TAX PRESS REVIEW

KSP legal & tax advice

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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 in March 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 Supreme Administrative Court (NSA), ruled on March 23, 2009 (case ref. I FPS 6/08) that a company which earmarks products free of charge for purposes connected with its business, does not add VAT, even if it deducted VAT upon the purchase of the products.**

  It is another judgment concerning VAT on free-of-charge transfers of products for business related purposes that is beneficial to taxpayers. As this judgment was issued by a full panel of seven judges, it will finally solve taxpayers' disputes with tax authorities. The controversies were caused by an incorrect implementation of EU regulations by Poland. In accordance with EU regulations, each free of charge transfer of products, including those for business-related purposes, is subject to VAT. Art. 7 Sec. 2 of the VAT Act expressly stipulates that only free-of-charge transfers of products for purposes other than business-related are subject to VAT. Notwithstanding the above, tax authorities refer to Art. 7 Sec. 3 of the VAT Act, which stipulates that the rule according to which free-of-charge transfer of products for non-business related purposes is subject to VAT does not apply to printed advertising and informational materials, presents of small value and samples. According to the tax authorities, the wording of Art. 7 Sec. 3 of the VAT Act allows one, in compliance with the rules of functional interpretation, to disregard the literal wording of Art. 7 Sec. 2 of the VAT Act and to refer to the VAT Directive. Consequently, in accordance with EU provisions, all free-of-charge transfers are subject to taxation. The Supreme Administrative Court did not agree with the above interpretation by the tax authorities.

  The Supreme Administrative Court stressed that the application of a literal interpretation of the above provisions does not result in any inconsistencies, as one can imagine that advertising materials or presents with a small value are transferred for purposes other than business-related. The NSA held that in this case the Polish provisions do not implement the EU legal targets. The references by tax authorities to the pro-EU functional interpretation are not allowed. The Court stressed that the implementation of UE laws must not breach Art. 217 of the Polish Constitution which stipulates that taxes or other public levies, tax-paying entities and taxable activities, as well as tax rates, must be determined pursuant to a legal act, which means that a taxable activity must be clearly specified in the VAT Act. It must be stressed that in accordance with the established ECJ judicature, only taxpayers have the right to refer to mandatory and sufficiently precise Directive provisions in the event that a domestic legal norm harms their interests and is inconsistent with the Directive, or if the Directive was never implemented. Conversely, the state authorities cannot claim the provisions of the Directive in a situation where it was not properly implemented in the domestic legal system.

- **The NSA ruled on February 25, 2009 (case ref. I FSK 1770/07) that tax authorities may not make the right to deduct input VAT contingent on the registration of the issuer of the invoice as a VAT taxpayer.**

  A Tax Chamber deprived a taxpayer of the right to deduct input tax deeming that a person not registered for VAT purposes is not

authorized to issue invoices. Its position was based on Art. 88 Sec. 3a Clause 1 of the VAT Act, under which the right to deduct the input VAT does not apply if the sale was documented pursuant to invoices issued by person unauthorised to issue invoices. The court of the first instance confirmed that the EU regulations do not make the right to deduct VAT conditional on the registration of the invoice issuer as a VAT taxpayer. Additionally, the lack of registration does not result in the loss of VAT taxpayer status. The NSA deemed that one may deduct input VAT based on an invoice if the issuer has a VAT taxpayer status, which status is not determined by VAT registration, but by the objective conduct of the issuer. If it is an existing entity, which enters into taxable activities in connection with which invoices are issued, the purchaser of products and services has the full right to deduct the tax shown in the invoice.

