TAX PRESS REVIEW

KSP
legal & tax advice

9/2008

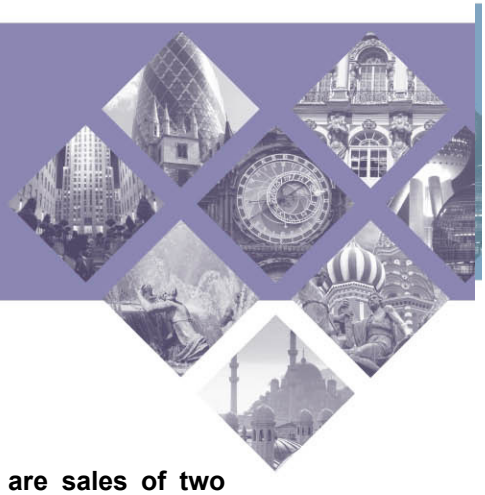
We are proud to present the eighth edition of our Tax Press Review which contains a selection of rulings and interpretations that had been issued or published in August. We hope that our publication will prove useful to you in your everyday work and that you will be interested in receiving further editions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

VAT

- **The WSA (Provincial Administrative Court) in Bydgoszcz ruled on 12 August 2008 (case ref. I SA/Bd 280/08) that Polish regulations banning a 30% deduction of input VAT when a taxpayer fails in his obligation to run his sales through a fiscal cash register, are contrary to EU law.**
  The State Treasury took the view that a taxpayer who, upon liquidating her firm, subsequently reopened it has no right to exemption from the duty to use fiscal cash register. As a result, until she starts evidencing her turnover through a fiscal cash register she cannot deduct the 30% input VAT paid on purchases of goods and services. The court found the sanction to be in default of EU law. It ruled that the principle of neutrality had been violated since the taxpayer was deprived of the possibility to recover the input VAT. The restriction of the right to make such deductions must be based on EU law which envisage this type of entitlement. The principle of proportionality had also been infringed since member countries cannot resort to ways and means that would lead to the systematic undermining of the right to deduct the VAT paid. Finally, the court emphasised that EU member countries may introduce these types of sanctions by implementing special means. But for this it is essential to follow special procedures which Poland has not done.

- **The WSA in Warsaw ruled on 5 September 2008 (case ref. III SA/Wa 1274/08) that if a company changes the purpose of its assets and uses them for VAT exempt activities, it should correct the tax it had deducted earlier.**
  The company had contributed the right to the perpetual usufruct of land and the buildings on it. In the company's view it did not have to correct the input VAT based on art. 91 of the VAT Act, since in the company's view the obligation to make amendments exclusively concerned fixed assets and intangible assets, and it did not treat the contributed assets as fixed assets. The tax authorities and the WSA ruled that the obligation to correct the input VAT in the event of a change of purpose of the assets to activities exempt from VAT, including a contribution-in-kind such as this, stems from art. 91.7 of the VAT Act.

- **The WSA in Warsaw ruled on 3 September 2008 (case ref. III SA/Wa 783/08) that the acquisition of a bad debt at a price that is lower than its nominal value constitutes a financial intermediation service that is exempt from VAT, and not a VATable debt recovery service.**
  The company intended to buy bad debts at prices below their nominal values. Next it planned to undertake enforcement measures or reach agreements with the debtors. The tax authorities took the view that such activities represent a taxable debt recovery service and denied the company an exemption. The court leaned towards the taxpayer's argument that the transaction concerns only the transfer of liabilities. As a result, the purchasers of

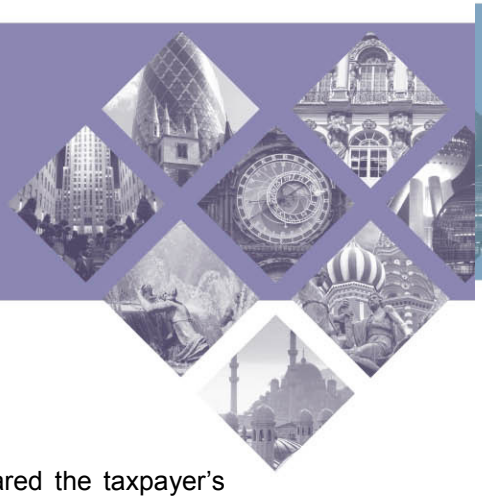


such receivables become their sole owners and may freely dispose of them. This includes writing them off. On the other hand a debt recovery service consists of the fact that an entity rendering the service is commissioned to collect the debt on a remunerative basis.

