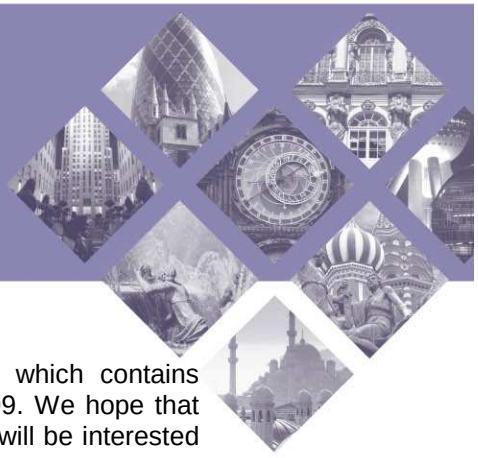
TAX PRESS REVIEW

KSP legal & tax advice



6/2009

We are pleased to present the next edition of our Tax Press Review which contains a selection of rulings and interpretations that had been issued in June 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 WSA (Provincial Administrative Court) in Warsaw ruled on 2 June 2009 (case ref. III SA/Wa 329/09) that the principle that taxpayers did not have the right to deduct input VAT contained in expenses which were not classified as tax deductible costs (which included the costs of representation) which was binding to 1 December 2008, was in line with EU law.**
  In the WSA's opinion, Article 88 Sec. 1 point 2 of the VAT Act did not stand in conflict with the VAT Directive's regulations, since the restriction in the right to deduct VAT from expenses not constituting tax deductible costs had been regulated by the VAT Act of 1993. As a result, the standstill clause, according to which a new member state, upon accession to the EU, may retain only those restrictions relating to deducting VAT which had prevailed before its accession, had not been violated. Moreover, the WSA underlined that the VAT Directive directly mentions costs of representation as an example of costs from which VAT cannot be deducted.

- **The WSA in Warsaw ruled on 18 June 2009 (case ref. III SA/Wa 696/09) that a firm selling its receivables due to problems with their enforcement, is not rendering services in the meaning of the VAT Act.**
  A telecommunications sector company, in face of its inability to enforce a receivable on account of the telecommunications services it had rendered, decided to sell this receivable. The WSA ruled that the sale of one's own receivables is a secondary activity, while the basic activity is the rendering of telecommunications services. The sale of receivables is not an end in itself but an activity aimed at recovering at least part of the receivables due to the company. In consequence, there is no way to recognise such a transaction as provision of services in the meaning of the VAT Act.

- **The WSA in Warsaw ruled on 26 May 2009 (case ref. III SA/Wa 453/09) that in order to classify goods as used goods, it is essential that the goods were really used for at least 6 months by the taxpayer selling the goods, and not by third parties.**
  The WSA pointed out that in the light of Article 43 Sec. 2 of the VAT Act, used goods should be exclusively understood to be those that really were used by the taxpayer. Thus, a movable thing leased out for six months is not a used item for the lessor under the VAT Act. At the same time, the WSA disagreed with the taxpayer's standpoint that in view of the fact that in the EU regulations there is a lack of provisions making tax exemption dependent on the actual usage of the goods (and merely on the lack of right to deduct them upon their purchase), the sale of cars previously hired out by the taxpayer is subject to exemption from VAT. The WSA underlined that art. 13 (B) c) of the VI VAT Directive, as invoked by the taxpayer, concerns exemption from tax of deliveries of goods in a situation in which at their acquisition, the taxpayer does not qualify for the right to tax deductions. Due to the fact that the taxpayer made a partial deduction of VAT at the purchase of the cars, the situation under consideration here does not come under art. 13 (B) c) of the VI VAT Directive.

- **The ETS ruled on 18 June 2009 (Staatssecretaris van Financien v. Stadeco B.V., case ref. C-566/07) that every taxpayer**

who declares VAT on an invoice is obliged to pay it.
The Tribunal pointed out that the duty to pay VAT also relates to situations in which the tax was incorrectly recorded on the invoice documenting the services, which were not subject to VAT in the invoice's issuer country. At the same time, the ETS stressed that when the invoice's issuer fully eliminated the risk of loss of tax revenues in the appropriate time, the principle of VAT neutrality demands that the incorrectly recorded VAT could be corrected.

Corporate Income Tax (CIT)

- **The Director of the Tax Chamber in Poznań issued an interpretation on 27 May 2009 (ref. ILPB3/423-96/09-5/MC) confirming that expenses incurred by a company on meals prepared for the participants of conference are the company's tax deductible costs.**
A building materials' trading company asked the Director of the Tax Chamber whether the expenses incurred on meals and beverages served to its business partners during conferences and training sessions constitute tax deductible costs. The company invoked Article 16 Sec. 1 point 28 of the CIT Act under which expenses on representation, in particular expenses sustained on gastronomic goods and services are not regarded as tax deductible costs, and stressed that not all expenses associated with feeding are not tax deductible costs. The company indicated that in accordance with its dictionary definition, "representation" is lavishness, showiness. Thus, if expenses on the acquisition of gastronomic goods and services do not comply with the features of lavishness, they may be counted as the company's tax deductible costs. The Director of the Tax Chamber confirmed the correctness of the position taken by the company.

