TAX PRESS REVIEW

5/2008

We are proud to present the forth edition of our Tax Press Review which contains a selection of rulings and interpretations that had been issued or published in May. We hope that our publication will prove useful to you in your everyday work and that you will be interested in receiving further editions of our Tax Press Review.

VAT

- **NSA ruled on 14 May 2008 (case ref. I FSK 655/07) that certainty of turnover between contractors excludes the faxed invoice transmission method. A faxed invoice constitutes its duplication and does not entitle one to set off the input VAT shown on such an invoice.**
  The NSA thus takes the view that faxed VAT invoices, despite documenting actual transactions, cannot constitute the basis for deducting input VAT. VAT invoices sent in pdf form and printed out by their recipients are treated likewise in the courts' verdicts. As would emerge from the WSA verdict in Warsaw (case ref. III SA/Wa 1341/07), invoices e-mailed without due regard to the conditions regulating electronic invoices puts paid to the right to deduct VAT. The above NSA verdict confirms that the taxpayer is entitled to deduct input VAT only if s/he has the original VAT invoice documenting the sustained expenditure.

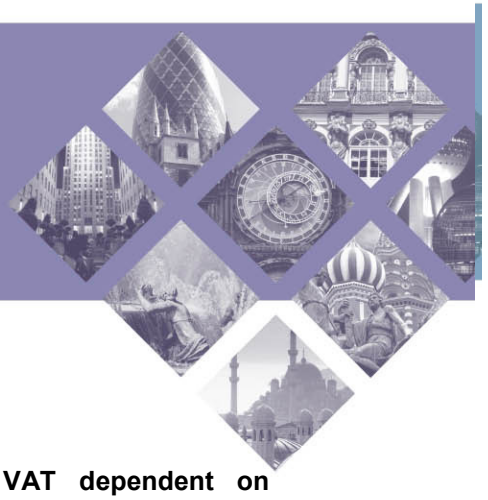
- **WSA in Warsaw ruled on 8 May 2008 (case ref. III SA/Wa 2185/07) that a firm which supplies goods for testing to customers does not have to pay VAT on such activity. Even if the goods do not correspond to the definition of a sample under the Polish VAT Act.**
  The court indicated that the definition of 'sample' in the Polish VAT Act is at variance with EU regulations. In this case, doubts concerned floor tiles glued to a piece of flooring. They are not samples in the meaning of the Polish VAT Act since this Act does not embrace processed goods. The court asserted that the aim of providing samples of processed goods is to enable customers to test them before they make their purchasing decisions. Floor tiles being the point at issue here, are samples in the colloquial sense of the word. It is worth mentioning that the courts are emphasising with increasing regularity that the free-of-charge supply of goods for business-related purposes is tax exempt. Such a supply is undoubtedly the supply of processed goods for testing, irrespective of whether they are samples or not in the light of Polish VAT Act.

- **WSA, Warsaw, ruled on 21 May 2008 (case ref. III SA/Wa 408/08) that if a shop received a premium from a supplier for increasing its sales of given goods, it cannot be regarded either as a service or as a rebate which would require the issue of correction invoices in regard of these goods.**
  The verdict concerns the controversial issue of cash premiums awarded for achieving specified sales rates. It falls in with the already established line in jurisdiction (e.g. the NSA ruling of 6 February 2007, case ref. I FSK 94/06) which lays down that a cash premium award cannot be treated as the rendering of a service. It should be noted however that the interpretations issued by the tax authorities frequently take a different position to that of the administrative courts.

- **WSA, Wrocław, ruled on 28 April 2008 (case ref. I SA/Wr 1551/07) that if the general costs, which are expenditure on staff events, have influence work quality, cement staff-employer relations, constitute a pricing factor and as a result - costs of earnings, the taxpayer qualifies for a deduction of the input VAT charged in the invoice documenting these costs.**
  The company deducted input VAT from the expenses sustained in organising a staff party. The tax authorities questioned this deduction arguing that such activities did not serve the purpose of increasing sales or improving work quality and thus they could not be associated with taxable activities. The court dismissed this verdict indicating at the same time that if the specified costs constitute costs of earnings and if they can be attributed to the taxpayer's taxable activities, then even if they cannot be directly attributed to taxable activities, the right to deduct input VAT remains undiminished.

