TAX PRESS REVIEW

KSP legal & tax advice

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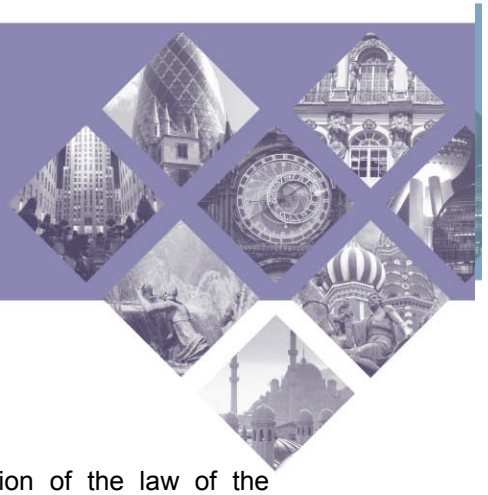
We are proud to present the sixth edition of our Tax Press Review which contains a selection of rulings and interpretations that had been issued or published in July. We hope that our publication will prove useful to you in your everyday work and that you will be interested in receiving further editions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

VAT

- **NSA (Supreme Administrative Court) in a ruling of 8 July 2008 (case ref. I FSK 871/07) asserted that if services performed by an entrepreneur are mainly related to housing construction works, they may be wholly subject to 7 percent VAT.**
  The Company was to modernise a sewage treatment plant wherein 80 percent of the work was to be utilised in a housing construction while the remaining 20 percent was accounted as serving other purposes. The tax authorities took the view that when the infrastructure is connected both with residential buildings and others, the part associated with the residential development must be distinguished and taxed at the 7 percent rate and the remainder at 22 percent. The courts leaned towards the Company's viewpoint that there are no grounds for dividing works performed by the Company for residential purposes and those connected with other purposes. The type of relationship with the accompanying infrastructural works is irrelevant; what is solely relevant is that the infrastructure associated with the works should serve residential purposes in the main. The verdict is convergent with the line taken by the ETS, which ruled in case ref. C-41/04 that if „two or more services (or activities) (…) are so closely connected that objectively they constitute in the economic aspect one whole, whose division would have an artificial character, then all these services or activities constitute a uniform service for VAT purposes."

- **WSA (Provincial Administrative Court) in Warsaw in a ruling of 10 June 2008 (case ref. III SA/Wa 382/08) revealed that only a leased building or structure can be classified as used goods. But they cannot be leased movables, even when the agreement lasted at least six months.**
  A Company wanted to sell its production line which had been leased for over 6 months. The Company adopted the view that that in a situation when it does not deduct input VAT on purchases of goods comprising this movable, its sale will be exempt from VAT. The Finance Minister, on the basis of art. 43. 1. 2 of the VAT Act, indicated that the legislator mentioned only immovables being the subject of rent, lease or other agreements of similar character to make it possible to maintain the status of used goods. The court upheld the Finance Minister's view indicating that if it had been the legislator's wish to incorporate movables being the subject of rent or lease under the concept of used goods, then he would not have made this reservation in relation to immovables.

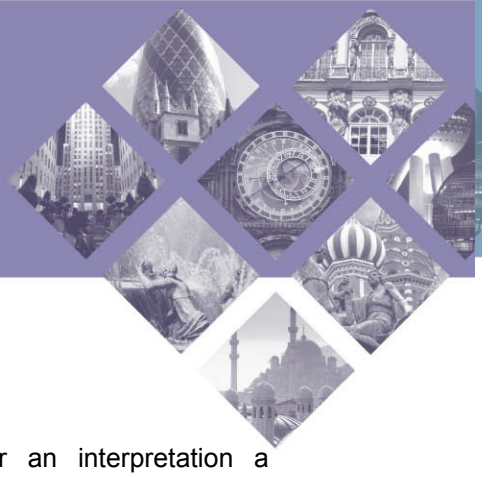
- **WSA in Bydgoszcz in a ruling of 10 June 2008 (case ref. I SA/Bd 170/08) stated that an entrepreneur paying a fine for infringing contractual provisions cannot deduct input VAT from the invoice issued in connection with this, because it is neither a supply of goods nor a rendering of services.**
  The tax office questioned a taxpayer's deduction of input VAT stemming from an invoice issued on account of an infringement of the provisions in a transport services contract. It assumed that the activity confirmed by the invoice is a penalty which



represents compensation and thus it cannot be classified either as a good or a service. The court took the part of the tax authorities stressing that the activity in question was a penalty for the default on an agreement. Such an activity is not taxed. By the same token the taxpayer does not have the right to deduct VAT.

