TAX PRESS REVIEW

2/2009

We are proud to present the next edition of our Tax Press Review which contains a selection of rulings and interpretations that had been issued or published in February. 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.

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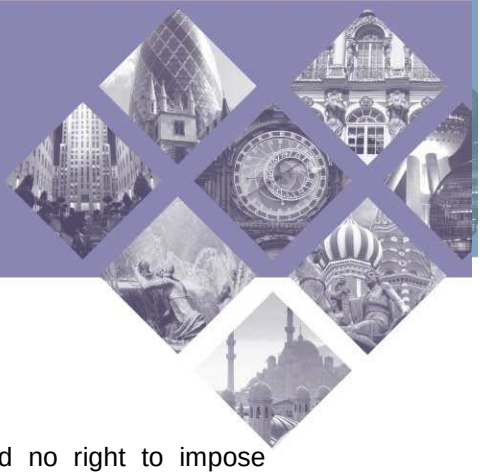
VAT

- **The NSA (National Administrative Court) ruled on 5 February 2009 (case ref. I FSK 1882/07) that a taxpayer may apply a 0% VAT rate when there is no doubt that an intra-community delivery had actually been made.**
  The Company had made an inter-community delivery of goods to which it applied the 0% VAT rate. The tax authorities questioned the Company's right to apply this preferential rate because at the time of the transaction the Company did not have the documents confirming this to be an intra-community delivery of goods and hence should settle the transaction on the basis of VAT rates appropriate to domestic sales. The NSA shared the view of the first instance court and pointed out that the lack of documents confirming it to have been an intra-community delivery of goods cannot deprive the taxpayer of the right to apply the 0% VAT rate. The NSA simultaneously pointed out that Polish regulations should be interpreted in consonance with EU law. In consequence in the NSA's judgment, the tax authorities may question taxpayers rights to apply preferential VAT rates exclusively in the event of showing that an inter-community delivery of goods had not taken place or that some other abuses had come into play.

- **The WSA (Provincial Administrative Court) in Kielce ruled on 22 January 2009 (case ref. I SA/Ke 445/08) that the sale of residential premises together with the right to use allocated parking spaces which are in the same building are subject to one VAT rate – the rate applicable to the residential premises.**
  A development company had sold independent residential premises together with shares in the building's common areas – including the grounds. The right to a parking space in the building's garage also tied in with the ownership of a flat. The company had asked the tax authorities the question whether the sale of a parking space could be assessed at the same rate as that due on the sale of a flat – i.e. 7 %. The tax authorities took the view that the parking space was subject to 22 % VAT stressing that the 7% rate applied exclusively to residential buildings or their parts which are of a residential nature. The WSA however took a different view, pointing out that next to the flats, the object of the sale, were parking spaces which were inextricably associated with the ownership of a flat. As the Court emphasised, parking spaces are not independent usable premises, since they do not constitute rooms marked out by permanent walls within the confines of one building. In consequence, the sale of residential premises together with the right to use a parking space is subject to one VAT rate, the rate appropriate to the residential premises.

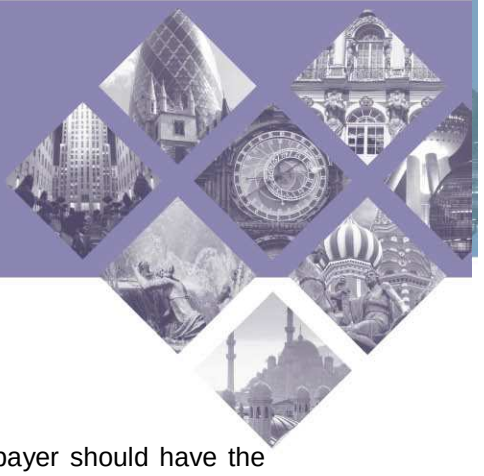
- **The Director of the Tax Chamber in Warsaw asserted in his interpretation of 5 January 2009 (case ref. IPPP1/443-1864/08-4/SM) that a non-monetary contribution to a company**



constitutes a chargeable delivery of goods that is subject to VAT.
The taxpayer's query addressed to the Director of the Tax Chamber related to the possibility of avoiding a correction of input VAT when buying fixed assets that are then contributed in kind. The Director of the Tax Chamber pointed out that a contribution in kind to a commercial law company fulfils the definition of a chargeable delivery of goods and by the same token is regarded as a sale in line with the definition arising from art. 2. 22 of the VAT Act. In consequence, in the case of the Company charging VAT on a contribution of fixed assets and trading goods will not be obliged to make a correction of the input VAT on these fixed assets and goods as deducted earlier. The interpretation was issued on the basis of VAT regulations as in force from 1 December 2008.

