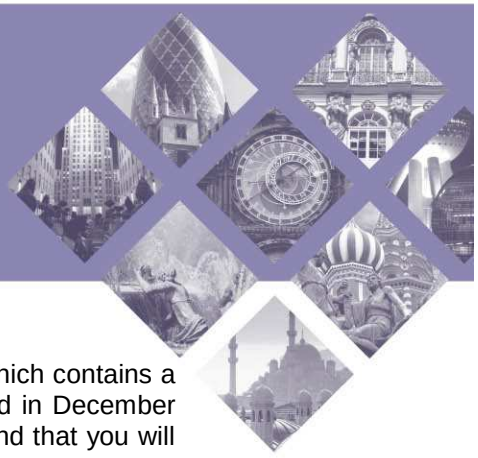
TAX PRESS REVIEW

KSP legal & tax advice



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We are pleased to present you the latest edition of the Tax Press Review which contains a selection of tax rulings and tax interpretations that were issued or published in December 2009. We hope that you find our publication useful in your everyday work and that you will be interested in receiving further editions of the Tax Press Review.

VAT

- **The NSA (Supreme Administrative Court) ruled on 4 December 2009 (case ref. I FSK 1859/08) that when taxpayers have issued a VAT invoice which does not document any transaction, they are obliged to settle such invoice without including it in the VAT return.**
  A municipality which had mistakenly issued a VAT invoice for a previously terminated lease agreement intended to settle the VAT mentioned on the invoice in its monthly tax return. However, the NSA stressed that where the so-called 'empty invoice' is issued, the VAT Act provides for the settlement of VAT in a separate procedure, not covered by the tax return. Therefore, taxpayers are not allowed to include the VAT amount stipulated on such invoices in the monthly tax return.

- **The WSA (Provincial Administrative Court) in Warsaw ruled on 7 December 2009 (case ref. III SA/Wa 1110/09), that where a housing unit is sold together with the exclusive right to use a parking space located in separate facilities in the same residential building, a VAT rate of 7% shall be applicable.**
  Thus, the Court questioned the position of the tax authorities, which take the view that the sale of a parking space is a separate transaction, independent from the sale of a housing unit and subject to a VAT rate of 22%. According to WSA, if one transaction is concluded, involving the sale of a housing unit together with the exclusive right to use a parking space located in separate facilities in the same building as the housing unit, the division of this transaction into two is arbitrary and unjustified.

- **The WSA in Warsaw ruled on 10 December 2009 (case ref. III SA/Wa 1022/09) that the amount of leasing insurance which the lessor charges to the lessee should be taken into account for the purpose of calculating the taxable amount for VAT.**
  In its ruling, the Court confirmed the position of the tax authorities. According to WSA any costs charged to the lessee should be included in the taxable amount for value added tax. Where the lessor takes out insurance for the asset being leased and subsequently re-invoices this service to the beneficiary, the service rendered qualifies as a homogeneous service which should be subject to one VAT rate as applicable to the primary service. The Court is of the opinion that the insurance costs constitute a component of the leasing service.

CIT

- **The WSA in Gdańsk stated in the ruling of 24 November 2009 (case ref. I SA/Gd 494/09) that an absence of real property or rights to real property among the assets contributed in kind to another entity does not preclude such assets from constituting an organized part of an enterprise.**
  The Court takes the view that a part of an enterprise may constitute a separate organized unit even if its tangible and intangible assets intended for the purpose of achieving specific economic objectives do

not include rights to real property, provided that such assets may constitute an independent enterprise, capable of implementing such objectives on its own. An organized part of an enterprise does not need to have the location - as at the date of its contribution to another entity - resulting from the right to dispose of real property constituting one of the tangible components of the assets.

- **The Director of the Tax Chamber in Warsaw stated in a tax interpretation of 17 November 2009 (IPPB3/423-546/09-2/KK) that the costs incurred in connection with the activity of supervisory bodies, i.e. the supervisory board or the audit committee, which are not of personal benefit to the members of such bodies constitute tax deductible costs of the company.**
  A company submitted a query about the possibility to classify the costs related directly to the activity of the company's supervisory body, i.e. costs of hiring conference rooms, legal consulting, translation and interpretation as well as the expenses concerning directly the members of such a body (for instance covering the costs of the participation of the members of such bodies in training sessions/seminars on the activity of the body in question and on the performance of specific tasks by its members) as tax deductible costs. The Director pointed out that costs of the training sessions/seminars for the members of the supervisory board are typical expenses of personal nature - they contribute to the improvement of qualifications and furthering of expertise, which the members need in order to be able to perform the tasks entrusted to them. Such expertise can be used solely by those persons - at present and in the future, not only for the purpose of fulfilling the tasks of the member of the company's supervisory board. However, the company is entitled to classify other expenses related to the activity of the supervisory body, such as the costs of hiring of the conference rooms, legal consulting, translation and interpretation, costs of phone calls, etc. as tax deductible costs.

- **The Director of the Tax Chamber in Warsaw stated in a tax interpretation of 18 November 2009 IPPB3/423-648/09-8/AG) that in the event of merger by acquisition accounted for under the pooling of interest method the books of accounts of the acquired company shall not be closed as at the day of the merger and the company's legal successor shall not be obliged to submit an annual tax return on behalf of the acquired company separately from the taxpayer's annual tax return.**
  The taxpayer, a joint stock company, owns 100% of shares in a limited liability company with which it intends to merge by acquisition. The Director indicated that, under Art. 12 paragraph 3, subparagraph 2 of the Accounting Act, the books of account need not be closed and opened in case of a merger of entities if in accordance with the provisions of the Act the acquisition is accounted for under the pooling of interest method and does not result in a new entity being established.