- **The NSA ruled on February 12, 2009 (case ref. III SA/Wa 3363/08) that joint marketing efforts by two entrepreneurs in order to entice their respective clients to purchase products from one of them, may not be treated as mutual liabilities triggering the obligation to pay VAT.**
  A company commenced marketing cooperation with its partner. The cooperation involved the mutual promotion of their respective services. The partner agreed to offer a discount to clients who make payments with bank cards issued by the company. In return, the company prepares, at its own expense, advertising materials of the partner program in which it uses the partner's name and trademark, as well as marketing information and address details. The tax authorities decided that the agreement was quasi-barter in nature, and consequently triggered the obligation to pay VAT. The court of the first instance shared the opinion of the tax authorities by stressing that one may speak of the existence of a performance if there is a beneficiary of the performance. Another trait of taxed activities is that they are not free of charge – in this case the reciprocity of performances. The NSA (case ref. I FSK 291/08) reversed the Provincial Administrative Court's award and indicated that a joint promotional effort was not a service in nature. It was aimed at increasing the sale of its own products and its effectiveness was uncertain, as it was not conditional on the other partner, but on clients. The said judgment was issued by the Provincial Administrative Court in compliance with NSA guidelines.

- **The European Court of Justice (ECJ) passed a ruling on February 19, 2009, in the *Athesia Druck* case (case ref. C-1/08) on the situations VAT on account of certain services may be settled in the country where the client of the services actually uses them.**
  The ECJ held that in principle certain services of an intangible nature (here: advertising services), where the client for the service is seated outside the EU, the service is deemed to have been provided where the client has its seat. However, as an exception, member states may determine the place of provision of services in the territory of a member country where the services are actually used by the client. The ECJ deemed that in the case of advertising services, actual use means the dissemination of the advertising content in the area of a specific member state.

- **The Provincial Administrative Court (WSA) in Rzeszow, pursuant to the judgment of March 23, 2009 (case ref. I SA/Rz 728/08) confirmed the possibility of taxpayers re-invoicing services, irrespective of their**

nature and/or the authorization to provide them.
The tax authorities refused the taxpayer the right to receive reimbursement of input VAT. In their opinion, the taxpayer did not engage in any taxable activities in the required time period, so the re-invoicing of a notarial service may not be deemed to be a taxable activity. The company did not agree with this, and indicated that it made a taxable activity, as acting on its own behalf, but for the benefit of a tenant, provided a service with the help of a third party, i.e. a notary. This activity was documented by the "reinvoice". The tax authorities deemed that the reinvoicing requirements adopted in practice were not met, including the requirement that the entity to whom the original invoice was raised must not use the reinvoiced service, only the final purchaser. The WSA deemed that the stance of the tax authorities was unjustified and confirmed that the VAT Act regulations do not define the term "reinvoicing", but this practice is widespread. It confirmed that no EU or domestic legal regulation made reinvoicing for services conditional on one holding an authorization to provide the services, consequently notarial services may also be re-invoiced. In this respect, one may directly apply Art. 28 of Directive 2006/112/WE, as it was not implemented in the Polish law. It regulates situations where a taxpayer, acting on its own behalf executes a contract, pursuant to which it agrees to provide a specific performance, but actually the performance is provided by a third party. In such a situation it is deemed for VAT purposes, that the client purchased the service from the actual provider and then provided the service to the client. This means that transactions involving the resale, on one's own behalf, of services provided by a third party are subject to tax to the same extent as other services provided by the taxpayer. The only requirement is that a taxpayer taking part in the provision of services must act on its own behalf but for the benefit of a third party. In consequence, the taxpayer has the right to receive an input VAT refund when the re-invoicing of services is the only taxed activity in a given settlement period.