- **The NSA ruled on 3 February 2009 (case ref. I FSK 1961/07) that a taxpayer cannot be punished by a VAT sanction if he had made a premature VAT deduction , as well as a taxpayer who had come late with his deduction. Additional obligations should be applied in a rational manner.**
The company which had imported a printing machine deducted VAT in connection with that transaction in its settlement for December 2003. The tax authorities, however, indicated that the VAT deduction should have been made in October 2003 and imposed sanctions on the company in the shape of an additional tax obligation. The case was resolved by the NSA which upheld the position of the I instance court, that the tax authorities had no right to impose such sanctions because no reduction whatsoever of the payables to the State Treasury had taken place. Moreover, the NSA pointed to the principle of proportionality as defined in the Polish Constitution and the need to move towards a rational application of VAT sanctions.

- **The WSA in Warsaw ruled on 26 January 2009 (case ref. III SA/Wa 1870/08) that a taxpayer is entitled to issue correction invoices in hard copy in a situation when the data exchange system used to transmit invoices electronically does not allow for the issue of correction invoices.**
A company intended to introduce a computer system enabling invoicing by electronic exchanges of data with its business partners by way of the EDI systems. In connection with the fact that the EDI systems introduced by the business partners do not accept correction invoices in electronic form as a matter of principle, the company asked the tax authorities whether it would be entitled to issue correction invoices in hard copy which relate to invoices initially issued in electronic form. The tax authorities, invoking the ordinance regarding the issuance and delivery of invoices in electronic form, concluded that the company has no right to issue correction invoices in hard copy which relate to invoices initially issued in electronic form. An alternative stance was taken by the WSA, which stressed that the ordinance relating to electronic invoices should be given a pro-community interpretation. As the VAT Directive regulations state, all invoices



should be treated equally irrespective of the form in which they were issued and a correction invoice is every document which changes the initial invoice and relates to it in a clear way.

- **Further to the ETS verdict of 22 December 2008 regarding case ref. C-414/07 Magoora Sp. z o.o., the Minister of Finance sent a letter on 13 February 2009 to all directors of tax chambers and tax control offices (PT3/812/4/15/CZE/09/185), setting out the procedural guidelines in VAT corrections to car fuel deductions and input VAT paid on purchases of cars or services in accordance with rental or lease agreements relating to cars.**
  The right to deduct the full amount of VAT obtains in relation to cars in relation to which:
  1. the VAT Act regulations in force since 1 May 2004 allowed for the deduction of tax,
  2. the VAT Act regulations in force since 1 May 2004 made it impossible to deduct tax, but the regulations of the VAT Act in force until 30 April 2004 made tax deductions possible.
  The condition of making a correction which takes into account deductions on account of car fuel purchases, as mentioned in pt. 2, as well as input VAT added on account of the purchase of a car or services in accordance with a rental or lease agreement for a car as referred to in pt. 2, is the ownership by the tax payer of documents confirming that the car used in the course of economic activities for the period in which the correction is made was not a passenger car and its admissible load-bearing capacity exceeds 500kg. Moreover, the taxpayer should have the original invoices confirming the purchase of car fuels or the purchase of cars or services, in accordance with rental or lease agreements or other agreements of similar nature whose object is cars.

