajkowski, Szwaja, 1994). For this reason, a view is represented in science that negates the division of the redemption procedure in such a way as to separate only one of its stages for tax purposes (Dumkiewicz & Kidyba, 2023). Last but not least, such a view is also shared in the jurisprudence

of Voivodship Administrative Courts (Wojewódzki Sąd Administracyjny; hereinafter: the VAC) on this issue (Judgment of the VAC in Kraków, 2013, I SA/Kr 222/13; Judgment of the VAC in Rzeszów, 2014, I SA/Rz 871/14; Judgment of the VAC in Łódź, 2015, I SA/Łd 1348/14). First of all, it is necessary to focus on the issue of the subjective scope of the value added tax, i.e. to analyze whether a company redeeming shares or stocks and paying remuneration for them acts as a taxpayer within the meaning of Article 15(1) of the VAT Act.

It follows from the general construction of value added tax that an entity performing a taxable activity should, with respect to that activity, appear as a taxpayer (Hanusz, 2019).¹ According to the provision of Article 15(1) of the VAT Act, a taxpayer is considered a legal person, an organizational unit without legal personality and a natural person, performing an independent business activity, regardless of the purpose or result of such activity. There is no doubt that capital companies under the provision of Article 12 of the CCC are equipped with legal personality, and a partnership limited by shares pursuant to the provisions of Article 8 § 1 of the CCC is an organisational unit without legal personality which is endowed by law with the capacity to perform legal acts. A problem arises with regard to the proper interpretation of the concept of economic activity, the definition of which, for the purposes of the Act, is found in the provision of Article 15(2) of the VAT Act.² The legal provisions defining the concept of a taxpayer and the concept of economic activity on the grounds of the national law, reflect the solutions adopted in the Directive of the Council of the European Union 2006/112/EC of November 28, 2006 on the Common System of Value Added Tax (Official Journal of the European Union L 347, 11.12.2006, pp. 1–118 as amended; hereinafter: the VAT Directive). The cited directive, unlike the national law, already in the catalog of taxable transactions emphasizes the subjective element and, in the provision of Article 2(1)(a), stipulates the taxation of a supply of goods for consideration within the territory of a member state by a taxpayer acting as such. According to the interpretation of the expression “taxpayer acting in such a capacity” adopted in Court of Justice of the European Union (CJEU) jurisprudence, the taxpayer must act in such a capacity with respect to the specific activity performed (Judgment of the CJEU, 1995, C-291/92). The above remarks

¹ The VAT Act provides for situations in which the scope of subjectivity includes persons who are not independently engaged in business activities. However, tax liability in these cases is related to the performance of strictly defined activities by non-business persons (Hanusz, 2019).

² According to the provision indicated, any activity of producers, traders or service providers, including natural resource extractors and farmers, as well as the activities of freelancers, is considered business activity. Business activity includes, in particular, activities involving the use of goods or intangible assets on a continuous basis for profit-making purposes.

should be confronted with the essence of the redemption of shares or stocks, and whether the activities undertaken in connection with this institution can be considered to be carried out in the course of business activities. There is no doubt that limited liability companies are formed in the dominant majority for the purpose of operating an enterprise and carrying out business activities within its framework. The definition of business activity, as well as the entire construction of the value added tax, points to the fundamental purpose of the general sales tax, which is to tax professional business transactions. It is disputed whether the act of redemption of shares or stocks, which is in fact an intra-company change, should be taxed as not strictly related to business activity (Rodzynkiewicz, 2018). This position also appears in the jurisprudence of administrative courts. The organizational nature of the redemption of shares combined with the payment of remuneration in cash or in kind, does not allow this activity to be considered as carried out within the framework of business activity (Judgment of the VAC in Poznań, 2011, I SA/Po 101/11). It should be recalled that in accordance with the provisions of Article 199 § 2 and Article 359 § 2 of the CCC, redemption of shares or stocks requires a resolution of the shareholders' meeting or the general meeting,³ and in the case of a simple joint-stock company, the redemption of stocks also constitutes an amendment to the articles of association. The relevant resolution therefore is the basis for the redemption of shares either voluntarily, by acquisition and subsequent liquidation, or compulsorily, in which the acquisition stage does not occur.

