TAX PRESS REVIEW

KSP legal & tax advice

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Welcome to our first issue of the Tax Press Review in 2009. We will be taking a look at selected tax judgments and interpretations that were made public in January 2009. We hope you will find it useful in your everyday work and that you will be interested in receiving future issues.

VAT

- **In a judgment of 30 December 2008 (I SA/Ol 473/08), the Voivodship Administrative Court in Olsztyn adjudicated that the interpretation of Article 88 (3a) (1) (a) of the VAT Act, pursuant to which an authority is entitled to refuse deduction of the VAT contained in subcontractors' invoices for actually performed services since the service seller did not have the status of an active VAT payer and has not paid the output tax, should be considered in violation of EU law.**

  The taxpayer deducted the VAT in the invoices documenting the purchase of transport services issued by an entity registered as VAT-exempted taxpayer. The tax authorities questioned the right to deduct input tax, arguing that the invoice had originated from an entity not authorised to issue it. The court noted that the neutrality rule fundamental to the VAT structure was reflected *inter alia* in the attempt to find, implement and protect legislative solutions ensuring a state of affairs in law where VAT paid by the taxpayer in the price of goods and services purchased by a VAT taxpayer, used for the purposes of his VAT-able operations, did not constitute a final cost for the taxpayer. The taxpayer must be afforded the possibility of recovering the input tax relating to its taxed activity. The court emphasised that as the sale of services had taken place but the entity which had sold them did not have the status of an active VAT payer, then it could not be considered that the purchaser should bear the negative consequences of that action of the seller.

- **In a judgment of 9 December 2008 (I FSK 1589/07), the Supreme Administrative Court in Warsaw found that a company providing free-of-charge services to its employees and their families should charge VAT on the services, as they were not performed for business purposes.**

  The request for an interpretation came from a public transport business providing free-of-charge services to its employees and family members consisting of journeys by municipal means of transport. The company was of the opinion that providing free-of-charge transport could not be considered as delivery of goods or provision of services, and therefore was not taxable. In contrast, tax authorities and the Voivodship Administrative Court considered free-of-charge transport services to be free-of-charge services unrelated to the conducted business. As the company deducted the input tax earlier, the above services should be taxed in accordance with Article 8 (2) of the VAT Act. The Supreme Administrative Court shared the standpoint of the tax authorities and the Voivodship Administrative Court, and considered that the company provided free-of-charge services by ensuring free-of-charge transport to its employees and family members. Furthermore, services of this type cannot be considered related to the conducted business. Only services provided for the purposes of the conducted business and not used for accommodating the personal needs of employees and family members can be treated as such.

- **In a judgment of 20 January 2009 (I FSK 1500/08), the Supreme Administrative Court in Warsaw considered that a supplier of goods to EU Member States was entitled to the zero VAT rate, even without having**

obtained a confirmation of export on the day of submitting the tax return.
A company delivering products to entities in other EU Member States requested the interpretation. In the company's opinion, if it does not hold all the documents confirming completion of the intra-Community delivery at the time of submitting the VAT-7 tax return for the given financial period, the company should disclose such transactions in the tax records as deliveries within the country. However, the company does not have to disclose such transactions in the VAT-7 tax return or pay the tax. In contrast, the Ministry of Finance and the Voivodship Administrative Court found that in the above circumstances the company should disclose a domestic delivery in the VAT-7 tax return and pay the output tax. The Supreme Administrative Court shared the company's standpoint. It pointed out that the lack of documents confirming the export of goods before submission of the tax return for the given financial period, when the export actually took place within the framework of intra-Community delivery of goods, did not create a duty to tax the transaction in accordance with the rules applicable to domestic deliveries using the 22% rate. In accordance with Article 42 (12) of the VAT Act, the company must only include the transaction in the tax records as a domestic delivery.

- **In its judgement of 15 January 2009 passed in the case of K-1 (C-502/07) the European Court of Justice ruled that an additional tax obligation in the VAT is not contrary to Community legislation.**
The tax office ascertained that the company had overstated the input VAT in the declaration and ruled an additional tax obligation for that month. The company appealed to the Fiscal Chamber and then lodged a plaint with the Voivodship Administrative Court pleading inconsistency of the tax sanction with Community legislation. Neither the tax authority of the second instance nor the court shared the opinion of the company, which then filed a cassation. The Supreme Administrative Court submitted a prejudicial question to the ECJ. The Court stated that an additional tax obligation in VAT does not have the characteristics of the VAT, and in particular, that the event giving raise to this obligation is not a taxable transaction but an error in a tax declaration. In addition, the amount of the obligation is not proportionate to the price received by the taxpayer. Therefore, this is not a tax, but an administrative sanction imposed in the event of ascertaining that the taxpayer has overstated the VAT refund amount. The European Court of Justice stressed that the Member States may impose other obligations, deemed by them necessary for the correct calculation and collection of the tax. It also pointed out that an additional obligation does not constitute a special measure, the introduction of which requires the consent of the European Union.

Corporate Income Tax

- **Business entities which deducted VAT on fuel for company cars through tax correction are not required to correct deductible expenses in income tax calculations.**
In connection with the doubts which were raised after the ECJ issued its judgment in the Magoora case (C-414/07) on 22 December 2008, the Ministry of Finance released on 12 January 2009 an announcement on the income tax effects of correction of input tax settlements in connection with the purchase of company cars and related fuel. The ECJ found that Poland, since its accession to the European Union, did not have the right to eliminate tax deduction for so-called "cars with rear bars" or

replace it by a more rigorous deduction made on the basis of the so-called Lisak formula. Also ineffective is the subsequent change, which introduced the currently applicable deduction mechanism. Taxpayers entitled to deduct input tax paid on fuel purchased for company cars under the rules in force before 1 May 2004, which lost this right as a result of subsequent changes, may submit VAT tax return corrections. These taxpayers included non-deductible input tax in the deductible expenses. As explained by the Ministry of Finance, the VAT correction does not result in a duty of correction in income taxes by reducing the deductible expenses by the amount of the input tax which will be deducted as a result of VAT correction. Instead, the amount of reimbursement or lowering of the VAT will constitute income tax revenue.