Corporate Income Tax (CIT)

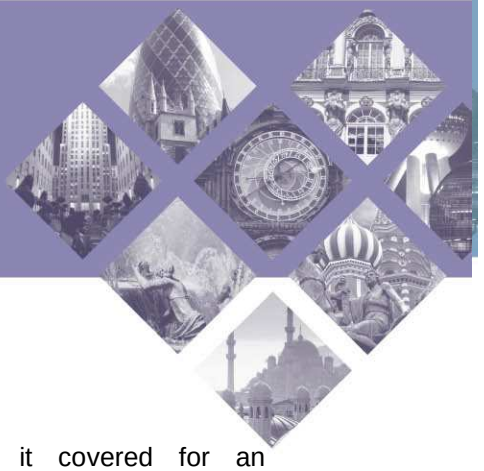
- **The WSA in Szczecin ruled on 10 December 2008 (case ref. I SA/Sz 461/08) that a clause on collecting interest in advance included in a loan agreement does not make this action recognisable as an interest payment.**
  A company's shareholder undertook in 2000 to provide the company with a loan in a specified amount, which included interest payable in advance. After the settlement of the interest the company received the remainder. The interest paid by the company in advance was included by the company in its tax deductible costs. However, the tax authorities stated that the interest was not actually paid by the company in that period and determined the amount of corporate income tax liability. The standpoint of the tax authority was confirmed by the WSA, which dismissed the complaint filed by the company and stated that only the interest on a loan which was actually paid, i.e. became the lender's income may be included in its tax deductible costs pursuant to the CIT Act. A clause on collecting interest in advance may not serve as a basis for considering that the payment was actually effected.

- **The Head of the Tax Chamber issued an interpretation on 19 January 2009 (case ref. IPPB5/423-161/08-2/AS) in**

which he stated that expenses sustained on software improvements may be included in direct tax deductible costs.
A company was using and making depreciation allowances on computer software used for managing business results. As it planned to improve the software in terms of its usability and functionality the company requested the tax authority to clarify whether expenses on the extension of already used software may be included in direct tax deductible costs. The company presented the standpoint that there is no way to increase the initial value of intangible and legal assets in the form of software with the expenses related to its improvement, and as a result such expenses may be included directly in the tax deductible costs. The tax authorities acknowledged the company's standpoint as correct.

- **The WSA in Warsaw ruled on 29 January 2009 (case ref. III SA/Wa 3183/08) that in light of the agreement concerning the avoidance of double taxation between Poland and Germany, facilities, bank time deposits, current account deposits in other banks and the issuance of banking securities may also be regarded as loans.**
A bank requested the Head of the Tax Chamber to issue an interpretation of Article 11 sec. 3 letter e of the agreement on the avoidance of double taxation between Poland and Germany and determine whether "any loan granted by the bank" should also be understood as other forms of crediting, such as facilities, bank time deposits. The Head of the Tax Chamber expressed the opinion that in light of the civil law, an action may be considered a loan only if the title to object of the loan is transferred to borrower, therefore the term "loan" may not be given a broader meaning. However, the standpoint of the tax authorities was not shared by the WSA which stated that the interpretation of the said term should not be limited to facilities in the meaning of banking law or loans referred to in Article 720 of the Civil Code. The court stressed that using the word "any" in the agreement on the avoidance of double taxation means that the contracting states did not intend to limit the term only to loans under civil law.

- **The WSA in Warsaw ruled on 21 January 2009 (case ref. III SA/Wa 1597/08) that if representation is only one of the elements of an event whose main purpose is to facilitate sales, expenses for the organization of such an event may be treated as tax deductible costs.**
A publishing company requested the tax authorities to determine whether its expenses incurred for the organization of promotional events whose purpose is to facilitate sales and increase the attractiveness of particular titles for readers and potential advertisers, constitute the company's tax deductible costs. The tax authorities gave a negative answer to the company's question and stated that such expenses constitute representation and may not be regarded as tax deductible costs. However, the Court considered that not all actions directed at potential clients may be deemed representation, as

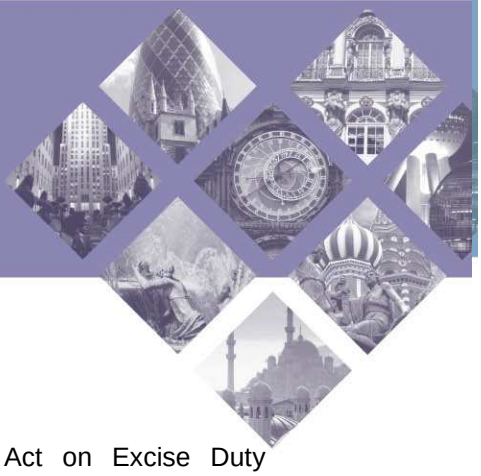


during promotional events entrepreneurs also carry out marketing, promotional and advertising actions and while assessing the nature of an event the characteristics of a given company as well as the scope and object of its activities should also be taken into consideration. The Court resolved that during promotional events representation purposes are performed additionally and they are not their main purpose. Consequently, the costs related to the organization of such events may be included in tax deductible costs.

