TAX PRESS REVIEW

KSP legal & tax advice

8/2008

We are proud to present the seventh edition of our Tax Press Review which contains a selection of rulings and interpretations that had been issued or published in August. 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.

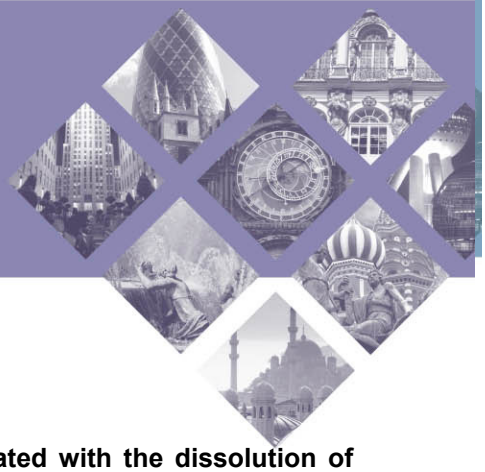
VAT

- **The WSA (Provincial Administrative Court) in Bydgoszcz ruled on 8 July 2008 (case ref. I SA/Bd 237/08) that: if a taxpayer does not apply to the tax authorities for confirmation that his contractor is a registered VAT payer, and then it turns out that that contractor is not registered for VAT, the taxpayer must bear the negative consequences of his lack of diligence.**
  The tax authorities questioned a taxpayer's right to reduce output VAT by input VAT on the basis of invoices documenting a transaction with an entity not registered for VAT. The court inclined to the tax authorities' view because the taxpayer had the option of applying to the tax chamber for confirmation as to whether his contractor was registered for VAT. The contractor, as an unregistered entity, was not entitled to issue VAT invoices, and in consequence the taxpayer did not qualify for setting off input against output VAT as shown in the invoices.

- **The WSA in Łódź ruled on 5 August 2008 (case ref. I SA/Łd 149/08) that: despite the fact that Polish regulations restrict the right to amend VAT declarations, taxpayers may avail themselves of the opportunity to amend such declarations on the basis of EU regulations.**
  The court pointed out that in the event of a difference between domestic law and EU law, priority should be given to community law norms. The VAT Directive (Art. 184 of Directive 2006/112/WE) does not impose restrictions on a taxpayer's right to make corrections after a tax control. As a result, Art. 81b § 3 of the Tax Ordinance, being inconsistent with EU regulations, cannot provide a basis for restricting the right to amend a declaration.

- **The WSA in Warsaw ruled on 20 August 2008 (case ref. III SA/Wa 539/08) that: awards given within the framework of loyalty programmes are not subject to VAT.**
  A taxpayer applied for a ruling as to whether the handover of goods to customers in exchange for points they collected in the course of a loyalty programme are VATable. The taxpayer took the view that such a handover is VAT-free since under Art. 7.2 of the VAT Act, the handover of goods on a gratis basis is taxable as long as it is not associated with the enterprise's business. The taxpayer argued that the exchange of points for goods by the customers as being associated with the business carried on by the taxpayer, should not be subject to VAT. By reference to the VAT Directive, the tax authorities asserted, however that such a free-of-charge handover should be subject to VAT. The court overruled the interpretation of the tax authorities and pointed out that in a situation where the Polish regulations are more liberal than EU law, the tax authorities cannot impose upon taxpayers additional obligations exclusively on the basis of EU regulations.

- **The WSA in Warsaw ruled on 30 June 2008 (case ref. III SA/Wa 540/08) that: the contribution-in-kind of an organised part of an enterprise is excluded from VAT.**
  The company's business was to acquire advertising time in the media for its clients. Due to separating out the whole of its operating activities for the benefit of another company and making of it a contribution-in-kind, the company applied for a ruling whether the positive value of the firm which had arisen upon this contribution-in-kind has bearing on the size of the proportion for partial deduction of input VAT. In the company's opinion the positive value of the firm remains beyond the scope of VAT. In its ruling, the WSA pointed out that the contribution-in-kind



of an organised part of an enterprise as well as the positive value of the firm remain beyond the scope of VAT. In the court's opinion, the concept of "enterprise" as used in Art. 6.1 of the VAT Act embraces all material and non-material components serving to achieve specified economic tasks regardless of whether they embrace the whole or only part of the given entity's assets. Thus the court did not share the view of the tax authorities that the transfer of part of the assets of an enterprise is not taxable only when it constitutes an establishment drawing up its balance sheet independently.

Corporate Income Tax (CIT)

- **The Supreme Administrative Court (NSA) ruled on 8 August 2008 (case ref. II FSK 744/07) that: expenses sustained on an investment that has not been commenced do not constitute costs of the abandoned investment and, by the same token, could be tax deductible costs.**
  The court emphasised that costs sustained by a company before commencing investment (if the intended investment was not commenced) cannot be excluded from the tax costs as the abandoned investment's costs. Under Art. 4a of the CIT Act, investments are fixed assets in under construction, in the meaning of the accounting act. Since the investor was not the owner of the real estate and did not have a building permit, he could not commence the investment. Due to this, the expenses sustained before commencing the investment on behalf of outside companies inspecting the potential land earmarked for development could not be recognised as costs of the abandoned investment.