A doubt arises in this case regarding the recognition of a contract for the sale of shares or stocks for consideration as falling within the scope of the company's business activities. As previously indicated, not every activity of an entity that is a taxpayer of value added tax can be considered taxable under this law. This is also the case with the sale or acquisition of treasury shares. If the taxpayer does not carry out an activity based entirely or partially on trading in securities, then, if such an activity is carried out, it cannot be regarded as an activity carried out by the taxpayer (The Head of the Tax Chamber in Poznań, 2010, ILPP1/443-766/10-2/NS).

The provision of the of Article 15(2) of the VAT Act and the provision of the Article 9(1) of the VAT Directive stipulate that the use of tangible or intangible property on a continuous basis for profit is considered an economic

³ An exception is redemption in the event of the occurrence of an event specified in the articles of association (so-called automatic redemption). In such a case, a resolution of the shareholders' meeting or general assembly on redemption is not necessary, only a resolution of the company's board of directors on the reduction of share capital.

activity. The provision of the cited VAT Directive corresponds in its content to the previously applicable Sixth Council Directive 77/388/EEC of May 17, 1977 on the Harmonization of the Laws of the Member States Relating to Turnover Taxes – Common System of Value Added Tax: Uniform Basis of Assessment (Official Journal of the European Union L 145, 13.6.1977, pp. 1–40 as amended). On the basis of the previously applicable regulations, a consistent CJEU jurisprudence arose emphasizing that only the fact of acquiring and holding shares in other companies, if it is not connected with the economic activity of trading in securities, does not constitute an economic activity of using intangible assets for profit (Judgment of the CJEU, 2004, C-77/01; Judgment of the CJEU, 2005, C-465/03). Therefore, since occasional transactions related to the acquisition of shares from other entities cannot be considered an element of business activity, the acquisition of treasury shares cannot constitute business activity for the purposes of these considerations. The SAC, in the cited resolution (Resolution of the SAC, 2015, I FPS 6/15), did not recognize the argumentation presented and pointed out that the essence of the problem is not whether the acquisition and holding of shares or stocks is an activity carried out as part of business activity. The resolution emphasized the possibility of separating from the procedure for redemption of shares only the payment of remuneration, when it qualifies as an activity subject to value added tax. If it is assumed that it is possible to separate a particular stage from the procedure for redemption of shares or stocks, this means that the necessity to examine the connection to business activity will refer only to the separated activity. In its resolution, the SAC dealt perfunctorily with the issue of the subjective scope of value added tax.

In the same resolution, the SAC, in its legal reasoning, refers to the situation of a shareholder making a contribution-in-kind to a company. According to the court, making an in-kind contribution to a company in exchange for the shares or stocks received, which constitutes a supply of goods, is the opposite situation to the sale of a shares or stocks by a shareholder for remuneration in order to redeem, and as such also constitutes a supply of goods. However, a more appropriate view seems to be that carrying of an in-kind contribution to a company cannot be considered a situation that is strictly opposite to the sale of shares or stocks by shareholders to the company, since this only results in a transfer of assets in a direction that may indicate a reverse action to the contribution (Bernat, 2016).

The jurisprudence and literature clearly indicate that the condition for the taxation of value added tax is the combined fulfillment of two premises, the subject premise and the object premise (Judgment of the SAC, 2007, II FSK 603/06;

Krywan, 2017). Thus, it will not be covered by the scope of taxation to perform a taxable activity by a taxpayer acting in this role for another reason, if he does not act as a taxpayer with respect to this particular activity (Bartosiewicz, 2022). Thus, it seems that such a situation also exists in the case of a company paying remuneration in kind for redeemed shares or stocks. Indeed, it is difficult to conclude, in light of the explanations made above, that the settlements between the company and its shareholders or stockholders related to the redemption procedure remain in connection with the company's business activities.

