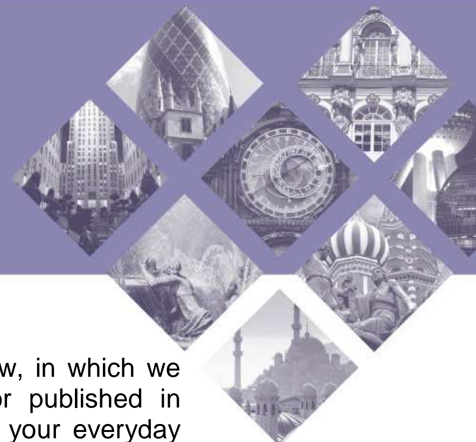
TAX PRESS REVIEW



11/2009

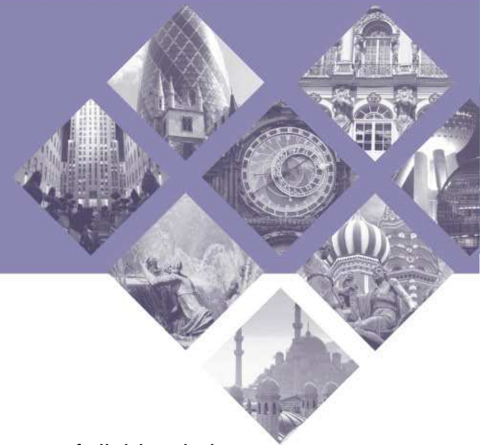
We are pleased to present to you a new release of the Tax Press Review, in which we describe selected tax rulings and interpretations that were released or published in November 2009. We hope that you find the publication of assistance in your everyday work and will be interested in receiving further releases of the Tax Press Review.

VAT

- **The Provincial Administrative Court (WSA) in Warsaw ruled on 28 October 2009 (case ref. III SA/Wa 712/09) that a taxpayer who, due to contractual clause amendments qualifies for higher remuneration, is obliged to issue a correction invoice relating to the earlier invoiced (pre-amendment) amount.**
In his request for an interpretation, the taxpayer asked about the consequences of the changed principles of settling installments on a leasing contract which occurred after the contract was signed, with regard to the increased value of various leasing rates. The tax authorities took the view that a correction increasing the output VAT should be settled in the month in which the initial invoice had been issued irrespective of the cause. The taxpayer argued in his complaint to the WSA that such an approach will cause tax arrears. In his view, the initial invoice had been issued correctly since he was in no position to foresee what the final tax base would be. The court took the part of the tax authorities stressing that the principles of settling corrections should be identical for all taxpayers irrespective of whether the increase in price occurs as a result of error or a change of contract.

- **The WSA in Warsaw ruled on 12 November 2009 (case ref. III SA/Wa 1255/09) that making a decrease in the VAT payable dependent on receiving confirmation of receipt of a correction invoice from the goods/service provider is against EU law.**
In his request for an individual interpretation of the tax law, the taxpayer argued that VAT Act art. 29. 4a is contrary to EU law because it infringes the principle of proportionality and neutrality in VAT. The tax authorities did not share the taxpayer's view arguing that the taxpayer is deducing from the corrected invoice beneficial legal effects for himself and thus the obligation weighs on him to prove the premises for reducing the tax base. The WSA waived this interpretation emphasising that EU regulations do not impose, as a condition for the right to reduce VAT to arise, the obligation to hold proof of delivery of a correction invoice of the purchaser of the goods or services. The legislator cannot introduce any additional formal requirements, other than those envisaged in EU regulations, which would restrict the right to reduce the VAT tax base.

- **The WSA in Poznań ruled on 13 October 2009 (case ref. I SA/Po 464/09) that a taxpayer is not obliged to correct input VAT on improvements on a real property contributed in kind to a limited partnership (*spółka komandytowa*).**
The company acquired real property on the basis of a VAT-exempt activity. It then sustained expenses on its improvement and deducted input VAT paid on the purchases associated with the enhancement. The court ruled that a contribution in kind was not listed among the activities entitled to VAT exemption on the basis of VAT Directive XI, 2006/112/WE. As a result, Poland had no right to exempt from VAT activities of



contribution-in-kind, but it could treat it as VAT neutral. Since Polish regulations on contributions-in-kind were at odds with the EU ones to 1 December 2008, it should be assumed that the contribution-in-kind should have been subject to VAT. In consequence, the taxpayer does not have the duty to correct the input VAT deducted earlier in connection with the improvement to the property.

