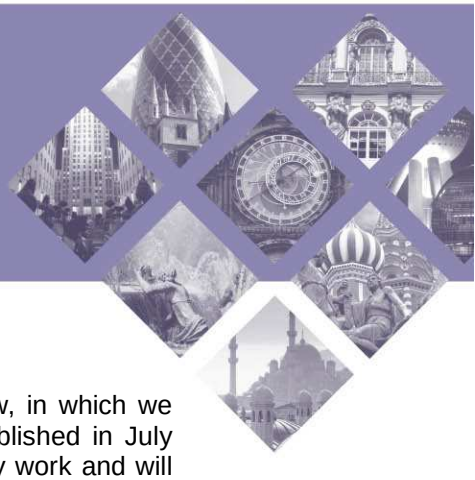
TAX PRESS REVIEW

KSP legal & tax advice



7/2009

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 July 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 Wrocław ruled on 23 June 2009 (case ref. I SA/Wr 508/09) that a free of charge transfer of goods associated with running an enterprise for promotional purposes is not a supply of goods in the meaning of the VAT Act.**
  The court disagreed with the tax office view that it is a supply of goods and that since the taxpayer may deduct input VAT charged on the purchased gifts, he is therefore obliged to calculate output VAT on their transfer. In the court's opinion the VAT Act unequivocally states that the transfer of such free-of-charge goods for purposes associated with running an enterprise is not a supply of goods, irrespective of whether the taxpayer has the right to deduct tax or not.

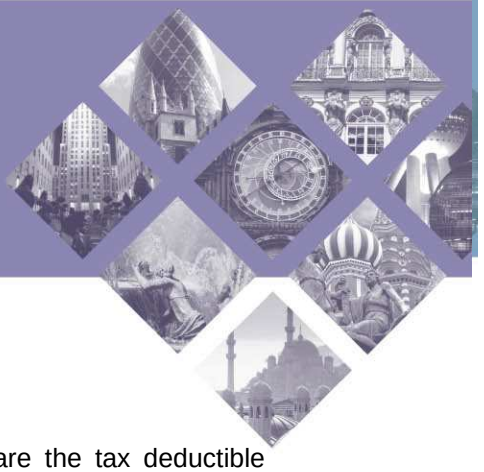
- **The NSA (Supreme Administrative Court) ruled on 23 July 2009 (case ref. I FSK 1324/08) that input VAT on expenses sustained on an enterprise that was subsequently abandoned can be deducted.**
  The VAT Act regulations prohibiting such deductions of input VAT were repealed on December 1, 2008. The courts also recognise taxpayers' rights to VAT deductions regarding abandoned investments before the change in the regulations. The NSA ruling confirmed that the restriction of the right to deduct input VAT paid on purchases relating to investments that were subsequently abandoned ought to be regarded as inconsistent with EU law.

- **The WSA in Szczecin ruled on 23 April 2009 (case ref. I SA/Sz 33-34/09) that until the court does not specify in its judgment that an activity confirmed by an invoice has not in fact been performed, the taxpayer is obliged to pay the VAT stated on that invoice.**
  The taxpayer failed to pay the VAT due on the issued invoices. He argued that in the penal proceedings against him, he admitted that the invoices did not reflect actual transactions. The court shared the view of the tax authorities and held that the charges regarding the offence of issuing invoices aimed at achieving fictitious income cannot prejudge the lack of obligation to pay the VAT shown in the invoices. Only the future court verdict will be binding in this matter for the tax authorities.

- **The WSA in Wrocław ruled on 21 May 2009 (case ref. I SA/Wr 87/09) that an employer granting loans out of the Company Social Benefits Fund („ZFŚS") is not carrying on economic activity in this field, and thus, when granting loans, does not act as a VAT payer.**
  The court emphasised that a housing cooperative loan given to a ZFŚS employee cannot be regarded as carrying on economic activity as understood in the VAT Act. In granting the loan, the employer is merely administering ZFŚS resources. The court stressed that ZFŚS resources do not belong to the employer.