The CJEU, whose ruling on the merits coincides with the analyzed resolution of a panel of seven judges of the SAC (Resolution of the SAC, 2015, I FPS 6/15), but contains some differences in the sphere of justification, stated otherwise. In the judgment of June 13, 2018 (Judgment of the CJEU, 2018, C-421/17), in the case of *Szef Krajowej Administracji Skarbowej v. Polfarmex Spółka Akcyjna w Kutnie*, the Court ruled that the transfer by a joint stock company of ownership of real estate to one of its shareholders, made as consideration for the company's acquisition of its own shares, related to the procedure for redemption of shares provided for by national regulations, constitutes a supply of goods for consideration if the real estate transferred is connected with the economic activity of that company (Judgment of the CJEU, 2018, C-421/17). In the cited judgment, the CJEU confirmed that the mere acquisition and holding of titles to other companies cannot constitute the use of goods on a continuous basis for property purposes. However, it recognized that a company transferring property in a redemption procedure is a taxpayer acting in such a capacity. According to the CJEU, the substance of the activity from which the obligation to supply goods arises is irrelevant. The fact that a company paying remuneration in kind is a taxpayer in relation to this activity is evidenced by the connection of the transferred real estate with business activity. Thus, it seems that the interpretation made by the CJEU, boils down to the claim that the nature of the institution of redemption of shares itself and its legal basis, do not indicate that this is an activity subject to value added tax. If, on the other hand, this is done for remuneration, as in the cited judgment, the connection of such a supply of goods with a business activity is evidenced by the mere prior use of the goods for the purposes of that activity.

2. Payment of remuneration for redeemed shares or stocks as a supply of goods for consideration

The starting problem is to approximate the concept of goods within the meaning of the value added tax law and to determine in which cases the remuneration paid for redeemed shares or stocks can be considered as commodities.⁴ There is no doubt that in the case of payment of remuneration for redeemed shares or stocks in kind, whether in the form of movables or real estate, there is a supply of goods. Pursuant to the provision of Article 2(6) of the VAT Act, goods are considered to be things and parts thereof, as well as all forms of energy. In practice, share redemption settlements most often occur through the transfer of ownership of real estate, to a former shareholder.

After the initial determination of the subject matter of the supply of goods, it is necessary to proceed to the essence of the supply itself, in order to determine what activities related to the payment of remuneration for the redeemed shares or stocks will fall within the scope of this activity. Under the provision of Article 7(1) of the VAT Act, a supply of goods for consideration is understood as the transfer of the right to dispose of goods as owner. This is a significant change compared to the regulation of the previously effective Act of January 8, 1993 on Value Added Tax and Excise Tax (Journal of Laws of 1993, No. 11, item 50 as amended), which, in the provision of Article 2, paragraph 1, defined the sale of goods as a taxable activity. In the provisions of the current law, the scope of the supply of goods was significantly expanded, which was an adaptation of the national regulation to the European Union (EU) regulations. In most cases, as a result of the procedure of redemption of shares, there is a transfer of ownership of the thing constituting the consideration. Such a situation occurs both in voluntary redemption carried out by means of the company's acquisition of its own shares, and in compulsory redemption, in which there is no conclusion of any agreement between the company and its shareholder. As is clear from the well-established jurisprudence of the CJEU, which has been unanimously adopted by the courts of the member states, for the purposes of the common system of value added tax, the supply of goods cannot be equated exclusively with the transfer of ownership in the sense of private law.

⁴ For obvious reasons, money, securities and other objects performing payment functions will not be commodities. Considering money or securities as commodities could be possible only if they are not transferred due to their role as a means of payment but, for example, due to their value as numismatic items (Krywan, 2017).

In the jurisprudence of the CJEU, in defining what is meant by the transfer of the right to dispose of goods as owner, the concept of economic ownership arose (Wesołowska, 2011). In the CJEU judgment of February 8, 1990 (Judgment of the CJEU, 1990, C-320/88), the panel answering the question stated that in the case of the supply of goods, the key is the transfer of tangible property as a result of which there is an authorization of the party to dispose of the property as if it were the owner, which is not necessarily tantamount to the transfer of the right of ownership within the meaning of national legislation (Judgment of the CJEU, 1990, C-320/88). Such a solution is justified and necessary for proper functioning of the common value added tax system. Regulations of individual member states define the transfer of property rights differently. Linking the supply of goods to such a transfer would contradict the principle of universality of taxation, unjustifiably differentiating the situation of taxpayers in individual member states. The departure from the decisive role of the transfer of ownership in the civil-law sense has another effect. In the case of a transfer of ownership that is not linked to the actual possibility of disposing of the property as owner, there will be no supply of goods. This problem was pointed out by the VAC in Warszawa, which stated that it is not the conclusion of the sale agreement itself that constitutes the subject of delivery of goods, but only the economic effects of this agreement in the form of actual transfer of possession of the property (Judgment of the VAC in Warszawa, 2012, III SA/Wa 1326/11).