- **The Director of the Tax Chamber in Warsaw stated in his interpretation of 1 August 2008 (ref. no. 1401/PP-I/4218-36/-08/RM) that: expenses associated with the dissolution of agreements which proved to be unremunerative for entrepreneurs constitute costs of earnings.**
  A taxpayer had renounced his lease on a property due to high service charges claiming that the further maintenance of sales outlets there would be unremunerative. On the strength of contractual provisions, he was obliged to pay compensation. The taxpayer took the view that the dissolution of the lease agreement, the compensation payment and the removal of the trading outlet to another place represented rational action aimed at reducing losses and safeguarding the source of income in consequence of which they may be booked as costs of earnings. The head of the tax office rejected this approach. However, the director of the tax chamber, seeing things differently, overruled the tax office's decision and asserted that keeping unprofitable outlets is harmful to the enterprise and thus if the entrepreneur liquidates such an outlet and moves it to a better location where there is the expectation of bigger profits then the expenditure on contractual penalties for the severance of the contract could be an admissible tax cost.

- **The WSA in Warsaw ruled on 8 August 2008 (case ref. III SA/Wa 221/08) that: firms using leased assets may book the preliminary fee as a cost of earnings at the moment of payment.**
  The tax authorities took the view that the preliminary fee is of a free-standing character and cannot be ascribed to particular lease payment installments, and its payment is an essential condition to commence the implementation of the agreement. In the opinion of the tax authorities this fee cannot be directly linked to specific revenues and since it concerns an agreement lasting more than a year as a rule, it should be booked as a cost of earnings in

proportion to its duration. The court disagreed with this view emphasising that the preliminary fee concerns not so much the duration of the lease period itself as the right to take up the lease. Thus, for tax purposes, the preliminary leasing fee is a one-off cost associated with signing the lease agreement and receiving its benefit, and hence it should be treated as a cost of earnings the moment it is paid.

- **The WSA in Szczecin ruled on 24 July 2008 (case ref. I SA/Sz 198-199/08) that: exchange rate differences do not occur in the event of a set-off of mutual liabilities.**
  Following a compliance review, the tax authorities asserted that a company had incorrectly recognised the exchange differences determined in a transaction of the set off of mutual liabilities. The company presented the view that the exchange differences arising in the course of commercial transactions are dependent on payment, and under Art. 498 of the Civil Code, set-offs are one of the forms of settlement of liabilities. That being so, in the company's view, exchange differences arise in set-offs of mutual liabilities. The court dismissed the company's complaint by ruling that for tax-related exchange differences to arise it is necessary to receive money or payment in cash, and the discharge of liabilities alone by the parties to the transaction are insufficient premises. The verdict concerned the legal status prevailing to the end of 2006.

- **The WSA in Szczecin ruled on 24 July 2008 (case ref. I SA/Sz 74/08) that: the conversion of a loan in foreign currency into Polish zloty has no influence on tax settlements. The computed exchange rate differences are neither a cost nor revenue.**
  A company made a foreign currency loan facility agreement with a bank. The loan was then redenominated into zlotys. The company regarded the resultant exchange differences as tax deductible costs and revenues. However, the tax authorities took the view that the redenomination of the foreign currency loan into zlotys has no bearing on tax settlements since its consequence is only the revaluation of the loan. The court dismissed the company's complaint that the differences arising out of the redenomination of the loan cannot be booked as costs or revenue, and their tax settlement could only be possible if the loan repayment was made in foreign currency.

Personal Income Tax (PIT)

- **The WSA in Warsaw ruled on 20 August 2008 (case ref. III SA/Wa 625/08) that: employees are groundlessly paying income tax on the medical cover benefits they receive from their employers since the mere putting of these types of benefits at their disposal should not generate taxable event.**
  The case concerned a taxpayer who applied for an interpretation of the tax regulations on the need to factor into the taxable income of employees benefits in the shape of medical care subscriptions. The tax authorities took the view that this constituted a free of charge benefit subject to taxation. The WSA did not share this view and pointed out that in light of the PIT Act, taxable income is the value of benefits in kind and other free of charge benefits while the purchase of a healthcare subscription by the employer is only the placing of certain benefits at the disposal of employees. In addition, the employer is in no position to confirm whether an employee had in fact taken advantage of the benefits made available to him. The WSA expressed the view that putting free benefits at the disposal of employees alone should not be treated as a taxable event.

Miscellaneous information

- **The Director of the Tax Chamber in Warsaw stated in his interpretation of 5 August 2008 (ref. IPBP2/436-159/08-2/AS) that: advancing a loan to a Polish taxpayer by a limited company (sp. z o.o.) is not subject to tax on civil law transactions if the agreement is made abroad and the monetary resources at the moment of its conclusion are in a foreign bank account.**

The taxpayer had planned to make a loan agreement with a Polish registered limited company. The agreement was to have been made abroad and on the day of its conclusion the money to be loaned was in the lender's foreign bank account. The transfer of the money was to have been made directly into the taxpayer's foreign bank account. The taxpayer asked whether in such a situation the loan agreement would be subject to tax on civil law transactions. The Tax Chamber's director stressed that transactions relating to things remaining abroad or property rights exercised abroad are subject to tax on civil law transactions provided two conditions are fulfilled simultaneously. Firstly, the purchaser must be resident or have his seat in Poland, and secondly, the civil law transaction must be made on Polish territory. In this instance, the agreement was to have been made outside of Poland. As a result, the director of the Tax Chamber ruled that the planned loan agreement will not be subject to tax on civil law transactions.

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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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