Corporate Income Tax (CIT)

- **The WSA in Warsaw ruled on 29 May 2009 (case ref. III SA/Wa 228/09) that in the**



event of a lease agreement being terminated prematurely and the item being sold to the lessee, it is unjustified to maintain that the level of revenue achieved on its sale may be determined on the basis of the unpaid installments that would have been paid, had the contract run its full course.
The court asserted that there is nothing in the CIT Act on how the lessor may determine the price in the event of a premature sale to the lessee. The court also underlined that under art. 14 of the CIT Act, income on the sale of an object is only the value defined in the price and shown in the contract. When the price deviates from the market value, the market price estimate is made by the appropriate tax office.

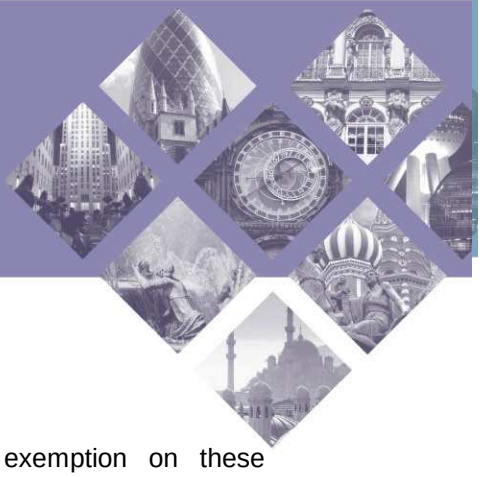
- **The NSA ruled on 7 July 2009 (case ref. II FSK 380/08) that in light of the regulations prevailing until January 1, 2007, for exchange rate differences being tax deductible costs to arise, in the meaning of the CIT Act, it was essential to make an actual monetary payment.**
The court underlined that payment in the meaning of art. 15 of the CIT Act should be understood exclusively as payment in cash form and no other form leading to the extinguishing of the liability. **An analogous stance was also assumed by the NSA in its ruling of 9 July 2009 (case ref. II FSK 419/08).**

- **The WSA in Szczecin ruled on 29 April 2009 (case ref. I SA/Sz 35/09) that expenses on transforming a company are tax deductible costs arising on account of the transformation.**
Expenses incurred in connection with transforming a civil law company into a limited liability one are the tax deductible costs of the company that has been formed in the result of the transformation. The court ruled that the fact that the costs had been covered by the transformed company's assets had no bearing on the classification of these expenses as the transformed company's tax deductible costs.

Other rulings

- **The NSA ruled on 30 July 2009 (case ref. II FSK 202/08) that for real property tax purposes a structure does not have to constitute a usable whole, and consequently only the building elements of the wind generating plant are subject to real property tax.**
The NSA disagreed with the Local Appeals Panel (Samorządowe Kolegium Odwoławcze) according to which the power station should be taxed as a whole, and noted that the amended Building Law of September 26, 2005, included in the definition of a building the structural parts of technical installations, including those of wind power stations. Thus, since building objects are the technical parts of a wind power station – foundations and masts, then it cannot comprise other building objects which would be taxed additionally.

- **The ECJ ruled on 9 July 2009 (the European Commission v Spain, case ref. C-397/07) that Spain had no right to make the fulfillment of specified formal requirements the condition for applying obligatory exemptions from capital gains tax in regard of restructuring activities such as the contribution-in-kind of an enterprise or its organised part involving capital companies.**



The ECJ pointed out that as from January 1, 1976, the capital gains tax rate on activities coming under art. 7. 1. b) of Directive 69/335 was reduced, on the strength of Directive 73/80 to between 0% and 0.5%. These activities were then exempted from capital gains tax by Directive 85/303 as from January 1, 1986 (which consisted of exempting all activities that had been taxed at the rate of 0.5% or less up to that point). Spain was not a member of the EU on January 1, 1976 and due to this it took the view that it was not bound by Directive 73/80 which reduced the capital gains tax rates on restructuring activities, which in turn conditioned the tax exemption on these activities. The ECJ did not share Spain's position and argued that Directive 69/355 together with the changes envisaged the automatic exemption from capital gains tax of restructuring activities as specified in art. 7. 1. b).

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

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