Personal Income Tax (PIT)

- **The Head of the Tax Chamber in Warsaw issued an interpretation on 28 January 2009 (case ref. IPPB2/415-1512/08-4/MK) stating that the value of a subscription fee for medical services purchased by an employer for an employee constitutes income under an employment contract.**
  A company which entered into an agreement with an entity providing medical services to its employees requested the Head of the Tax Chamber to specify if it should add a hypothetical value of the medical services (so- called subscriptions for medical services) to the employees' remunerations and whether the value of such services constitutes the employee's income under the employment relationship. The Head of the Tax Chamber stated that not the value of actually used medical services, but the value of the subscription for the right to use specified medical services paid by the employer constitutes an employee's income. An employer is obliged to add the value of additional medical services it covered for an employee to the remuneration paid to him/her in a given month and calculate, collect and pay an advance against the income tax in respect of the total amount in accordance with the rules concerning the taxation of incomes from an employment relationship.

- **The Head of the Tax Chamber in Warsaw issued an interpretation on 28 January 2009 (case ref. ILPB1/415-81/09-3/AMN) stating that: an entrepreneur who in order to increase sales of wines by putting on free wine tasting events, may include expenses related thereto in his tax-deductible costs.**
  A wine importer who facilitates sales by laying on free wine tasting events for clients requested the Head of the Tax Chamber to determine whether the value of wine used for free tasting may be included in tax deductible costs. The Head of the Tax Chamber gave a positive answer. A linguistic interpretation of the expression "any costs incurred for the purpose of generating income" used by the legislator means that a taxpayer is allowed to deduct for tax purposes all expenses directly related to a given source of income and incurred in order to generate income from such. The purpose of the tasting is to familiarize clients with the offered wine prior to its purchase. Therefore, expenses incurred for purchasing products consumed during the tasting, related to the business activity carried out by the taxpayer, constitute tax deductible costs.



Other information

- **The Head of the Tax Chamber in Warsaw in the interpretation of 26 January 2009 (IPPB2/436-425/08-4/MZ) stated that if one of the parties to a loan agreement is a VAT payer such a loan is not subject to the tax on civil law transactions.**
  By the same token, the Head of the Tax Chamber shared the view of the company claiming that pursuant to Article 2 section 4 of the Act on the Tax on Civil Law Transactions a loan agreement is not subject to such tax if at least one party bears an obligation to pay VAT on such a transaction or is exempted from such payment. The exemption of a deed from the operation of provisions on VAT depends not on the fact that the parties to an agreement are VAT payers, but only the fact that at least one of the parties bears the obligation to pay VAT on this particular deed or is exempted from such obligation.

- **The Court of Justice of the European Communities in its judgment of 12 February 2009 (C-475/07) ruled that the provisions of the Polish Act on excise duty which define the moment the tax obligation arises with respect to electric power has been inconsistent with the community law since 1 January 2006.**
  Pursuant to the Act on Excise Duty effective since 1 March 2009 a tax obligation with respect to electric power occurred at the date of its release to the grid, and not at the time of its delivery by a distributor or re-distributor as provided in the Directive 2003/96. The excise duty on electric power should be due upon its delivery to the end user i.e. an entity using the power for its own purposes. Poland was required to adjust its internal regulations to the provisions of Directive 2003/96 by the end of 2005. Bearing in mind that the provisions of the Directive had not been implemented in the Polish Act on excise duty, a proceeding before the Court of Justice was initiated against Poland. The Court's judgment stating that since 1 January 2006 the provisions of the Act on excise duty with respect to electric power have been inconsistent with the community law, provides producers of electric power with an opportunity to file requests for the refund of undue excise paid since 1 January 2006.

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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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