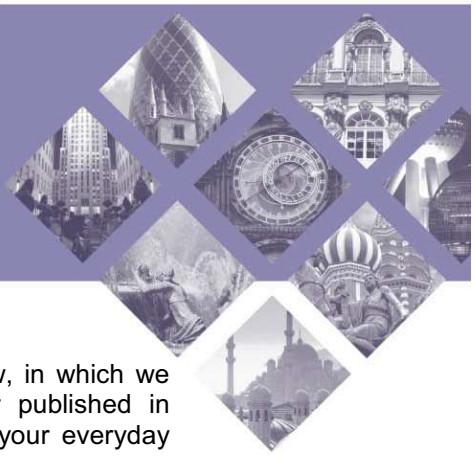
TAX PRESS REVIEW

KSP legal & tax advice



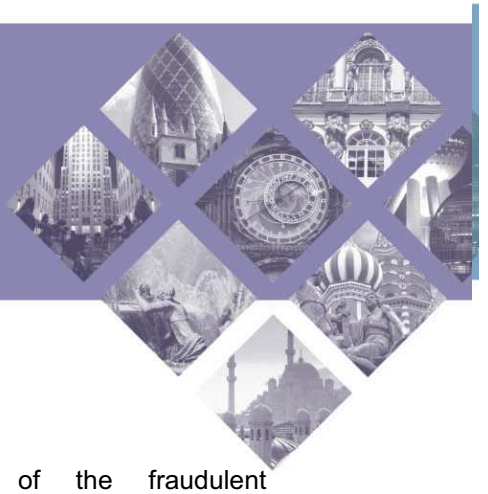
12/2008

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 December 2008. 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 WSA (Provincial Administrative Court) ruled on December 18, 2008 (case ref. no. III SA/Wa 2337/08) that: the lack the entitlement to deduct VAT by companies whose sales are exempted from VAT in the majority of cases is in conflict with EU law.**
  A Bank addressed the Head of the Tax Chamber with a request for an interpretation of Articles 90 and 91 of the VAT Law to determine whether the Bank would be entitled to make a final verification of the input VAT if the rate established pursuant to Art. 90 Section 2 of the VAT Law (the so-called sales ratio) amounts to 1%, and the ultimate ratio calculated at the end of year amounts to 3%. The Head stated that the taxpayer would be authorized to deduct 3% of the input tax since the final ratio would be higher than the initial one by 2% only. As pointed by the Court, the provision of Article 91 Section 1 of the VAT Law, which stipulates that in the event that the difference between the final and initial ratio does not exceed 2% the taxpayer is not authorized to deduct VAT in accordance with the higher ratio is inconsistent with VAT Directive 2006/112. Additionally, the VAT Directive does not contain any provision that would deprive the taxpayer of its right to deduct VAT if the sales ratio remains low. As a consequence, the rule expressed in Article 90 Section 2 of the VAT Law which deprives the taxpayer of the right to deduct VAT when the sales ratio does not exceed 2% is inconsistent with EU regulations.

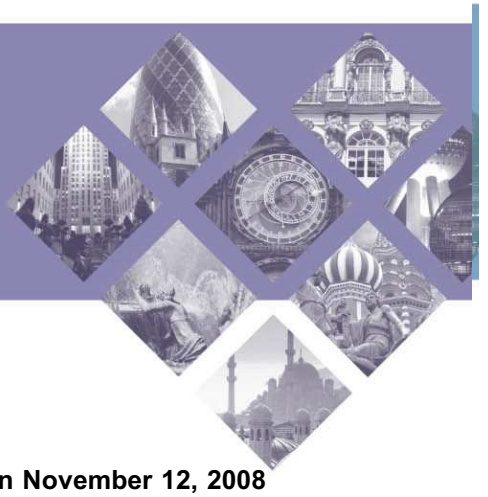
- **The ECJ (European Court of Justice) ruled on December 22, 2008 (case ref. no. C 414-07) that: the provisions of the Polish VAT law that restrict the possibility to deduct VAT on cars acquired by companies and the fuel used in such vehicles are inconsistent with EU regulations.**
  In 2005, a company entered into a car leasing contract. The company was deducting VAT on the leasing fees and purchased fuel. However, as a result of the unfavourable change in the law in August 2005, the company lost its right to deduct VAT on fuel. The company addressed the Head of the Revenue Office with a request for an interpretation of the provisions of the VAT Law regarding the scope of and limitations on the deduction of VAT charged when purchasing fuel for a car used pursuant to the car leasing contract. Following the adverse decisions of the tax authorities, the company filed a complaint with the WSA in Krakow which, in turn, addressed the ECJ with a prejudicial question. The Court found Poland in breach of the so-called stand-still clause, pursuant to which a new EU member state, following EU accession, may preserve only those restrictions on the right to deduct VAT that were effective prior to its accession. Meanwhile, as indicated by the Court, following its accession to the EU, Poland made two changes to the legal provisions imposing limitations on the right of business operators to deduct VAT. As a



consequence, the Court questioned the exclusion of the right to deduct the VAT charged paid on an estate car (following May 1, 2004) and those conforming with the so-called Lisak model (following August 22, 2005). The Court's ruling means that taxpayers will be entitled to claim refunds of the non-deducted VAT.