- **The WSA in Warsaw ruled on 3 September 2008 (case ref. III SA/Wa 783/08) that Polish regulations forbidding the deduction of input VAT on services imported from tax havens are out of line with EU law.**
  A telecommunications sector company is charged fees for roaming services. Since in most cases it declares output VAT on imported services and deducts it from its input VAT, it loses out when paying the tax haven based operator since, in accordance with Polish regulations, it cannot deduct VAT from such a service. The company argued before the tax authorities that the exceptions to the principle of deductibility can only relate to concrete goods and services, and invoked the ETS verdict of 30 March 2006 (C-184/04). However the tax authorities took the view that they were not competent to test the domestic law's consistency with EU law. The court ruled that the restriction in deducting input VAT cannot be formulated so generally as is the case in art. 88. 1. 1 of the VAT Act. In connection with this, this regulation is inconsistent with EU law.

- **The WSA in Warsaw ruled on 1 August 2008 (case ref. III SA/Wa 577/08) that a publisher who adds additional gadgets to a periodical for a price, should tax them by reference to their appropriate rates because these are sales of two products.**
  The company publishing and selling periodicals adds gadgets to some of them with the purpose of increasing sales. The price of a periodical with a gadget is higher than of that periodical without a gadget. In the company's opinion, it has the right to apply the 7% VAT rate because the addition of gadgets constitutes a gratuitous transfer of goods. The company indicated that the higher price does not cover the purchase costs of the gadgets, and only covers the costs of adding them to the periodicals. The court shared the view of the tax authorities. It referred to the ETS verdict of 20 January 2005 (C-412/03), that the circumstance that a transaction was made at a price that was lower or higher than the cost of production has no bearing on its qualification as a chargeable transaction. The court emphasised that in this situation, we are dealing with the supply of two products.

- **The NSA (Supreme Administrative Court) ruled on 4 September 2008 (case ref. I FSK 1252/07) that an entrepreneur rendering hotel services, who provides meals for his guests, may deduct input VAT charged on the purchase of catering services.**
  The entrpreneur asked for an interpretation of art. 88. 1. 4. a) of VAT Act, which does not allow VAT deductions from catering services with the exception of such purchases being made by taxpayers rendering tourist services on condition that they do not come under tourist services taxed by the margin method. In the taxpayer's opinion tourist

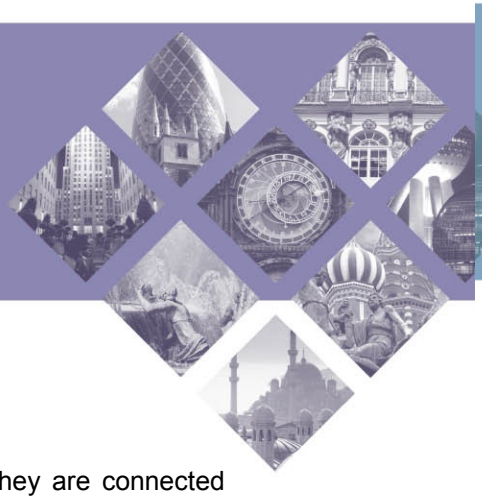


services should be defined as per the tourist services act, which includes hotel services. Thus in his opinion, he has the right to deduct VAT paid on catering services. The tax authorities took the view that tourist services should be defined by reference to the PKWiU (classification of products and services). Thus, tourist services should be associated exclusively with the services of tour organisers and intermediaries. (PKWiU 63.3), which closes the possibility of deducting VAT by the taxpayers on the purchase of catering services. The court agreed with the taxpayer that since there is a lack of a separate grouping for tourist services in the PKWiU, they cannot be identified by reference to statistical classifications. The court also pointed out that when a tax act uses a concept from another area of the law, without defining it, it is admissible to establish its meaning by applying a definition from that other area of law.

- **The NSA confirmed on 2 September 2008 (case ref. I FSK 1076/07) that an employer who lends money to employees from the works' social benefits fund does not render a financial intermediary service since it is an activity which does not come under VAT.**
  A company had lent money to its employees from the work's social benefits fund for housing purposes and took 1% interest for this. It took the view that these activities are not subject to VAT because they are not economic activity. However the tax authorities took the view that granting loans out of the fund are VATable and simultaneously exempt from VAT as a financial intermediary service. The court shared the taxpayer's view mindful of the fact that the employer only administers the fund, and that is not an economic activity. He is not at liberty to dispose of the fund's assets as he likes, and only performs his duty as imposed on him by the regulations.

- **The WSA in Warsaw ruled on 29 September 2008 (case ref. III Wa 984/08) that the taxpayer has the right to take into account the input VAT stated on the invoice documenting the expenditure, which is not a cost of earnings, and the regulation that bans this (art. 88. 1. 2 of the VAT Act) is inconsistent with EU law.**
  The taxpayer invoked the ETS ruling which says that an exclusion from the right to deduct VAT must be in line with the II Directive 67/228/EEC, which regulated the VAT until Directive VI came into effect on 1 January 1979. VAT Directive VI contained the regulation allowing for the obligatory restrictions on VAT deductions at the time to remain. But this means that any restrictions must be formulated in a way that is consistent with Directive II. The regulations of Directive II on the other hand do not allow for the application of so broadly defined restrictions. They should be detailed and concern eg. specified categories of goods. The court upheld the taxpayer's view and deemed art. 88. 1. 2 of the VAT Act to be inconsistent with EU law.