Applying the above remarks to the issue of payment of remuneration for redeemed shares or stocks, it should be noted that any act resulting in the transfer of economic ownership may be considered a delivery of goods. Despite the most common transfer of ownership of goods used in this procedure, other hypothetical methods of settlement cannot be excluded. In the case of voluntary redemption, there is a great deal of freedom in shaping the content of the legal act by which the company acquires its own shares or stocks. There may be a situation where, as a result of the redemption of shares, the company does not pay the standard remuneration, but, for example, enters into a lease or rental agreement with the former shareholder on favorable terms. As a result of such an agreement, in accordance with the provision of Article 7(1)(2) of the VAT Act, there will also be a delivery of goods. The freedom to shape the remuneration in this way is limited in the case of compulsory redemption, which, under the provisions of Article 199 § 2, Article 359 § 2 and the Article 30045 § 3 of the CCC, has a certain minimum value.

In practice, the chargeability of the delivery of goods made as part of the payment of remuneration in kind for redeemed shares or stocks raises the greatest

doubts. In the repeatedly cited resolution of a panel of seven judges of the Supreme Administrative Court (Resolution of the SAC, 2015, I FPS 6/15), this issue was not comprehensively addressed. It is not possible to completely agree with the statement in the aforementioned resolution, according to which the chargeability of the supply is evidenced by the fact of acquisition of own shares by the company. The Act on Value Added Tax of 2004 does not contain a legal definition of consideration. It should be recognized that a supply of goods is chargeable when it is made for remuneration (Krywan, 2017). Remuneration in the colloquial sense is understood as giving payment for something or compensating for losses (*PWN Dictionary of Polish Language*, 2009). In this sense, the key is the creation of a material gain on the part of the remunerated. However, it should be noted that not always the money received, or benefits in some other form, will constitute remuneration to the service provider or supplier of goods. Given this, not every supply of goods or provision of services combined with the creation of an augmentation on the part of the entity that performs these activities will prove their remuneration (Judgment of the VAC in Poznań, 2010, I SA/Po 272/10).

The above remarks are fully applicable to the situation of payment of remuneration for redeemed shares or stocks. It cannot be considered that the company's remuneration for the transfer of ownership of goods is its own share or stock. The company's acquisition and ownership of its own shares or stocks is an extraordinary and, as a rule, undesirable situation, as is clear from a mere analysis of the provisions of the Commercial Companies Code. The shares or stocks acquired as a result of the redemption procedure are legally annihilated, and the company does not have the option of transferring them for reacquisition, and therefore the company does not obtain any material gain in this way. It is worth returning to the concept of economic transfer. In the framework of a supply of goods for consideration, for tax liability to arise, such a transfer of goods is necessary that ensures the actual possibility of disposing of the property as owner. Basing the supply of goods on this premise may lead to the conclusion that the consideration that constitutes remuneration for the supply of goods should be transferred so that it can be realistically used. In the case of the acquisition of own shares or stocks for cancellation, the company receives no benefit. Although the shares or stocks may have a significant value, in the redemption transaction, they do not occur due to this feature. A distinction must be made between the situation in which the delivery of goods is made for consideration in the form of shares or stocks in a third-party company. In this case, the company that acquires such shares or stocks can, as a result, reap certain profits, whether

in the form of further sales or the collection of dividends due. Acquisition of treasury shares for the purpose of cancellation results from a statutory obligation and pursuant to the regulations of the Commercial Companies Code, their annihilation must occur.