- **The WSA in Wrocław ruled on 12 November 2009 (case ref. I SA/Wr 1155/09) that a rebate causing a reduction of the tax base for VAT may be documented not only by invoice but also by other documents.**
  The taxpayer received rebates directly from his suppliers and by proxy of a company which negotiated terms of delivery in his name. The rebates received directly from suppliers were backed by correction invoices. Those received from the intermediary were documented by credit notes. The tax authorities took the view that rebates could only be documented by correction invoices. However, the WSA ruled that a rebate could be documented otherwise, for example, by credit note. Such a document must be supplemented with additional information which shows who gave whom the rebate and in what amount.

Corporate Income Tax (CIT)

- **The WSA in Wrocław ruled on 4 November 2009 (case ref. I SA/Wr 1250/09) that a capital company can book interest on a loan drawn to pay dividends as tax deductible costs.**
  In answer to the application for an individual interpretation, the tax authorities took the view that that the payment of dividends is not an income-generating expense. The WSA dismissed this interpretation arguing that a loan to pay dividends enables the company to maintain its financial fluidity, thus it has a connection with the conduct of economic activity. Moreover, the court emphasised that in the scope outlined above, the tax authorities should take cognizance of the established case law.

- **The Supreme Administrative Court (NSA) ruled on 13 October 2009 (case ref. II FSK 514/09) that in order to book losses on forward type contracts as tax deductible costs, their connection with the revenue achieved by the taxpayer must be demonstrated.**
  The company entered into a forward type contract to build a gas pumping station still before it came into effect. The tax authorities questioned losses sustained on a forward contract being booked as tax deductible costs since in their opinion there was no causal link between the expenses and the revenues achieved in subsequent years from the building of a gas pumping station. The WSA upheld the company's view pointing out that the recognition of expenditure on term contracts as tax costs requires assessment from the point of view of its purposefulness. With this the decisive factor is the striving itself for achieving revenue and not the effect of these efforts. The NSA quashed the WSA verdict expounding in its oral justification of its position that the court of first instance did not indicate the legal basis for booking expenses associated with term contracts as tax deductible costs.

Personal Income Tax (PIT)

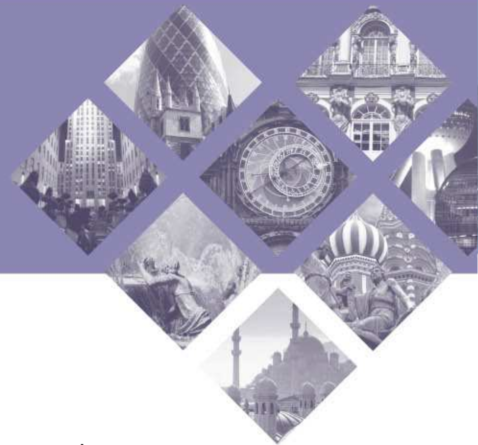
- **The WSA in Warsaw ruled on 28 October 2009 (case ref. III SA/Wa 628/09) that taxable income on shares received by workers on preferential terms arises only when they are sold.**
  In response to a request for an individual interpretation, the tax authorities asserted that a taxpayer's income arises upon the receipt of shares on preferential terms. The WSA did not share this interpretation pointing out that the recognition of income should be moved to the moment of disposal of these shares by the worker.

- **The WSA in Warsaw ruled on 10 November 2009 (case ref. III SA/Wa 623/09) that a worker does not have to pay tax on the value of a medical benefits package made available to him and his family free-of-charge by his employer.**
  The tax authorities argued that the income arising from an employment relationship is not predetermined by the employee or a member of his family utilising a specific medical service but the very fact of receipt by the employee and his family of a medical subscription (of defined monetary value). The court upheld the taxpayer's case, arguing that the placing at the disposal of the employee of a free benefit is not in itself subject to tax. Employees in receipt of free medical benefits packages from their employers do not receive any pecuniary consideration, as a result of which there is no tax liability on their value.