- **WSA in Warsaw in a ruling of 24 June 2008 (case ref. III SA/Wa 480-481/08) stated that the taxable base in the exchange of foreign currencies should be the general positive result of the transaction in a given period, and not the entire sales' price achieved in exchange for the currencies.**
  A bank asked the tax authorities how to treat, for VAT purposes, the services it rendered re foreign exchange in a situation when it does not take any commission for this and its remuneration is the difference between the lower rate of purchase and the higher rate of sale (so-called spread). The bank's doubts were aroused by the question whether in the above factual status, the amount due (turnover) is the whole currency sale price, or the overall positive result of transactions in a given period. The tax authorities supported the first position, pointing at the NSA ruling of 24 January 2008 (case ref. I FSK 144/07) in which the court asserted that in calculating the turnover on exchange rates, the whole value of the currency purchase and sale must be taken into account, and thus the entire sum received from the customer for the service. In the ruling under consideration, the Warsaw WSA supported the second position indicating that additionally in a situation when there is no clear regulatory provision for a given question in Polish law, it must be supplemented by way of a pro-community interpretation of the law of the country, taking into account the ETS case law. The court quoted the ruling in case ref. C-172/96 First National Bank of Chicago, in which the ETS asserted that the taxable base in VAT of foreign exchange transactions should be the overall result of the transactions in a given period.

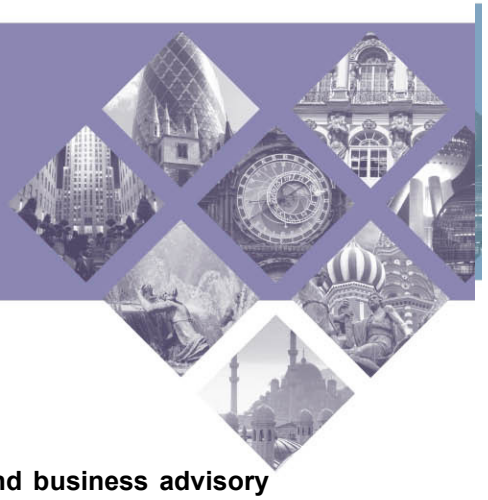
- **WSA in Szczecin in a ruling of 26 June 2008 (case ref. I SA/Sz 95/08) stated that the right to deduct input VAT by a person using a passenger car on the basis of a rental, hire or lease agreement, is only 60 percent does not infringe the regulations of the VI directive.**
  The taxpayer deducted from output VAT the VAT stemming from the invoice documenting the amount due on the operating lease of the passenger car. In the course of a tax office compliance review the tax authorities questioned the deduction pointing at regulation at art. 86. 7 of the VAT Act restricting the deduction of VAT to 60 percent of the input VAT stemming from the invoice. The taxpayer lodged a complaint in court arguing that the restriction infringes the VI directive. The court dismissed the complaint indicating that, albeit the EU regulations do not anticipate this kind of restriction in deducting input VAT, nonetheless, taking into account the content of art. 17. 6 of the VI directive it should be recognised that the introduction into the VAT Act of such a restriction does not infringe EU regulations. The court drew attention to the fact that still before Poland's accession to the EU, Polish regulations restricted the right of service recipients using passenger cars to reduce the output VAT.



- **ETS in a ruling of 10 July 2008 (case ref. C-25/07 Alicja Sosnowska) stated that the extension of the time for refunding VAT from 60 to 180 days if a new taxpayer does not pay a guarantee deposit of PLN 250,000, is contrary to the EU directive.**
  In her tax declaration for January 2006, Alicja Sosnowska reported a VAT overpayment of nearly PLN 45,000 and applied for its refund within 60 days. The tax authorities dismissed this claim arguing that she had been running her business for under a year and she had not paid a guarantee deposit. The taxpayer lodged a claim in court which, in turn, addressed a prejudicial question to the ETS. The Tribunal concluded that the Polish regulations are at odds with EU law. As stems from the verdict, the state cannot differentiate the legal situations of firms and impose on new enterprises additional obligations and restrictions only because the State Treasury fears abuses. With this, the taxpayer does not have the possibility to prove that s/he is not a cheat. In the Tribunal's opinion Polish law infringes in this way the principle of proportionality. The security provisions applied in the VAT Act are not commensurate with the aim they are set, which is fighting abuses and preventing tax avoidance. These regulations infringe "to an excessive degree" the aims and principles of the VI directive.

- **WSA in Wrocław in a ruling of 20 May 2008 (case ref. I SA/Wr 126/08) stated that free of charge supplies of goods and services shall not be VATable if they are associated with the statutory activities of the enterprise. This link may be indirect or direct.**
  In an application for an interpretation a taxpayer asked whether the vouchers and gifts he adds on a free of charge basis to orders are VATable. The taxpayer took the view that the free of charge supply of goods for purposes associated with his enterprise is not VATable. However, the tax authorities asserted that these expenses are taxable because they are not directly related to achieving income. The taxpayer disagreed with this and lodged a complaint with the WSA. The court waived the tax authorities' interpretation. It ruled that the free of charge supply of vouchers intended for customers and other such expenses shall not be VATable if they are connected with the business that is being carried on, and indirectly as well. The above verdict confirms an already established line in case law according to which the supply of goods to contractors without payment when such supply is made with an aim associated with the activities of the enterprise are tax exempt.