- **WSA, Wrocław, ruled on 11 April 2008 (case ref. I SA/Wr 1892/07) that Poland could not introduce new restrictions on VAT deductions relating to fuels expenses after 1 May 2004. If regulations introduced after that date were less favourable than the previous ones, the latter should be applied.**
  The taxpayer applied for a refund of the input VAT factored into the fuel price he paid arguing that under the pre- 1 May 2004 legal regime, he could invoke this right. The tax authorities refused to make a refund. The court ruled that in accordance with EU regulations, the right to deduct tax could be subject to restrictions only in relation to input VAT from expenses which are not strictly associated with economic activity (e.g. expenditure on luxury goods or entertainment). Member states could, however, retain additional restrictions in deducting input tax which prevailed up to their day of accession to the EU. But they could not introduce new restrictions as from the day of accession to the EU. In connection with the above, Poland could not introduce further restrictions in the right to deduct input VAT on fuel purchases as from 1 May 2004. That is why the regulations which prevailed before the date of accession should be applied within the above-mentioned scope.

- **NSA ruled on 23 April 2008 (case ref. I FSK 1788/07) that making available equipment to a contractor which serves to render the service is not VATable if it is an element of their cooperation. It is then not regarded as a separate transaction.**
  The taxpayer was acquiring specialist machinery and equipment which he then made available to his contractors on a free-of-charge basis which that then used to produce and assemble specified goods for him. VAT was not remitted on this handover of machinery and equipment. The tax authorities took the view that this was a mutual rendering of services and that both these services should be VATable. The court ruled that making machinery and equipment available for the purpose of performing set tasks and manufacturing products is

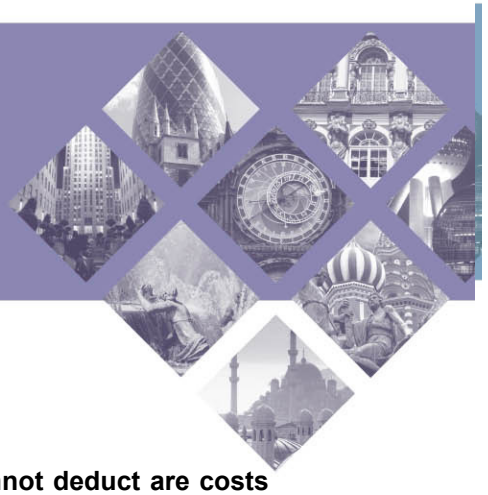


not a separate rendering of service by a contractor. Thus it cannot be considered as a separate VATable event since it services are not being rendered in the understanding of the VAT Act.

- **NSA ruled on 13 May 2008 (case ref. FSK 600/07) that a firm which donates free-of-harge goods for purposes associated with the enterprise does not have to add output VAT, even if it deducts it upon the purchase.**
  Under Art. 7.2. of the VAT Act, a VATable supply of goods should also be understood as the handover (free-of-charge) of goods by the taxpayer of goods belonging to the enterprise for purposes other than the aims linked to the business of the enterprise. From this regulation, *a contrario*, it would appear that the supply of goods for the purposes of the business of the enterprise is not a taxable supply of goods. Such a conclusion is at variance with EU regulations in connection with which some tax authorities maintain that the free-of-charge handover of presents to a contractor, and thus for an aim associated with the enterprise, should be VATable. The NSA confirmed that such an interpretation of the regulation is inadmissible despite the fact that Polish regulations are at variance with the VAT directive. Only the taxpayer can claim the more favourable EU law by reference to the Polish regulations' inconsistency with the directive.

