TAX PRESS REVIEW

KSP legal & tax advice

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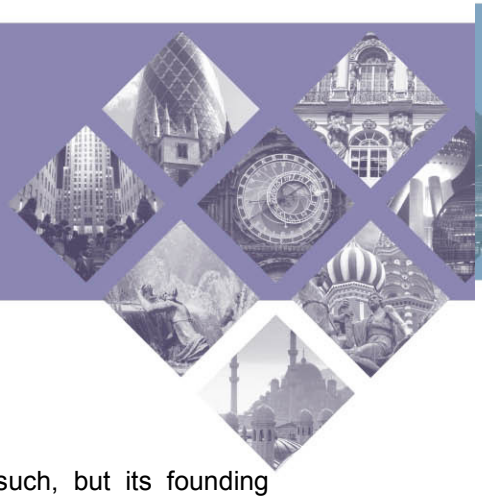
We are pleased to provide you with the next issue of Tax Press Review, in which we present selected tax rulings and interpretations that were issued or published in June 2008. We hope that our publication turns out useful in your day-to-day practice and that you will be interested in receiving next issues of Tax Press Reviews.

Value Added Tax (VAT)

- **In the interpretation dated 20 May 2008 the Head of the Tax Chamber in Warsaw (ref. no. IP-PP2-443-560/08-2/IB) stated that an entrepreneur has the right to decrease the output tax with the input tax specified on the invoice evidencing the receipt of a financial bonus.**
  Despite the standpoint unanimously expressed by the administrative courts stating that financial bonuses are not subject to taxation (the latest ruling of the Provincial Administrative Court in Warsaw dated 29 May 2008, case ref. no. III SA/Wa 659/08), some tax authorities still claim that financial bonuses give rise to VAT liabilities. Such a standpoint is supported with the said interpretation of the Head of the Tax Chamber in Warsaw, according to which a VAT payer has the right to reduce the amount of output tax with the input tax insofar as the goods and services are used for the performance of taxed activities.

- **The Provincial Administrative Court in Warsaw in its ruling of 2 June 2008 (case ref. no. III SA/Wa 269/08) stated that a company that incurs costs connected with increasing its share capital may deduct VAT specified in the invoices for legal and economic advisory services and other services related to the said increase.**
  The tax authorities refused to accept the position of a company which claimed that it is entitled to deduct VAT under the invoices evidencing services connected with the increase of the share capital through issuing new shares. The court overruled the interpretation ruling issued by the tax authorities and stated that their analysis of the factual background was superficial. In the said case it should be taken into consideration that the financial means gained in result of the increase of the share capital will be used to perform taxed activities. Raising capital through the issue of new shares allows for the development of the basic activity of the company, which is subject to VAT.

- **The Supreme Administrative Court in its ruling of 10 June 2008 (case ref. no. I FSK 706/07) stated that an in-kind contribution of fixed assets to a company always brings about the need to correct VAT.**
  The ruling was issued on the basis of the factual background in which a taxpayer joined two limited liability companies. The shares were acquired in exchange for in-kind contributions and cash. The devices and machines being the in-kind contribution were purchased and used for the purposes of the previous activity of the taxpayer. The input tax was deducted from the purchased fixed assets being the subject of the in-kind contribution.
  In the justification the court mentioned the provision of the VAT Act pursuant to which if a fixed asset with respect to which the whole input tax was deducted is sold in the period of correction of the input tax, the taxpayer is obliged to correct the amount of the input tax that was deducted from the output tax. In the event the sale was exempted from or was



not subject to taxation, to calculate the adjustment one should assume that the goods will be further used exclusively for the activities exempted from or not subject to the taxation.

