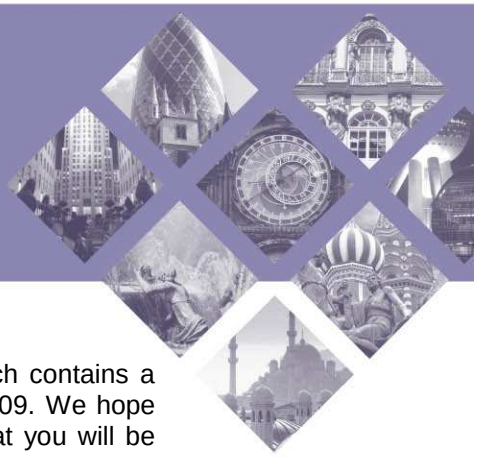
TAX PRESS REVIEW

KSP legal & tax advice



10/2009

We are pleased to present the next edition of our Tax Press Review which contains a selection of rulings and interpretations that had been issued in October 2009. 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 Provincial Administrative Court (WSA) in Gdańsk, in its ruling of 8 October 2009 (case ref. I SA/Gd 459/09) stated that in the case a taxpayer, for economic reasons, has decided to abandon an investment, he shall not be obliged to adjust VAT previously deducted in connection with purchasing goods and services.**
  Tax authorities decided that abandonment of an investment by an economic entity results in the situation where such an investment will not be used in the future to perform VAT-able transactions. Consequently, the company is obliged to make a one-time adjustment of input VAT in the statement for the account period in which the decision on abandoning the investment was taken. The court did not share the opinion of the tax authorities, and indicated that there was no obligation to submit an adjustment of deducted VAT. However, the Court emphasized that the taxpayer is released of said obligation only in case the investment was not used for any purpose, and it was abandoned for reasons beyond the taxpayer's control.

CIT

- **The Director of the Tax Chamber in Warsaw, in the interpretation dated 6 October 2009 (IPPB5/423-432/09-6/JC) stated that a company that distributes advertising gifts to its clients may treat the same as deductible costs.**
  A Company owning a shopping center organizes various forms of events of promotional nature during which sweets and gadgets are distributed and in-kind prizes are drawn. The aim of such events is to attract clients to visit the shopping center and the stores operating within its premises (the Company derives its income mainly from leasehold). The Head of the Fiscal Chamber believes that the Company's activity is aimed primarily to increase its revenue and consequently the Company is entitled to treat the expenses incurred to purchase the sweets and gadgets as well as the in-kind prizes distributed among its clients as deductible costs, pursuant to article 15 sec. 1 of the CIT Act.

- **The Director of the Tax Chamber in Warsaw, in the interpretation dated 23 September 2009 (IPPB5/423-520/09-2/JC) indicated that a company which acquired food products to treat its clients and contracting parties may classify the expenses thus incurred as tax deductible costs.**
  The Director referred to the provisions of Article 16 sec. 1.28 of the CIT Act, which stipulate that entertainment costs (costs of representing the company), in particular costs incurred for gastronomic services, purchase of food and beverages, inclusive of alcoholic beverages, shall not be treated as tax deductible costs. He emphasized that representation, according to its dictionary definition, means splendor, lavishness in one's lifestyle, related to the position or social status. Expenses incurred by a company for its secretarial needs are customary treatment offered to contracting parties and clients, and a commonly practiced cultural standard (devoid of the quality of splendor), and as such they can be treated as deductible expenses.

- **The Director of the Tax Chamber in Warsaw, in the interpretation dated 6 October 2009 (IPPB5/423-433/09-4/JC)**

stated that a company that incurred expenses for infrastructure associated with a building investment is authorized to classify the same as tax deductible costs at the time of incurring them.
A developer incurred outlays for constructing related infrastructure, i.e. for the construction of parking lots and pedestrian traffic routes within the area owned by a commune. The infrastructure was related to completion of an investment in the form of a shopping hall. Since the infrastructure was not classified as a fixed asset owned by the Company, the Company had no legal right to use the same, and the expenses thus incurred were not expenses incurred for manufacture of a fixed asset or an investment in a third party's fixed asset. Therefore, they could not be accounted for in the form of depreciation write-offs. The Director of the Tax Chamber expressed the opinion that expenses incurred to construct associated infrastructure should be considered as costs other than directly associated with revenue, as they were not directly reflected in the revenue obtained, but they had to be incurred for the revenue to be obtained. Therefore, such expenses should be classified as tax deductible costs for the company upon being incurred.