- **The Minister of Finance indicated in his interpretation of 4 May 2009 (ref. DD5/8211/ZDA/08/PK-786) that a firm whose associated company guaranteed a bank loan free of charge is not obliged to declare taxable income on this account.**
By the same token the Minister of Finance changed the interpretation of the Director of the Tax Chamber in Bydgoszcz, in whose assessment the free of charge guarantee of a bank loan constitutes the benefit in kind in the meaning of the CIT Act, and the beneficiary of this benefit is obliged to declare income on this account. As the Minister of Finance stressed, in reference to the WSA's ruling in Łódź on 24 April 2007 (case ref. I SA/Łd 2033/06), a guarantee given by another entity solely represents loan security, and the taxpayer does not gain material benefit at the expense of this entity.

- **The NSA (Supreme Administrative Court) ruled on 19 June 2009 (case ref. II FSK 276/08) that the licence fee payable to a German supplier for using a computer program is not subject to CIT in Poland (i.e. withholding tax).**
The NSA, sustaining the verdict of the court of first instance, stressed that under Article 12 of the Polish-German double tax treaty which defines licence fees, does not mention fees due on licences to computer programs. Thus, in the NSA's view it is impossible to recognise these payables as subject to tax in Poland. The NSA, referring to the copyright and neighbouring rights act, took the view that computer programs do not come under the concept of scholarly, literary or artistic work and constitute the object of the copyright protection which is separate from literary or scholarly works. **The view, in accordance with which granting a licence to use a computer program to a Polish entity by a foreign contracting partner, will not cause**

the need to withhold appropriate income tax at source was also taken by the WSA in Warsaw in its ruling of 26 May 2009 (case ref. III SA/Wa 3364/08).

Personal Income Tax (PIT)

- **The WSA in Warsaw ruled on 22 June 2009 (case ref. III SA/Wa 225/09) that an employee who has the benefit of a subscription enabling the utilisation of medical services that are financed by his employer is not in receipt of a taxable benefit.**
  The company had acquired health packets for its employees which encompass both obligatory medical check ups as required by the Labour Law and the possibility of enjoying additional medical benefits. The company pays for each employee to the firm rendering medical services a flat rate monthly fee and its level is not influenced by whether the employees had availed themselves of the services available under the scheme or not. Medical services were merely put at the disposal of employees and there is a lack of information as to whether the given employee used them or not. The court invoked Article 11 Sec. 1 of the PIT Act from which it results that only the receipt of a benefit in kind gives rise to a chargeable event. In this given case, one could only speak of income arising only if the employee actually utilises the benefits placed at his disposal and it was possible to determine that benefit's value. Because the medical benefits had been exclusively placed at the disposal of the employees and there is no way of determining the values of their particular components, the WSA took the view that the employees were not in receipt of taxable income on account of this benefit.
- **The WSA in Wrocław ruled on 7 May 2009 (case ref. I SA/Wr 1326/08) that when the charge for a team-building event for employees is borne by the employer as a lump sum expense, the proportionate value of the benefit cannot be assigned to any specific employee. As a result, this benefit does not give rise to taxable income made by the employees involved on account of their employment relationship.**
  The WSA referred to the PIT Act, Article 12 Sec. 1 according to which taxable income made on account of an employment relationship is all types of monetary payments and monetary values of benefits in kind or their equivalents, irrespective of the source of finance of these payments. In the WSA's view, for cash and monetary values to be regarded as taxable income it is sufficient for them to be placed at the disposal of the taxpayer. On the other hand, benefits in kind and other free benefits can only be regarded as taxable income upon receipt of these benefits by the taxpayer. As the WSA ruled, when the value of the benefit cannot be assigned to a specific employee, there is no basis for determining the taxable income achieved by the employee on account of the organisational costs of a team building event organised by the employer, because there is no way of determining whether the employee really did receive the benefit and what was its value.

Other information

- **The WSA in Warsaw ruled on 11 May 2009 (case ref. III SA/Wa 3378/08) that if a taxpayer had already obtained an interpretation under the Tax Ordnance regulations that were binding before 1 July 2007, then the tax authorities cannot issue a second interpretation of the same issue as governed by the new regulations.**
  The WSA ruled that in the matter, which related to an appealed interpretation, the interpretation had been issued earlier by the tax authorities. This interpretation had been

issued under the Tax Ordnance regulations prevailing before 1 July 2007. Under those regulations a written interpretation is binding on the taxpayer's local tax authorities, and may only be changed or waived by way of a decision of second instance authority. Because the initial interpretation was binding on the tax authorities, it was the duty of the Director of the Tax Chamber to check whether it related to the same issue as that which was now raised in the appealed present interpretation. Should it turn out in a specific case that an interpretation had already been issued on the matter, the tax authorities cannot consider the taxpayer's motion to have an interpretation issued in the same matter.

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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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