- **The NSA (Supreme Administrative Court) ruled on December 5, 2008 (case ref. no. I FSK 1581/07) that: an invoice received from a business partner not registered for VAT purposes does not deprive a person of the right to deduct VAT. In such an event, the tax authority must prove that the taxpayer at least suspected fraud. An unaware victim of a dishonest business partner will be able to reconcile the VAT invoice.**
  A taxpayer was deducting VAT on invoices issued by an entity not-registered for VAT purposes. A tax authority charged the purchaser for an illegal VAT deduction. The matter was resolved by the NSA which upheld the position of the first instance court that the tax authority failed to carefully examine the circumstances of the transaction. The examination limited to the verification as to whether the issuer of an invoice is registered for VAT purposes is an excessive oversimplification and cannot result in the automatic loss of the right to deduct VAT on the part of the business partner. The NSA pointed to the position of the ECJ which stated that a purchaser cannot bear the consequences of any dishonest actions of the seller if the purchaser, acting with due diligence, was not in the position to become aware of the fraudulent practices of the seller.

- **The new ordinance of the Finance Minister of November 28, 2008 has become effective. The ordinance regards the VAT Law and results from the amendment to the VAT Law which became effective on December 1, 2008.**
  The new ordinance introduces a number of new solutions. One of them is the removal of the VAT exemption for non-cash contributions made in commercial and civil companies. Pursuant to § 38 of the ordinance "*in the period through March 31, 2009, the tax exemption may be applied in the event of making non-cash contributions to commercial and civil companies*". Hence, the exemption will become definitely ineffective on April 1, 2009.
  Additionally, a higher limit of exemption was introduced as regards the imports of fuels transported in a standard container of a commercial motor vehicle used to transport cargo. Currently, it corresponds to 600 litres of fuel. Additionally, a zero tax rate now applies to cargo transport services within the EU if the transport constitutes a part of an international transport service. The following documents are required to benefit from the reduced tax rate:
  - Bill of lading or a cargo transport document;
  - Or any other document indicating that a third party border was crossed as a result of transporting goods from the place of dispatch to the cargo destination;



- An invoice issued by the transport agent.

Corporate Income Tax

❖ **The NSA ruled on November 14, 2008 (case ref. no. II FSK 1146/07) that: an entrepreneur purchasing receivables may report the expenses made on their purchase as tax deductibles in proportion to the revenues on enforcement.**

The facts of the case considered by the NSA related to a company purchasing receivables for the purposes of debt collection. The receivables purchase contract determined the value of the purchased receivables and the purchase price. Payment was made within 12 months and amounted to 70% of the value of the collected debt. The issue in dispute with the tax authorities was the question whether the company, when generating revenues on the partial debt collection may recognize the entire portion of the purchase price of the receivables as tax deductible. The company claimed that the taxable income is generated when the value of repayment exceeds the purchase price. The tax authorities held a different opinion arguing that when the company collected only a part of the debt from the debtor, the expenses incurred to purchase the same should be reported as tax deductibles only in proportion to the revenue so generated. The NSA upheld the position of the court of the first instance and agreed with the opinion of the tax authorities.

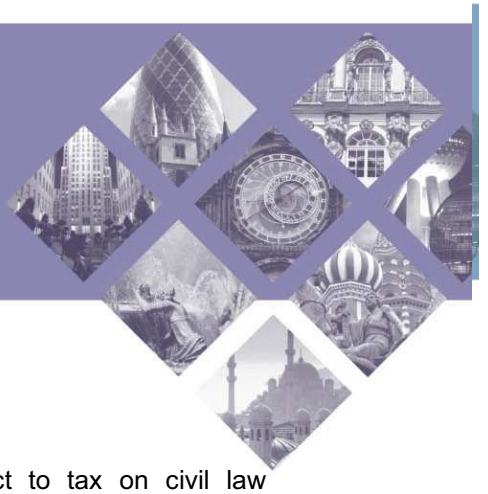
❖ **The WSA ruled on November 12, 2008 (case ref. no. I SA Sz333/08) that: a developer paying interest on the credit facility drawn to purchase land may not report the interest as tax deductible until it generates revenues on sales.**

The case involved a company engaged in the developer business. The company financed the purchase of land with a loan and credit facility drawn from a bank and reported interest as tax deductible on the interest payment date. The manner of interest reconciliation became the subject of the company's dispute with the tax authorities which argued that the interest may be deducted only upon generating revenues on the sale of the land so purchased. The court upheld the position of the tax authorities by reference to the arguments resulting from the interpretation of its purpose. As emphasized by the court, it would be inequitable to make entrepreneurs purchasing land with a credit facility or loan pay considerably less tax than the than those purchasing land with cash.