- **The WSA in Cracow ruled on 5 November 2009 (case ref. I SA/Kr 1016/09) that, with the increase in the initial capital not being subject to income tax, the recognition of the costs incurred for the issue of shares**

as tax deductible costs would result in a double reduction of the tax base.
The Court confirmed the position of the tax authority and pointed out that expenses related to the increasing of initial capital by the issue of shares, such as the payments due to the investment advisor, expert auditors, legal advisors, brokerage office or advertising agencies as well as court fees are not considered tax deductible costs. A financial benefit received for the purpose of increasing the capital does not qualify as income in accordance with tax law provisions and does not lead to an increase in tax base. If the above mentioned expenses were to be regarded as tax deductible costs, the tax base would be reduced twice due to the same circumstances – first by a statutory reduction of income and, subsequently, by inflated costs.

- **The WSA in Warsaw ruled on 16 November 2009 (case ref. III SA/Wa 898/09) that the costs of a loan (commission, interest rates) taken out for the purpose of redeeming shares do not qualify as tax deductible costs.**
The Court takes the view that expenses incurred for the redemption of capital which is related to creating, expanding or improving a source of income are not to be considered tax deductible costs. The costs of a loan granted to a company for the purpose of buying out and later redeeming the shares are to be classified among the expenses referred to in Art. 16 paragraph 1, subparagraph 10 c) of the CIT Act. Therefore, such expenses cannot be regarded as tax deductible costs.

PIT

- **The Director of the Tax Chamber in Warsaw stated in a tax interpretation of 16 December 2009 (IPPB1/415-746/09-2/EC) that expenses incurred for snacks and drinks served during business meetings constitute tax deductible costs. However, the taxpayers are not entitled to classify expenses incurred for meals and drinks ordered during a business meeting in a restaurant as tax deductible costs.**
As the Director stressed, under Art. 23 (1) of the PIT Act the hospitality expenses, in particular those incurred for food services, the purchase of food and drinks, including alcoholic beverages, do not qualify as tax deductible costs. Hospitality expenses are defined as expenses incurred by taxpayers for the purpose of creating a positive image of themselves as well as emphasizing their wealth and professional approach. The costs of snacks and drinks served during business meetings held in the premises where the economic activity is conducted, provided that such snacks and drinks are not of a sumptuous nature, are customary and, not being mentioned in Art. 23 of the PIT Act, they can be classified as tax deductible costs. Simultaneously, in view of the fact that expenses incurred for lunch, dinner or supper served during business meetings in restaurants or cafes (outside the principal place of business) involve creating and maintaining a positive image of the company, they cannot be regarded as tax deductible costs.

Tax on civil law transactions

- **The NSA ruled on 5 November 2009 (case ref. II FSK 891/08) that a taxpayer who terminates a contract with the consent of the other party has no right to claim the refund of the tax on civil law transactions.**
  As stressed by the Court, the termination of a contract by mutual consent does not constitute grounds for a refund of the tax on civil law transactions (Polish: PCC). A taxpayer who had terminated a contract and, subsequently, concluded it again, has no right to claim a refund of the tax paid. The tax on civil law transactions is subject to refund, *inter alia,* where the legal effects of the declaration of will have been revoked (the so-called relative nullity). Avoidance of the legal effects of civil law transactions by a simple declaration of will does not constitute grounds for the tax refund.

Other information

- **The NSA ruled on 14 December 2009 (case ref. FPS 7/09) that it cannot be inferred from the provisions of the Tax Ordinance Act that the tax authority is to deliver a tax interpretation within three months. Issuing a tax interpretation does not cover its delivery.**
  The Court ruled that following the amendment of the provisions the concept of failing to issue a tax interpretation cannot be deemed to cover the failure to deliver such a decision, with effect from 1 January 2007. It was established that if a taxpayer can be protected under the system of tax interpretations, the authority itself needs to be protected against negative effects of delays in delivery by the Polish postal service and of the deliberate avoidance of the receipt of postal deliveries by the taxpayer. Thus, even if a postal delivery reaches the taxpayer after three months have expired, he or she will not be entitled to invoke the so-called 'acceptance by silence', which refers to a situation in which the position of the taxpayer becomes applicable due to the tax authority's failure to deliver the letter within the deadline.

- **The WSA in Wrocław ruled on 18 November 2009 (case ref. I SA/Wr 1521/09) that preferential default interest rates due to be paid in the event of a voluntary adjustment of a tax return do not apply exclusively to the tax returns submitted after 1 January 2009. Taxpayers who voluntarily adjust their tax returns are eligible for this relief also with regard to earlier tax returns.**
  A company inquired if it is possible to apply reduced interest rates of 75% of the outstanding amount where the adjustment of a tax return concerning the previous years is performed after 1 January 2009. The tax authority concluded that the current regulation has no retroactive force and therefore is applicable to adjustments of tax returns submitted after 1 January 2009. The Court did not agree with this interpretation and established that the statutory regulation does not lay down any time criteria for the application of the reduced rates for default interests.

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We hope that the above information will prove useful. This information does not constitute legal opinion or advice..Should you require exhaustive information or legal advice, please contact us. .

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