Tax on Civil Transactions (PCC)

- **The ETS ruled on 12 November 2009 (case ref. C-441/08) that Poland had no right to charge PCC on a debt for equity swap when earlier, before 1 May 2004, PCC was paid on account of this loan.**
  In his application for confirmation of overpayment, the taxpayer pointed out that by paying PCC on the loan and then again on its conversion to capital, EU law and double taxation had been violated. The tax authorities dismissed the application arguing that taking into account pre-EU accession events for defining the legal effects of post-accession activities would mean the retroactive application of the law. The NSA addressed the question to the ETS, which asserted that under EU law, in calculating the tax base arising from an increase in share capital by way of a debt for equity swap before Poland's accession to the EU (in a situation when the swap came after our accession) the tax paid earlier on account of the loans received should be taken into account. The ETS underlined that EU regulations are to be applied to future effects of events occurring before the accession of a given state to the EU.

- **The WSA in Kraków ruled on 22 October 2009 (case ref. I SA/Kr 813/09) that the appropriation by Poland of PCC on contributions in the shape of an enterprise or its organised part before 1 January 2009 was contrary to EU law.**
  Under the binding EU regulations, member states are obliged to exempt from capital gains tax (in Poland it is PCC) activities connected with the contribution of an enterprise or its organised part, as long as on 1 July 1984 they were tax exempt, or subject to a tax rate no higher than 0.5%. In this period, similar transactions in Poland were subject to stamp duty at the highest rate. As a result, the tax authorities, taking



the literal interpretation of the regulation, maintain that the Treasury did not have the obligation to exempt the above activities from tax after 1 May 2004. The WSA, invoking the ETS ruling (case ref. C-397/07), ruled that Poland is obliged to apply exemptions arguing that exemptions should be considered in the context of the initial wording of the EU regulations and their further amendments. Since 1 January 1976, tax on these transactions was reduced to between 0% and 0.5%. In the light of the above, in the court's view, the aim of the EU legislator was undoubtedly to make the discussed restructuring transactions tax exempt.

- **The WSA in Gdańsk ruled on 27 October 2009 (case ref. I SA/Gd 491/09) that the purchase of receivables as components of an organised part of an enterprise that is being acquired, is not a service under the VAT Act and, as such, the transaction is subject to PCC.**
  In the court's assessment, an analysis of the resolutions in a contract of sale and the declarations of the parties, indicates that the transaction constituted a one-off sale of components of the seller's assets in the form of an organised part of an enterprise. Because on the part of the buyer there is a lack of intention to undertake similar activities in a frequent way. In consequence, the acquisition of receivables does not constitute VATable services rendered by the buyer, but financial intermediation and thus subject to PCC.

- **The NSA in Warsaw ruled on 28 October 2009 (case ref. II FSK 870/08) that the acquisition of shares as part of a squeeze out of shares is not subject to PCC.**
  In the court's assessment, the squeeze out of shares, as regulated by art. 418 of the Commercial Company Code (KSH), cannot be identified as a contract of sale. It is a specific institution quite distinguishable from a contract of sale, regulated exclusively by the KSH. The court emphasised that it cannot be treated as a sale equally because it does not fulfill the characteristics of a contract of sale as regulated by the Civil Code. In connection with the above, it is not subject to PCC since it is not listed in the catalogue of activities encompassed by this tax.

Miscellaneous

- **The WSA in Wrocław ruled on 4 November 2009 (case ref. I SA/Wr 1034/09) that cable lines together with their casing duct systems constitute structures (as a telecommunications network), and increase the taxable base of this structure by real estate tax.**
  The dispute concerned the inclusion of the value of cable lines in the tax base of the cable duct system (which is a structure), which they run through. The taxpayer argued that the cable lines are not an integral part of the cable duct system (cable vaults). He stressed that in his register of fixed assets cable lines and the cable duct system constitute separate fixed assets. The court indicated that cable lines constitute a part of the technical network which consists of – apart from the cables themselves – the cable ducts as well. A cable casing duct system constitutes protection for the cables running through it. Thus the subject of the tax is the telecommunications network structures which are made up of two component parts: the cable duct system and the

telecommunication cable lines that it protects. These two elements together constitute a technical-utility whole.

* * *

We hope that the above information proves helpful. The information does not constitute a legal opinion or advice. To obtain further information or legal advice please contact us.

Contact in SALANS:

Salans
Rondo ONZ 1
00-124 Warszawa

Tel. (22) 242 52 52
Fax. (22) 242 52 42

Karina Furga-Dąbrowska
email: kfurga-dabrowska@salans.com

Contact in KSP:

Krupa Srokosz Patryas sp. k.
ul. Chorzowska 50
40-121 Katowice

Tel. (32) 731 68 50
Fax. (32) 731 68 51

Magdalena Patryas
email: magdalena.patryas@ksplegal.pl