Personal Income Tax

❖ **The Head of the Tax Chamber in Warsaw issued an interpretation on December 9, 2008 (ref. no. IPPB2/415-1343/08-2/SP) stating that: a subscription for non-compulsory medical services purchased for an employee and members of his/her family constitutes taxable revenue on employment contract.**

A company financing medical services for its employees and members of their families asked the Chamber whether the

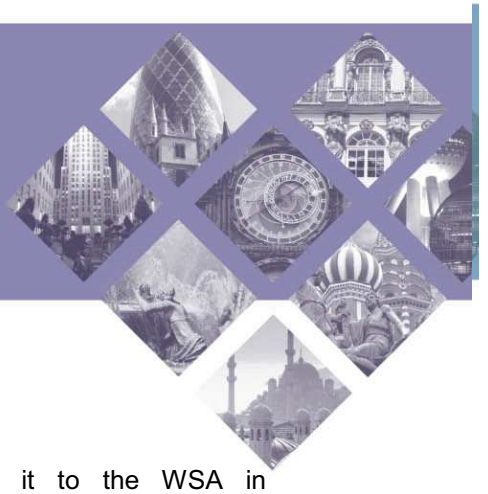


sole warranty of access to free-of-charge medical services in subscription constitutes an employee's tax-free benefit-in-kind or taxable income if the medical services are used. The Head of the Tax Chamber stated that the value of the medical services portfolio that entitles the employees to use specific medical services constitutes taxable income arising from an employment contract. At the same time, the Head stressed that it is not the fact of using such medical services by the employee that creates a taxable event but the sole fact of the employee and his/ her family receiving a subscription of a specific monetary value.

Other Information

- **The Head of the Tax Chamber in Warsaw issued an interpretation on November 19, 2008 (ref. no. IPPB2/436-352/08-2/MZ) stating that: a cash – pooling contract is not subject to tax on civil law transactions.**
  A company intended to execute a cash – pooling contract pursuant to which it intended to entrust a company based in Belgium with the management of the company's liquidity. A company was supposed to have an account opened with a foreign bank to be incorporated by the bank into the financial liquidity management system maintained for a group of companies being members of a cash – pooling structure. In connection with the planned undertaking, the company asked the Head of the Tax Chamber whether the cash – pooling contract is subject to tax on civil law transactions. The Head of the Tax Chamber pointed out that the cash-pooling contract is not subject to that tax because Article 1 Section 1 Clause 1 letter b of the Act on Tax on Civil Law Transactions relates to loan agreements pursuant to which the lender agrees to transfer to the borrower the title to a specific amount of money or items specified as to their type and the borrower agrees to repay the same amount of money or return the same number of items of the same type and quality.

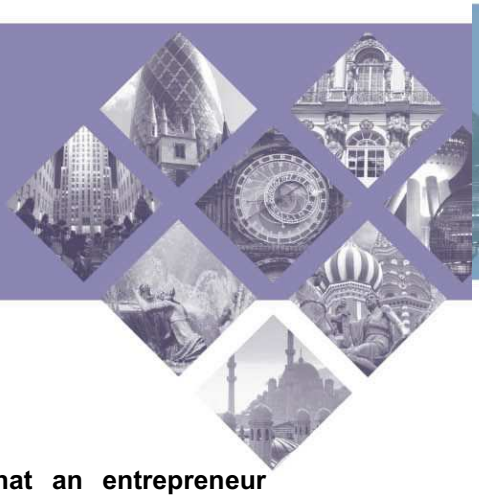
- **The NSA ruled on December 17, 2008 (case ref. no. II FSK 1318/07) that: a non-gratuitous disposal of receivables constitutes a service within the meaning of the VAT Law and is VAT-exempt. Therefore, a non-gratuitous disposal of receivables which constitutes only one of the elements of providing the service of financial intermediation is not subject to tax on civil law transactions.**
  A company asked the tax authorities to confirm that it had made a tax overpayment on a civil law transaction paid on account of the execution of an agreement for the purchase of receivables. Tax authorities refused to confirm the overpayment by pointing out that the sale of one's own receivables does not constitute a non-gratuitous delivery of goods and, as such, is not covered by the regulations of the VAT Law. As a consequence, since the transaction was not subject to VAT, the company was required to pay tax on civil law transactions. The position of the tax



authorities was then confirmed by the Court of the first instance. However, the NSA upheld the company's position. In the opinion of the NSA, the non-gratuitous sale of receivables by the company constituted a service within the meaning of Article 5 Section 1 and 2 and Article 8 Section 1 of the VAT Law. It constituted financial intermediation services consisting in the trading in receivables (purchase and sale), and, as a consequence, business activity performed on the company's own account with the use of the company's own funds. The service was rendered to the seller of receivables and, pursuant to the VAT Law, it was VAT-exempt. Therefore, pursuant to Article 1 Section 1 and Article 2 Clause 4 of the Act on the Tax on Civil Law Transactions, the non-gratuitous sale of receivables constituting only one element of the financial intermediation service is not subject to tax on civil law transactions.