- **The WSA in Warsaw, in the ruling passed on 4 September 2009 (case ref. III SA/Wa 871/09) resolved that losses sustained from non-depreciated portion of an investment in a third party's fixed asset were to be classified as deductible costs.**
The Court disagreed with the opinion expressed by tax authorities whereby in the situation when an agreement binding the parties is dissolved prior to full depreciation of an investment in a third party's fixed asset, and the investment, together with the fixed asset, is transferred to the owner, the non-depreciated portion thereof is not to be classified as deductible cost by the taxpayer who has depreciated the asset to date. The authorities stated that in this situation, a loss of the fixed assets resulting from its liquidation did not occur (to the amount of non-depreciated value of investment in third party's fixed asset), as the asset was not liquidated, i.e. it was not destroyed, as stipulated in article 16 sec. 1.6 of the CIT Act. The court, admitting the Company's standpoint, indicated that the possibility to treat the non-depreciated portion of investment in a third party's fixed asset as deductible cost is excluded if the type of business activity was changed, which was not the case in the actual situation subject to analysis.

- **The WSA in Lublin, in its ruling of 25 September 2009 (case ref. I SA/Lu 290/09) decided that charges related to the increase of company's capital are to be classified as tax deductible costs. They should be associated with the revenue derived from the activities financed as a result of share capital increase.**
Tax authorities queried the right of a company to treat expenses incurred for making a notarized deed and the tax on civil law transaction related to the increase of share capital as tax deductible costs, referring to article 12 sec. 4.4 of the CIT Act, which stipulates that revenues shall not include revenue received for the creation or increase of the initial capital. Consequently, also expenses incurred for the increase of share capital cannot be treated as tax deductible costs. The court's opinion was contrary: expenses of this kind should be associated and connected not so much with the revenue by which the share capital was increased, but with the revenue from the company's business activity financed from the amounts obtained for share capital increase. Consequently, said expenses are classified as deductible costs

within the meaning of article 15 sec. 1 of CIT Act.

Other Information

- **The WSA in Warsaw, in the ruling passed on 11 September 2009 (case ref. III SA/Wa 619/09) resolved that Polish regulations of the Act on Civil Law Transactions Tax of 2007-2008, providing for taxation of a loan granted to a capital company by its shareholder, were incompliant with the Community law.**
  A company applied for confirmation of overpayment of civil law transactions tax, indicating that a shareholder based in Belgium granted to it a loan exempt from such tax pursuant to article 9 sec. 10 of the CLT Tax Act. Tax authorities refused to confirm the overpayment indicating that granting of a loan to a capital company by its shareholder is to be considered as an amendment to the company's articles of association, which is subject to the CLT Tax (pursuant to article 1 sec. 3.1 of the CLT Tax Act). The court stated that the provisions of the CLT Tax Act of 2007-2008 were incompliant with the provisions of the Directive 69/335/EEC in this respect. In the legal situation as of 1 July 1984 (to which the directive applies), the civil law transactions tax applied only to loans granted by a company's shareholder where the total of all loans on the date of granting the loan exceeded half of the share capital. Upon accession to the European Union, Poland was not entitled to extend the scope of taxation with CLT Tax. However, according to the amendment to the CLT Tax Act which came into effect at the beginning of January 2007, CLT Tax became applicable to transactions which were exempt from taxation on the date of Poland's accession to the EU. This ruling opens the way to recovery of overpaid tax on civil law transactions by entities which received loans from their shareholders in 2007-2008.

- **The Supreme Administrative Court, in the ruling of 14 October 2009 (case ref. I FSK 197/08) stated that a taxpayer was eligible to recover the overpaid excise duty even if the tax was actually paid by the consumer. The right to repayment of the duty exists regardless of who has incurred the economic burden of the tax.**
  The Court indicated that the Polish legislator did not include the premise of taxpayer's impoverishment as a condition for claiming the repayment of overpaid tax. The Supreme Administrative Court expressed the opinion that the relation between the consumer and the taxpayer must not affect the interpretation of the regulations applicable to the relation between the taxpayer and public administration authority.

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We do hope the above information proves helpful. The information is not a legal opinion or advice. Please contact us to obtain full information or legal advice.

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