- **In a judgment of 20 November 2008 (II FSK 1171/07), the Supreme Administrative Court in Warsaw considered that a company which pays a company based in another country a fee for the use of computer programs should have withheld tax on this fee and paid this tax to the tax office.**
  A distribution company purchased computer hardware along with licensed software and then sold it to other entities. The company was of the opinion that it was not under obligation to pay licence fees on the software because it did not use it but only marketed it. Therefore, the company was not under obligation to withhold "tax at source" on the software fees paid to foreign entities. Tax authorities were of a different opinion. They considered that under Article 21 (1) and Article 26 of the CIT Act payment of the licence fees on software for entities not based in Poland was associated with the duty of withholding tax. The Voivodship Administrative Court considered that tax authorities misclassified the fees for purchasing the right to software use as licence fees referred to in Article 12 (2) of the OECD Model Convention, and thus as a licence fee for scientific or literary works. As the double taxation agreement does not expressly mention computer program licences when defining licence fees, they cannot be classified as taxable with the withholding tax on licence fees. The Supreme Administrative Court overturned the judgment of the Voivodship Administrative Court, indicating that the reference to copyrights included in Article 21 (1) of the CIT Act covered the catalogue listed in Article 1 (1) (1) and Article 1 (2) of the Copyright Act, i.e. including computer programs.

Personal Income Tax

- **In its judgement of 27 January 2009, in the case of Hein Porsche (C-318/07) the European Court of Justice ruled that limiting deductions of donations made to charitable organisations established in Member States other than the Member State of the donor is not allowed.**
  In his 2003 tax returns, Hein Porsche, a German tax resident, deducted a donation made to a charitable organisation in Portugal. The German inland revenue office refused to accept this deduction arguing that the beneficiary of the donation was not established in Germany and that Hein Porsche had failed to submit the donation receipt confirmation in a due form. The German court asked the EJC a prejudicial question regarding the possibility of making a tax deduction contingent upon the beneficiary having its seat in the territory of the taxpayer's country. The European Court of Justice stated that restricting the possibility of deducting donations made to charitable organisations having their seat in other

Member States may affect the readiness of taxpayers to make such cross-border donations, and as such constitutes a restriction of free movement of capital, which is prohibited. The Court stressed that Community legislation does not impose upon the Member States an obligation to automatically recognise the status of foreign organisations with the status of charitable organisations in another Member State. A Member State may treat differently domestic and foreign organisations in its legal regulations pertaining to the tax-deductibility of donations. However, if a charitable organisation recognised as such in one Member State has as its objective the promotion of identical interests of the community, in such a way that it may be considered a charitable organisation in another Member State, the bodies of that State may not refuse it the right to equal treatment only because it does not have its seat in the territory of the Member State.

Other Information

- **In accordance with the judgment of the Voivodship Administrative Court in Gliwice of 8 January 2009 (I SA/GL 184/08), the three-month deadline for issuing a tax interpretation covers both drawing up and delivery of the document.**

  In the interpretation, the tax office considered the taxpayer's standpoint to be in error. The tax chamber refused to change the interpretation. In the appeal to the Voivodship Administrative Court in Gliwice, the taxpayer brought a charge that the interpretation was issued after the mandatory deadline.

  Under Article 14b § 3 and § 5 of the Tax Ordinance, failure by a tax authority to issue a tax interpretation within three months means that the standpoint presented in the taxpayer's request becomes valid. In doctrine and case law, there are controversies surrounding the issue of whether the interpretation must be prepared and signed by this deadline, or whether it must be sent – or delivered – to the taxpayer by the deadline. In its judgment, the Voivodship Administrative Court in Gliwice considered the latter standpoint to be right. The court emphasised that in accordance with established case law administrative courts and opinions found in the literature, the actual date of issuing a decision was the date it was delivered to the party concerned. Furthermore, the court pointed out that if the so-called tacit interpretation of the tax law remained within the legal system, then it should be inadmissible for a first-instance authority to issue a ruling in this case. A decision issued in such circumstances is void and the appeal body should revoke it *ex officio*.

- **In a judgment of 17 December 2008 (II FSK 1318/07), the Supreme Administrative Court found that sale of debt for a fee, constituting only one of the elements of provision of financial intermediation services, did not attract the tax on civil law transactions.**

  A company carrying on debt trade business requested a reimbursement of overpaid tax on civil law transactions in relation to entering into a debt sale contract. Tax authorities of both instances refused to make the reimbursement, pointing out that the status of the seller of the goods or property right was important, because the duty to pay the tax on civil law transactions or exemption from this tax depended on that status. In the authorities' opinion, in the presented state of facts the seller did not have the status of a VAT taxpayer because it sold its own debt. The Voivodship Administrative Court shared the opinion of the tax authorities, indicating that if the operation was neutral with respect to VAT, then as a result the exemption from the tax on civil law transactions could not

apply. The Supreme Administrative Court shared the taxpayer's opinion, indicating that the authorities had unjustifiably separated one of the elements of the business carried on by the company. Such an approach undermines the sense of business operations, which must be considered in overall terms. Sale of debt by the company was an element of its debt trade business and thus constituted a financial intermediation activity exempted from VAT. And as an operation exempted from VAT it was subject to exclusion from the tax on civil law transactions.

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We hope that the above information will prove useful. This information is not a legal opinion or advice. To obtain full information or legal advice, please contact us.

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