- **WSA, Warsaw, ruled on 30 April 2008 (case ref. III SA/Wa 173/08) that making the right to set off input VAT against output VAT dependent on income tax regulations is inconsistent with the VAT directive.**
  The verdict concerned an abandoned investment however its thesis could have application in all cases in which the taxpayer does not have the possibility of deducting input VAT from expenses that are costs of earnings, e.g. in relation to expenses of representation which, as from 1 January 2007, do not qualify in their entirety as costs of earnings. But the general restrictions of VAT deductions as contained in EU regulations should be borne in mind.

- **NSA ruled on 15 may 2008 (case ref. I FSK 766/07) that the limit of booking given expenses as tax deductible costs under CIT Act, Art. 16.1.28 (under the legal regime prevailing to 1 January 2007) does not impact on the level of deduction of input tax due to these expenses. The input tax may be fully deducted.**
  The NSA thereby confirmed the position already contained in the WSA rulings, that Art. 88.1.2 of the VAT Act is inapplicable when the taxpayer does not include a given expense as a cost of earnings only because of exceeding the statutory limit, though in principle such an expense may be a cost for tax purposes. Thus exceeding the limit on non-public representation and advertising expenses (as per the legal status before 1 January 2007) should not influence that deductibility of VAT from expenditure on non-public representation and advertising which remained beyond the scope of tax deductible costs only



because of the then existing limit of 0.25 % of revenue.

Corporate Income Tax (CIT)

- **WSA, Kraków, ruled on 17 April 2008 (case ref. I SA/Kr 1265/07) that expenses associated with maintaining and developing distribution channels can be treated as tax deductible costs. In the end they impact on the sales values of entrepreneurs.**
  The taxpayer, being the producer and distributor of tobacco products, financed the installation of ventilating facilities in catering establishments which were the taxpayer's contractors. This enabled the contractors to comply with the conditions imposed by anti-nicotine regulations and in consequence reduced the likelihood of a stop in their purchasing of the taxpayer's products. These expenses were booked as the taxpayer's costs of earnings. The tax authorities asserted, however, that the link between the taxpayer's expenses and the protection of the source of income is too remote. The court ruled that in a situation when a significant proportion of the taxpayer's products are sold via catering establishments, activities aimed at protecting this distribution channel are wholly justified, also when the link between the costs sustained and the revenues achieved is quite remote.

- **Tax Chamber, Warsaw, interpretation of 14 May 2008 (ref. IP-PB3-423-302/08-2/ECH) that VAT paid on that part of representation costs that the entrepreneur cannot deduct are costs of earnings.**
  The taxpayer claimed that since representation expenses do not constitute costs of earnings, there is no possibility of deducting input VAT occasioned by the purchase of goods and services connected with representation. He referred to Art. 15 of the CIT Act, according to which various expenses can be booked as costs of earnings if two conditions are fulfilled simultaneously: if the expense is sustained with the purpose of achieving revenue and if it is not listed in the schedule of expenses not constituting costs of earnings. The Tax Chamber drew attention to the fact that there are exceptions to the general rule that VAT does not constitute a cost of earnings. Under Art. 16.1.46a of the CIT Act , input VAT is a cost where, in accordance with the VAT Act, the taxpayer does not qualify for a reduction or refund of the difference.

Miscellaneous issues

- WSA, Warsaw, ruling of 9 May 2008 (case ref. III SA/Wa 537/08) confirmed that in a situation when the tax authorities conclude that the taxpayer's supporting evidence for booking expenses on refurbishments as costs of earnings is insufficient, they cannot limit themselves to the automatic treatment of such expenses as adaptation costs. The tax authorities must wholly elucidate the actual status in the matter without pushing the burden of proof onto the taxpayer.

- NSA ruled on 3 March 2008 (case ref. I FSK 219/07) that registration is not necessary in order to qualify for the status of a taxpayer. And since that is so, the right to deduct VAT on the basis of invoices issued by unregistered taxpayers cannot be denied.
- NSA resolved on 26 May 2008 that the payment of tax by another firm for a taxpayer does not extinguish the tax obligation. It is an obligation of a personal character, and civil law agreements in this field are ineffective from the tax office point of view.

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The information above does not constitute legal opinion or advice. Should you require full information or legal advice on any issue, please contact us

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