- **The WSA ruled on November 27, 2008 (case ref. no. I SA/Sz 496/08) that: when resolving a tax issue, the tax authorities may refuse to take into account the issued interpretation. Therefore, if simultaneous proceedings for an interpretation and tax proceedings are in progress, the authorities do not have to suspend the tax proceedings until the interpretation is issued.**
- Spouses asked the tax authorities whether the sale of 13 plots of land designated for development in the local zoning plan is subject to VAT. The authorities issued an interpretation that was unfavourable for the taxpayers who appealed against it to the WSA in Warsaw. Due to the contents of the interpretation and the fact that the wife was not registered for VAT purposes, the tax authorities instituted proceedings against the wife. Tax authorities of both instances refused to suspend the proceedings until the appeal against the interpretation is resolved. The court pointed out that pursuant to Article 201 § 1 Clause 2 of the Tax Code, a tax authority suspends proceedings when the consideration of the case and the issue of a decision is preconditioned by the resolution of a preliminary issue by another authority or court. The Court stated that the tax authority, when resolving a tax issue, may refuse to take into account the issued interpretation. Therefore, if proceedings for an interpretation and tax proceedings are in progress simultaneously, the authority is not required to suspend the tax proceedings until the proceedings for the issue of an interpretation are effectively concluded. The Court pointed out that the matter is not resolved in the proceedings for the issue of an individual interpretation and instead, a position is only taken as regards the issue of the interpretation of a provision that provokes problems with interpretation.

- **The NSA ruled on November 6, 2008 (case ref. no. II FSK 1031/07) that; the tax authorities should prepare and deliver interpretations to applicants within three months following the receipt of a request for an interpretation. If the interpretation is delivered upon the lapse of such a**



period, the authorities must adopt the position of the taxpayer.
On April 3, 2006, asked the Head of a Tax Office for an interpretation of the tax law. This interpretation was delivered to the Company after the lapse of the three-month deadline for a response. As pointed out by the WSA in Warsaw, the authorities violated Art. 14 § 3 of the Tax Code pursuant to which, if an interpretation is delivered more than three-months after the filing of the request, the tax office must endorse the taxpayer's position. The WSA ruled that the phrase "issue of a decision", as used by the legislator means the delivery of a decision to a party. In the case in question, the delivery occurred after July 3, and, as a consequence, the three-month deadline was not observed. The NSA upheld the WSA's position, and cited the NSA resolution adopted by the panel of seven judges on November 4, 2008 (case ref. no. I FPS 2/08), in which it was stated that "a failure to hand down a decision" means the failure to deliver it within the three months following the date of the submission of a request for interpretation.

- **The WSA in Gdańsk ruled on October 21, 2008 (case ref. no. I SA/Gd 418/08) that: the fact that an entrepreneur uses a building for the conduct of seasonal business activity is irrelevant to real property tax assessment.**
A taxpayer, filing an appeal against the decision of tax authorities, stated that the tax is assessed for the whole year while the company conducts its business activity for 5 months in each year and the activity is suspended for the remainder of the year. When dismissing the taxpayer's appeal, the WSA in Gdansk stressed that the tax is assessed with respect to the real property and not the business activity of the taxpayer. Additionally, the suspension of the business activity by the taxpayer is related to the adopted business strategy. Therefore, the lack of profits from the conducted business activities and the need to refurbish a building structure cannot have an impact on the principles of making real property tax assessments.

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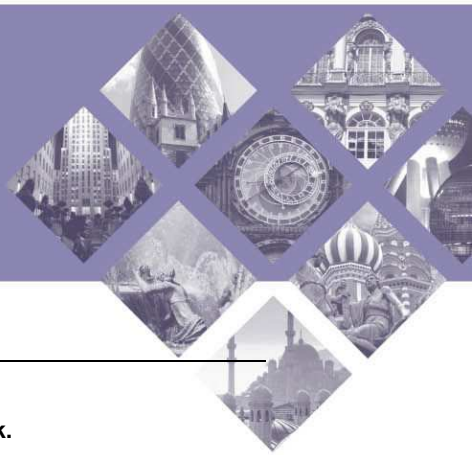
We hope that the above information proves helpful. The information does not constitute a legal opinion or advice. To obtain further information or legal advice please contact us.



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