The SAC in its jurisprudence points to the basic conditions proving the chargeability of an activity. First, there must be a legal relationship between the supplier of goods or provider of a service and the recipient. Second, remuneration has been paid. Third, the relationship between the service provided or goods delivered and the remuneration received in return must be characterized by directness. This directness is manifested in the fact that from the legal relationship, which is the basis for the performance of a taxable activity, there is a clear and direct benefit to the person performing this activity (Judgment of the SAC, 2012, I FSK 273/12). Applying the conditions presented to the situation in which the company redeems the acquired shares, it seems doubtful that it obtains a clear and direct benefit in this way. In the jurisprudence of the CJEU, it has been argued in numerous judgments that consideration occurs when the provider of a service or the supplier of goods obtains remuneration that is equivalent to the goods delivered or the service rendered, from the entity with which it is bound by the legal relationship that is the basis of the activity (Judgment of the CJEU, 1994, C-16/93; Judgment of the CJEU, 2009, C-246/08). At the time of the conclusion of the relevant contract, the shares or stocks unquestionably pass to the company and have a specific value. However, as previously mentioned, this is a temporary situation, resulting from a statutorily defined procedure for the redemption of shares, which does not result in a real gain.

The comments presented above are, at least in part, reflected in numerous judgments of administrative courts holding that the payment of remuneration in kind for redeemed shares or stocks does not constitute a supply of goods for consideration (Judgment of the SAC, 2012, I FSK 1010/11; Judgment of the SAC, 2014, I FSK 1853/13; Judgment of the SAC, 2015, I FSK 1814/13; Judgment of the VAC in Bydgoszcz, 2013, I SA/Bd 430/13). The case law presenting a different view is relatively rare (Judgment of the SAC, 2011, I FSK 1212/10; Judgment of the SAC, 2015, I FSK 1652/14), but it is this interpretation that the SAC adopted in the resolution of a panel of seven judges. Also, in the previously cited judgment of the CJEU in the case *Szef Krajowej Administracji Skarbowej v. Polfarmex Spółka Akcyjna w Kutnie*, the CJEU ruled that in the case of a company's acquisition of its own shares in accordance with national regulations for the purpose of their redemption and payment of appropriate remuneration for shareholders or stockholders, there is a supply of goods for consideration. Thus, the CJEU adopted

the concept that the company acquiring its own shares receives remuneration for the delivery of goods, as there is a mutual transfer of ownership. However, such reasoning gives rise to a certain inconsistency. It results in a situation where, in the context of a supply of goods for consideration, the making of the supply must involve not only the transfer of ownership in the private law sense, but also the transfer of actual authority over the property, and the payment of consideration for the goods is limited only to the transfer of ownership of the shares. It is irrelevant that despite the transfer of the consideration in the form of shares and stocks, the company does not obtain the right to dispose of them as the owner. The concept of economic ownership, described earlier, is selectively applied in this situation.

In discussing the issue of the chargeability of the delivery of goods made in the course of the redemption of shares, attention should be paid to the issue of compulsory redemption and automatic redemption. Only voluntary redemption is made through the acquisition by the company of its own shares or stocks. In the case of compulsory redemption and automatic redemption, such a transfer of ownership of shares or stocks does not occur, as it is not needed as a result of the regulations of the Commercial Companies Code. Consequently, shares that are redeemed remain the property of the shareholder at all times. However, the company, as a rule, continues to be obliged to pay the consideration.⁵ This may lead to a situation in which a supply of goods is made as consideration for the redeemed shares or stocks, but it will not be a supply for consideration within the meaning of the VAT Act. The company will not even formally gain ownership of the shares, but will only reduce its assets. In the jurisprudence on the tax obligation for value added tax related to the redemption of shares or stocks, the issue of compulsory or automatic redemption occurs incidentally compared to voluntary redemption (Judgment of the VAC in Warszawa, 2014, III SA/Wa 2730/13).

Recognizing that in the case of compulsory or automatic redemption, there can be no supply of goods for consideration, reference should be made to the emergence of tax liability related to the gratuitous transfer of goods. According to the provision of Article 7(2) of the VAT Act, a supply of goods is also understood as a gratuitous transfer by a taxpayer of goods belonging to his enterprise. The further

⁵ It is worth recalling that in the case of a limited liability company, according to the provision of Article 199 § 3 of the CCC, with the consent of the shareholder, redemption may be carried out without remuneration, unlike in a joint-stock company in which, as indicated by the provision of Article 359 § 2 sentence 3 of the CCC, in the case of compulsory redemption, remuneration is obligatory.

part of the provision indicates that such a supply takes place, in particular, in the transfer or consumption of goods for the benefit of former shareholders and stockholders. From the point of view of a company making a gratuitous supply, it is important that it is entitled, in whole or in part, to reduce the amount of output tax by the amount of input tax. If these conditions are met, the activity will be considered taxable. It is worth mentioning that under the same provision, the payment of dividends in kind is subject to value added tax (Litwińczuk, 2016).