Corporate Income Tax (CIT)

- **The NSA ruled on February 19, 2009 (case ref. II FSK 1619/07) that businesses which pay fees in return for sureties or guaranties granted by Cypriot companies, are obliged to charge flat rate income tax on these fees (so called withholding tax).**
Pursuant to a surety agreement, a Cypriot company agreed to secure a bank loan drawn by the company. To secure the payments under the agreement, the surety provider was to pay amounts upon each request made by the beneficiary. In return, the debtor was required to pay to the surety provider a fee of 0.1% of the surety amount for each month. The Tax Control Office (UKS) concluded that Art. 14 Sec. 4 of the Double Taxation Avoidance Treaty between Cyprus and Poland, for the purpose of defining the term 'interest' makes reference to Art. 21 Sec. 1 of the CIT Act. According to the said authority, this provision makes interest equal to other types of income listed therein, including income on account of performances, sureties and guarantees. In connection with the above, a Polish company should have charged flat rate income tax at 20% of the disbursed amounts. The NSA shared the view of the tax authorities and ruled that since Art. 21 Sec. 1 Clauses 1 and 2a of the CIT Act made tax consequences equal for interest income under a loan agreement and fees under warranty contracts within Art. 11 Sec. 1 i 4 of the Polish Cypriot Agreement, the warranty fee constitutes income subject to withholding tax.

- **The NSA declared on February 5, 2009 (case ref. II FSK 1583/07) that when a bank loan denominated in a foreign currency is paid back in Polish Zlotys, no exchange rate differences take place.**

  The bank granted a loan denominated in Japanese yens, which was to be paid back in Polish zlotys. Subsequently, the bank loan currency was changed to US dollars and the parties agreed that the loan would be repaid in US dollars. The tax authorities questioned the exchange rate differences posted on the loan repayment from before the loan currency swap, deeming that exchange rate differences occur only if a bank loan is repaid in a foreign currency. Both the trial and appellate courts shared the tax authorities' views. The NSA indicated that due to the nature of exchange rate differences, in the case of the repayment of a bank loan, the differences only take place if the loan was incurred and paid back in the same foreign currency.

- **The NSA ruled on January 9, 2009 (case ref. II FSK 1754/07) that in order to write off a group of debts as bad debts, each such debt must be documented separately, even if owed by one debtor, and one of them was correctly confirmed to be irrecoverable.**

  The bank made an inquiry with tax authorities as to whether, in a situation where the same debtor has several outstanding debts at a bank, it may deem that the irrecoverability of them is adequately documented if one of them (the one with the lowest value) has been confirmed not to be recoverable. The tax authorities and the WSA held that each debt must be documented separately. They indicated that in order for a given receivable to be deemed documented, one needs to take all action aimed at enforcing it. It was also stressed that the loans of one and the same person may be underwritten by various persons, and that different payment dates may be set for the debts, which may lead to a change in the debtor's property situation. The NSA shared the views of the trial court and dismissed the bank's last resort appeal.

Personal Income Tax (PIT)

- **The WSA in Warsaw, confirmed on February 17, 2009 (case ref. III SA/Wa 2926/08) that a contribution in kind to a partnership is not subject to taxation based on the PIT Act.**

  The tax authorities deemed that the transfer of shares as a contribution in kind to a partnership yields a taxable income. This is because the securities change hands, and in return the contributor receives shares of a specified value in the partnership. Consequently, we are dealing with a paid transfer of shares, and provisions concerning taxation of income from capital gains must apply to the income thus obtained, although the said regulations only mention a paid disposal of shares with companies possessing a legal identity, not partnerships. However, the WSA ruled that the above approach was incorrect. In the WSA's opinion, the above transaction is free of charge, because "paid" means "something that is paid for, requires a payment or reimbursement of costs", and the value of the contribution often has no bearing on the value of the share received in return. In the deed of partnership partners are free to stipulate that profits will be distributed at their sole discretion, not based on the value of their respective contributions. The WSA pointed to Art. 17 Sec. 1 Clause 9 of the Act, which does not anticipate taxation on contributions in kind made to partnerships, only those made to companies limited by shares. The court also concluded that in the situation at issue it was

not possible to assess the income. As a result of the contribution in kind to the partnership, the contributor only obtains the right to receive a profit distribution, but is not given any rights with an assessable value as at the transfer day. As a result, it is impossible to assess the income received by partners in a partnership on account of the contributions in kind they make to the partnership.