- **The Supreme Administrative Court in its ruling of 5 June 2008 (case ref. no. I FSK 739/07) stated that energy suppliers are not obliged to pay tax on thefts of electricity. In such event the title to the goods is not transferred, therefore no supply takes place.**
  The court emphasized that pursuant to art. 7 sec. 1 of the VAT Act a supply of goods shall be understood as the transfer of the right to dispose of the goods like their owner. Hence for a transaction to be considered a supply of goods, the cooperation of trading partners is needed. A theft is not a bilateral agreement, so it can hardly be assumed that the title to the goods was transferred. Fees collected by a supplier for illegal energy consumption are of compensatory nature, so they are not subject to VAT.

Corporate Income Tax (CIT)

- **In the interpretation dated 23 May 2008 the Head of the Tax Chamber in Warsaw (ref. no. IP-PB3-423-372/08-2/JG) stated that a tax on civil law transactions paid by a company may not be considered a tax deductible expense in the meaning of the CIT Act.**
  The Head stressed that the expenses connected with the formation of a joint-stock company, such as costs of a notarial deed on the Articles of Association, including the tax on civil law transactions on the deed, are not tax deductible expenses of the company, as the expenses are not incurred by the company as such, but its founding partners for whom they will be tax deductible expenses by virtue of the sale for consideration of the shares taken up in the company.

- **In the interpretation issued on 29 May 2008 the Head of the Tax Chamber in Warsaw (ref. no. IP-PB3-423-413/08-2/PS) stated that a company is obliged to pay tax on the remitted interest on the loans.**
  The Head of the Tax Chamber did not share the standpoint of the taxpayer who stated that the remittance of interest on a loan is tax neutral. According to the Head remittance of interest means that a company gains a benefit consisting in the opportunity to temporary use capital free of charge. Therefore, the company attains an income subject to taxation, to which art. 12 sec. 1 point 2 of the CIT Act applies.

- **In the ruling of 25 June 2008 (case ref. no. II FSK 555/07) the Supreme Administrative Court stated that as long as a tax authority fails to prove that the only purpose of a price differentiation by a company was to evade taxation, it may not make an assessment of the income on the grounds of its relations with other companies.**
  The case settled by the court concerned the situation of a taxpayer- an importer and distributor of car paints, who was selling goods to the related and non-related entities, and the price for the related entities was lower than the one applied in case of the non-related entities. Tax authorities, referring to art. 11 of the CIT Act assessed the taxpayer's income. However, the Supreme Administrative Court pointed out that art. 11 sec. 1 of the CIT Act is an

exemption to the rule according to which an income of a taxpayer is the actual, not hypothetical income and the aforementioned regulation should be applied with particular care, as it may interfere with the constitutional principle of the freedom of economic activity.
In the court's judgment differentiation of the prices between related companies as such does not constitute a precondition to apply the aforementioned regulation as long as the tax authority fails to prove that the only purpose of the differentiation of prices was to evade taxation and it was not caused by economic reasons.

Miscellaneous

- **On 27 May 2008 the Provincial Administrative Court in Olsztyn (case ref. no. II SA/OL 178/08) dismissed a taxpayer's complaint delivered by a courier due to the failure to observe the deadline for it to be filed.**

The court stated that pursuant to art. 57 § 5 point 2 of the Administrative Procedure Code a deadline shall be deemed observed if a brief was sent in a Polish post office of a public operator before the expiry of the deadline (the same rules of filing the means of appeal concern tax proceedings). A courier company is not a public operator. Postal law vested the obligation of a public operator in Poczta Polska. It does mean that briefs may not be sent by a courier, but in such case they must be delivered to the intended authority before the expiry of the fixed deadline.

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We do hope that the information herein turns out useful. The information constitutes neither a legal opinion nor advise. If you wish to obtain complete information or legal advise please do contact us.

Contact person in Salans:

Salans
Rondo ONZ 1
00-124 Warsaw

Tel. (22) 242 52 52
Fax. (22) 242 52 42

Karina Furga
email: kfurga@salans.com

Contact person in KSP:

Krupa Srokosz Patryas sp. k.
ul. Chorzowska 50
40-121 Katowice

Tel. (32) 731 68 50
Fax. (32) 731 68 51

Magdalena Patryas
email: magdalena.patryas@ksplegal.pl