TAX PRESS REVIEW

KSP legal & tax advice

5/2009

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 May 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 WSA (Provincial Administrative Court) in Szczecin ruled on April 23, 2009 (case ref. no. I SA/Sz 97/09) that the fact that an entrepreneur failed to fulfil all the formal requirements related to the business activity carried out by the entrepreneur is not a decisive factor in resolving whether it is inadmissible to recover VAT on the invoices issued by such an entrepreneur.**
  A company recovered VAT on the invoices issued by a company that failed to fulfil a number of formal requirements in connection with the business activities carried out by the company. In particular, the company was not registered for VAT purposes and it was not filing any tax returns. The Court ruled that the entrepreneur's failure to submit tax returns in a certain period of its activity is not an objective indicator of the fact of carrying out the business activity and a business partner is entitled to recover VAT resulting from the invoices issued by such a taxpayer.

- **The WSA in Warsaw ruled on May 5, 2009 (case ref. no. III SA/Wa 3448/08) that a taxpayer selling goods to other EU states does not have to hold a return receipt from the recipient of such goods to apply a zero VAT rate.**
  The Court pointed out that the zero VAT rate may be applied provided that the following two conditions are met: (i) the right to dispose of the goods as their ownership has been transferred and (ii) the goods have been transported abroad. The fulfilment of the aforementioned conditions renders it possible to apply the zero VAT rate even when the taxpayer does not hold any return receipt confirming the delivery of such goods to the purchaser.

- **The WSA in Warsaw ruled on April 3, 2009 (case ref. no. III SA/Wa 3479/08) that VAT to be recovered by foreign entities constitutes VAT overpayment within the meaning of the Tax Ordinance. Therefore, if the tax authorities fail to observe the six-month period for the return of such a payment, the entities are eligible for default interest.**
  The Court reiterated that Art. 76b of the Tax Ordinance pursuant to which the regulations concerning overpayment apply accordingly to tax refund are applicable in the case of a failure to timely reimburse tax to foreign entities. On the one hand, the six-month period was provided to enable the tax authorities to verify tax applications but on the other hand, it was established to render it possible for the taxpayer to be aware of the time limit for the expected reimbursement of tax. If the prescribed time period is not observed, the taxpayer is eligible for default interest in the same amount as that awarded to domestic entities.

- **The WSA in Warsaw ruled on April 9, 2009 (case ref. no. III SA/Wa 154/09) that the transfer of rights and obligations under a preliminary agreement may constitute an activity subject to VAT.**
  The Court emphasized that contrary to the statements made by the tax authorities, the transfer of rights and obligations under a preliminary agreement may be treated as the provision of services within the meaning of Art. 8 of the VAT Act. As a consequence, it may constitute an activity subject to VAT.

Corporate Income Tax (CIT)

- **The Supreme Administrative Court (NSA) ruled on May 14, 2009 (case II FSK 263/08) that the capitalisation of interest on a loan from a foreign investor should be treated on an equal footing with the payment of that interest. On the day of capitalisation, the foreign lender receives taxable revenues which should have tax deducted at source.**
  The Company indicated that the capitalisation of interest cannot be treated as "making a payment" under art. 26. 1 of the CIT Act. The court explained that in interpreting a legal provision one cannot be guided solely by its literal timbre and underlined that under art. 26. 7 of the CIT Act as amended on 1 January 2007, payment is taken to mean the performance of an obligation in any form whatsoever, including the capitalisation of interest. In the court's view, the fact that art. 26. 1 of the CIT Act was made specific not by way of its modification but by the addition of a new provision shows that the change had the aim of clarifying the binding legal regime and not to make a change in the normative status.

- **The NSA ruled on April 7, 2009 (case ref. II FSK 1229/07) that the regulations concerning foreign exchange differences under the legal regime binding to 1 January 2007 were inapplicable to set-offs of receivables.**
  The court explained that in accordance with CIT Act regulations binding to 1 January 2007, exchange differences occurred exclusively when payables connected with a given transaction were made in cash. On the other hand, due to set-off, both receivables are written off, down to the level of the smaller receivable, whereby the debt encompassed by the set-off is extinguished, In the court's opinion, the set-off is not a form of debt repayment expressed monetarily but another way of extinguishing mutual receivables by two parties. Since the extinguishing of the debt does not occur in such a situation due to monetary payment, the regulations concerning exchange differences are inapplicable.

- **The WSA in Gdańsk ruled on April 6, 2009 (case ref. I SA/Gd 837/08) that expenses incurred on a consolidation process do not constitute costs of earnings for companies that are being taken over. But they may constitute such costs for the takeover company, since it will be achieving revenues from the enterprise arising from the merger.**
  The court emphasised that as a result of the merger, the company being taken over is dissolved, thus it cannot be maintained that the consolidation process is connected with its achievement of revenues. In the court's opinion, expenses sustained in the course of consolidation by the taken over company do not have the aim of achieving revenues but the termination of its activities. In connection with the above they do not constitute costs of earnings.

- **The NSA ruled on May 6, 2009 (case ref. II FSK 78/08) that giving a goods' gift voucher should be treated on a par with being given a price rebate. As a result, the value of the rebate does not impact on the tax deductible costs but on the true level of revenues that is achieved.**
  The court of first instance indicated that the nominal value of the voucher does not represent a cost for its issuer. A goods' gift voucher is neither a good nor a cash equivalent. A goods' gift voucher is merely the promise of a rebate equal to the voucher's nominal value. The amount indicated on the

bond defines the value at which its holder may purchase the issuer's goods. That is why the issue of the voucher has the same effect as a rebate. In consequence, the nominal value of a voucher impacts on the true level of revenue and not on the level of tax deductible costs. The NSA fully endorsed the argument of the court of first instance and dismissed the cassation claim.

Tax on civil law transactions

- **The WSA in Gdańsk ruled on May 12, 2009 (case ref. I SA/Gd 935/08) that the disposal of receivables for payment is not subject to tax on cilvil law transactions (PCC) when it comes as part of intermediary financial services rendered to the seller of the receivables.**

The dispute concerned the qualification of the acquisition of a packet of receivables by a company from a telecommunications firm. The tax authorities maintained that on grounds of the VAT Act the important thing is the status of the entity which, within the framework of the services rendered, disposes of its property rights. The taxpayer does not have VAT-payer status in the same scope in which it disposes of its own receivables. That is why, in the opinion of the tax authorities, a telecommunications firm cannot render services in the above-mentioned situation since it was disposing of its own receivables. The court indicated that, indeed, telecommunications firms disposing of their own receivables did not perform VATable activities but asserted that the company acquiring the receivables from telecommunications firms rendered intermediary financial services, in connection with which it was exempted from VAT. Since one of the party's to the agreement was VAT exempt (the purchaser), it was not subject to PCC.

* * *

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

Kontakt w 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

Kontakt w 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