- **By the Minister of Finance's a letter of 4 September 2008 (ref. No. PT5/033/JBN/08/1081) all the country's tax chambers and tax control offices were ordered to refund tax to newly**



established firms making transactions within the EU in a period of less than 180 days, and without paying a deposit.
The minister's order was sent out because of the ETS ruling of 10 July 2008 in case ref. No. C-25/07. The tribunal ruled that art. 97. 5 and 7 of the Polish VAT Act relating to guarantee deposits, was inconsistent with EU law. The minister said that his order was aimed at avoiding the costs of proceedings before administrative courts should further taxpayers come and demand the earlier refund of VAT without having to pay a guarantee deposit.

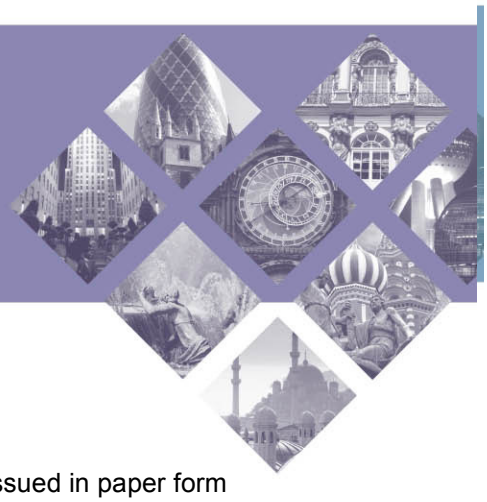
Corporate Income Tax CIT

- **The WSA in Warsaw ruled on 27 September 2008 (case ref. III SA/Wa 444/08) that if the legal basis of the bankruptcy proceedings with the possibility of an arrangement against a bank are not the regulations of the Bankruptcy and Restructuring Law, but the regulations of other legal acts, then the written off liabilities connected with this proceeding constitute taxable income.**
The court indicated that in a situation when proceedings are in progress on the basis of regulations other than those contained in the Bankruptcy and Restructuring Law, eg. on the basis of the ordinance of the President of the Republic of Poland of 24 October 1934 - The bankruptcy law then premises of art. 12.4.8.b) of the CIT Act are deemed to be unfulfilled. This regulation indicates clearly that write offs should not be booked as income if they are connected with a bank's bankruptcy proceedings with the possibility of arrangement in the understanding of the Bankruptcy and Restructuring Law.

Personal Income Tax (PIT)

- **The WSA in Warsaw ruled on 29 September 2008 (case ref. III SA/Wa 1356/08) that the value of a medical subscription bought by an employer is the employee's income even if he does not take advantage of the medical services subscribed for.**
The issue of PIT charged on such medical subscriptions is very controversial. In a different case concerning another company but the same issue, the WSA in Warsaw (case ref. III SA/Wa 625/08 of 20 August 2008) ruled the opposite, i.e. that there were no grounds for taxing as an income the possibility itself of having medical care as provided by an employer.

- **The directors of the Tax Chamber in Warsaw issued an interpretation on 28 August 2008 (ref. no. IPPB2/415-919/08-2/SP) in which they recognised that a written or emailed confirmation of the continued validity of the certificate of residence is sufficient for international agreements to be applicable.**
This interpretation was issued on the basis of the personal income tax act, but also finds application on the basis of corporate income tax provisions. The Tax Chamber agreed with the position adopted by the taxpayer, presented in his



application for an interpretation. No tax law provision regulates the question of the validity of a residence certificate. There are no requirements in the regulations as to the renewal of the certificate after a set period of time. That is why it can be recognised that as long as there are no changes to the actual status as confirmed by the certificate, it remains valid.

Miscellaneous

- The WSA in Warsaw ruled on 8 August 2008 (case ref. III SA/Wa 1308/08) that if the tax authorities make a mistake and treat as an overpayment what they subsequently discover to be an error, they cannot treat this as a tax arrear subject to penalty interest. The court emphasised that the taxpayer cannot be made to suffer the negative consequences of errors made by the state authorities.

- The director of the Tax Chamber in Bydgoszcz issued an interpretation on 29 August 2008 (ref. n, ITPP3/443-158/08/ZG) in which he recognised that an invoice cannot be issued in paper form while its copy is kept in electronic form. A taxpayer wanted to lower his storage costs by printing only the original sales invoices and archiving their copies in electronic form. The company argued that it had the right to do this since the regulations on keeping copies of documents by the seller do not require that invoices have to be written paper, and at the same time do not require the printing of originals and their copies. The director of the Tax Chamber took the view that the regulations do not envisage the possibility of taxpayers keeping in electronic form copies of invoices which had been issued in paper form, with a view of printing them out should the need arise. There is no legal basis to apply a mixed mode since separate legal regulations have been envisaged for both forms of invoice.

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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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