- **The Director of the Tax Chamber in Warsaw, in his interpretation of March 9, 2009 (case ref. IPPP1/443-1864/08-4/SM) decided that third party liability insurance paid by a company for persons acting on its behalf does not result in arising any income for them.**

  The company's enquiry concerned the consequences of the execution of an insurance contract concerning civil law claims brought against company officials. The premium will be flat and there will be no breakdown into particular persons or insured risks. The insurance contract does not contain a list of insured persons. Moreover, it will not be necessary to attribute responsibility to any specific person for the damages to be paid out. The Tax Chamber concluded that for taxable income on account of a free-of-charge benefit to arise it is essential that the benefit is obtained or left at the taxpayer's disposal. The Chamber indicated that the circle of the insured persons is not precisely indicated as it may be subject to changes during the term of the agreement. This does not affect the amount of premium paid by the company. This is caused by the fact that the insured were not named in the contract and therefore it is not easy to identify them. As a result, it is not possible to assess income on account of free-of-charge benefits, as it is not possible to attribute a specific portion of the insurance premium paid by the company to a specific insured person.

- **The Director of the Tax Chamber in Warsaw, in his interpretation of January 26 2009 (IPPB2/415-1517/08-2/AK) confirmed that a business which created a commuter fare reimbursement scheme for its employees must add the value of this benefit to the employee's income and make a PIT withholding on this account.**

  In connection with a change in the registered office, in order to retain experienced members of staff, the company decided to organize free-of-charge transport for employees to and from work. The company concluded that the carrier is paid a contractually fixed fee per one kilometer. The Company stressed that it may not determine how many employees commute on a daily basis and, therefore, it is not possible to determine the value of the consideration obtained free of charge by individual employees. This results, in the company's opinion, in a situation where no taxable income is created on the employees' part. However, the tax authority took a different stance. It deemed that the employer is able to assign the value of a transport service to a particular person, as the service is purchased for a specific group of employees. The court also indicated that the tax obligation arises because of the mere fact of one being able to avail oneself of a service provided by the employer.

- **The Director of the Tax Chamber in Warsaw, in his interpretation of February 11, 2009, (case ref. IPPB1/415-1304/08-2/AG), explained that interest paid by a general partnership to a partner on account of a partner loan may not be treated by the said partner as tax deductible.**

  A partner of a general partnership was planning to grant an interest bearing loan to

the partnership on arm's length terms and conditions. She made an inquiry in which she asked whether all partners will be able to deduct the interest paid on the loan from their tax liability. The tax authority stressed that pursuant to Art. 23 Sec. 1 Clause 9 of the PIT Act, interest on a shareholder's own equity contributed to an income-generating business is not considered as a tax deductable cost. A loan granted by a partner to a general partnership in which the partner has interests is a form of a shareholder's own equity. A partner lends money to himself/herself to the extent s/he has interests in the company's profits. For this reason, s/he cannot post the interest paid out to him/her as tax deductible income. Conversely, other partners have this right. They may post the value of the interest paid as tax deductible costs to the extent they participate in the company's profits.

Real Estate Tax

- **The WSA in Kraków ruled on January 27, 2009 (I SA/Kr 1458/08) that a telecom cable is part of a building structure, and as a result the value of the cable must be added to the taxable basis for the real estate tax calculation.**

The Company filed a corrective real estate tax return, claiming that a telecom cable is not a constituent element of a building structure (here: telecom infrastructure), and consequently its value does not need to be added to the taxable basis for the real estate tax. The tax authorities, when determining the amount of the tax liability took into account the value of the telecom line. The WSA dismissed the company's appeal and stressed that the cable is permanently attached to the telecom building structures, and consequently is a constituent part thereof. In consequence, the value of the cable must be added to the value of the building structure determining the taxable basis for the real estate tax.

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We hope that the above information will prove to be useful. The information however does not constitute legal opinion or advice. Should you require full information or legal advice on any issue, please contact us.

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