- **WSA in Kielce in a ruling of 19 June 2008 (case ref. I SA/Ke 110/08) that a firm selling goods to another EU state can apply zero rate VAT even if earlier it did not register itself for the needs of such transactions. What's important is whether intra-community supplies of goods (WDT) had truly taken place.**
  The taxpayer sold goods in Slovakia in September 2007 while only in October did he report to the tax authorities, the intention to perform WDT activities. The tax authorities asserted that it was not registered for WDT purposes, thus the condition for applying the zero-percent VAT rate was not fulfilled. From the VAT Act provisions it stems that WDT is zero rated for tax on condition that among

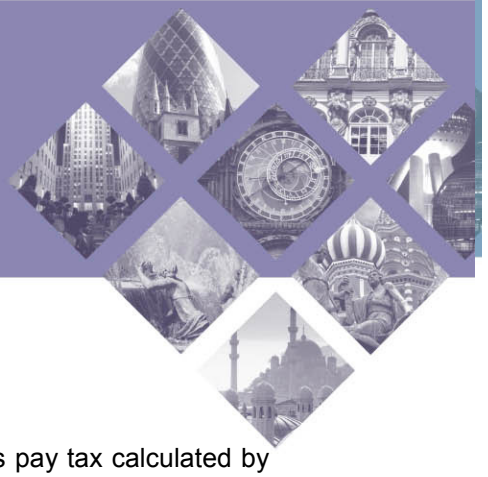


others the taxpayer performing the WDT gives the number which he had received for intra-community transactions. As the court indicated, the above regulations are at odds with EU regulations since the obligation to register the supplier of goods as a taxpayer does not arise from the community definition of WDT. The ETS expressed its opinion on the same issue in its ruling of 27 September 2007 (case ref. C-146/05 Albert Collee) indicating that if the supply fulfils the conditions for applying exemption for intra-community supplies then no VAT obligation arises.

- **The director of the Tax Chamber in Warsaw issued an interpretation on 3 July 2008 (ref. no. IP-PP2-443-596/08-2/KCH) in which he asserted that a building put up by a lessee belongs to the owner of the plot it stands on. If the lessee wants to buy the plot, he must also pay VAT on the building.**
  The taxpayer leased out the land to a related company, which put up a building on the land at its own expense. In connection with the planned sale of the land together with the building to the related company, the taxpayer asked how the transaction should be taxed. The tax authorities ruled that the building belongs to the owner of the land. Thus this building does not constitute a separate object of ownership from the land. It is a constituent part of the land subject to sale. Thus, VAT should be applied to the sale of the developed land at the rate appropriate to the building which stands on it.

Corporate Income Tax (CIT)

- **WSA in Warsaw in a ruling of 10 June 2008 (case ref. III SA/Wa 544/08) stated that fees for legal and business advisory services and for preparing share issue prospectuses are costs of earnings. They have direct connection with economic activity, and sustaining them could impact on the scale of earnings achieved.**
  The Company asked the Finance Minister whether it could classify expenses sustained in connection with the organisation and carrying out of a public issue of shares as costs of earnings. In the Company's opinion, since the share capital is to help enter the stock exchange, in other words everything that ties in with the company's position, with its turnover, its financial position, popularity or its lack – and thus with the financial result – constitutes general costs. These expenses should be recognised as costs of earnings. The Finance Minister deemed the Company's view to be erroneous pointing out that according to art. 12. 4. 4 of the CIT Act, income received for the creation or increase of share capital does not qualify as revenue. On the other hand, under art. 7. 3. 3 of the CIT Act, in establishing the taxable income, costs of earnings associated among others with revenues not subject to income tax, are not taken into account. The court asserted that taking into account the financial-organisational structure of the company stemming from the commercial company code regulations, share capital cannot be treated as a category of revenue. In consequence, art. 7. 3. 3 of the CIT Act will not be applicable to costs sustained in order to create capital. The court indicated also that expenses associated with entry onto the stock exchange and thus acquiring capital from a share issue, should be seen as intermediate costs connected with the general activities of the company, as sustained in order to develop this activity.



They may be counted as costs of earnings. Nonetheless it should be noted that in similar cases courts also issued opposite rulings, that is why the classification of costs of share issues will tie in for companies with considerable tax risk.

Miscellaneous information

- NSA in a ruling of 24 July 2008 (case ref. II FSK 418/08) stated that technical installations are an element of a building, further to which they cannot be taxed like structures subject to real estate tax. Taxpayers should thus pay tax calculated by reference to the building's usable area which contain installations, and not be reference to the value of these installations.

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We hope that the above information will prove to be useful. The information however 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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