Conclusions

Resolving a dispute over the legitimacy of making the redemption of shares or stocks subject to the obligation under value added tax, is not easy due to many interpretative doubts. For this reason, domestic and EU case law plays a significant role in this matter. Despite the preponderance of administrative court rulings holding that neither the share redemption procedure itself nor the related payment of remuneration in kind, remain outside tax obligation, the SAC has adopted an approach less favorable to taxpayers.

Unquestionably, the claim that it is possible to separate the taxable portion from a given legal action or to consider that the action remains taxable only in a certain part should be accepted. The institution of redemption of shares or stocks is an internal activity of the company unrelated to its business operations. In a situation where this procedure results in the payment of remuneration in kind, the activity may be taxed as a supply of goods for consideration. The problematic issue is such a broad inclusion of the scope of activities that are considered to be performed in the course of business activity. The case law advocates the primacy of the principle of universality of taxation. Therefore, it is irrelevant that the act of paying remuneration for redeemed shares or stocks, whether in the case of voluntary or compulsory redemption, is not a typical transaction occurring in business. The act of paying remuneration in kind paid as a result of the redemption is therefore equated in its tax consequences with the disposal of goods for profit.

The jurisprudence has moved away from analyzing the economic impact of the payment of remuneration for goods delivered. The consideration in this case is determined only by the transfer of ownership of shares or stocks, which are then legally annihilated. Retribution, therefore, will only occur in a formal way, without any real gain on the part of the company redeeming the shares. It should be pointed out, that there is a need to move away from the argument

about the chargeability of the supply of goods made as a result of redemption. Even recognizing that in the case of both voluntary and compulsory redemption there is no supply of goods for consideration, does not mean that the payment of remuneration in kind associated with the redemption procedure will not be taxed. Assuming that this activity falls within the subjective scope of value added tax, if the conditions set forth in the provision of Article 7(2) of the VAT Act are met, it may be taxed as a gratuitous supply of goods. In light of the above considerations, such a solution would be rational and raise fewer legal questions.

Bibliography

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Summary

The article presents the problem of taxation of value added tax and the remuneration in kind paid to a shareholder as a result of the redemption of shares. Settlements made between a company and a former shareholder may be considered a taxable transaction. Two opposing concepts found in the case law are to treat for tax purposes the redemption of shares with remuneration as a single transaction, or to separate only the phase of payment of remuneration for the redeemed shares and consider it a supply of goods for consideration. The practical importance of the issues raised is evidenced by the fact that these settlements often result in significant property flows. The purpose of the article is to try to demonstrate which of the existing concepts corresponds to the provisions of the law and the structural principles of the value added tax more closely.

KEYWORDS: redemption, shares, stocks, value added tax, remuneration

Streszczenie

W artykule zaprezentowana została problematyka opodatkowania podatkiem od towarów i usług, wynagrodzenia rzeczowego wypłacanego wspólnikowi lub akcjonariuszowi w wyniku dokonanego umorzenia udziałów lub akcji. Rozliczenia dokonywane pomiędzy spółką a byłym wspólnikiem lub akcjonariuszem mogą zostać uznane za czynność podlegającą opodatkowaniu. Dwie przeciwstawne koncepcje występujące w orzecznictwie dotyczą traktowania (dla celów podatkowych) umorzenia udziałów lub akcji za wynagrodzeniem jako jednej czynności albo odseparowanie wyłącznie fazy wypłaty wynagrodzenia za umorzone udziały lub akcje i uznanie jej za odpłatną dostawę towarów. O doniosłości praktycznej poruszanej problematyki świadczy fakt, że rozliczenia te często powodują znaczne przepływy majątkowe. Celem artykułu jest próba wykazania, która z występujących koncepcji w większym stopniu odpowiada przepisom prawa oraz zasadom konstrukcyjnym podatku od towarów i usług.

SŁOWA KLUCZOWE: umorzenie, udziały, akcje, podatek od towarów i usług, wynagrodzenie

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