

Tax Newsletter



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Dear Sirs,

The end of the year brings us new information concerning changes in law regulations. This time we raise the issue of introducing the electronic invoices. In the current edition of the tax newsletter we also comment for you on the selected decisions of European Court of Justice in the scope of VAT, concerning issues such as VAT deduction from the services purchased in so called tax heavens or definition of samples and gifts of low value.

In the case of new and small business taxpayers, we also draw your attention to the reduction by a half of the limit of one-time amortization deductions which will take place on 1 January 2011.

We hope that the presented information will be usefull in your activity.

Yours faithfully,

Krystyna Szydłowska

EDITORIAL

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VAT - On the road to normality - planned changes concerning e-invoices

In connection with the fact that on 20 August 2010 the so-called "Invoicing directive" no. 2010/45/EU came into force, obligating the Member States to simplify e-invoicing regulations, the Polish Ministry of Finance published drafts of new ordinances in this respect. It is planned that they should enter into force already on 1 January 2011.

The analysis of the contents of the above-mentioned ordinances leads to the conclusion that **they remove most existing barriers limiting the practical use of e-invoices**. The drafts of the ordinances contain, among others, the following provisions:

- Sending invoices and making them available in any electronic format provided that it has been accepted by the recipient (e-mail, fax).
- Freedom to use any means guaranteeing the authenticity and integrity of invoices (not just a qualified electronic signature or EDI).
- Repealing the requirement for invoices to be stored and sent in the same format.
- Enabling the storage of all invoices (including the ones issued in a traditional manner and sent electronically) in electronic form, including outside the state territory in a Member State provided that online access to them is guaranteed.
- Simplifying the procedure of sending more than one invoice to the same recipient at the same time (common data mentioned only once).
- Enabling tax authorities to access electronic invoices in a manner allowing immediate downloading and processing of data in text format.
- Repealing the requirement to mark invoices as "original" or "copy".

VAT - As far as services rendered by companies from tax havens are concerned, it will be possible to deduct VAT and apply for the refund of previously not deducted VAT with interest

Such conclusions can be drawn from the ECJ judgement of 30 September 2010 in case C-395/09 Oasis East concerning the ban on deducting VAT for services imported from the so-called tax havens.

This ban, expressed in Article 88 sec. 1 item 1 of the Polish VAT Act, refers to taxable persons who are obligated to independently settle VAT on imported services used for activity subject to VAT. The act prohibits the deduction of this tax **solely due to the fact of paying the amount due for the imported services to an entity from a territory regarded as a so-called tax haven** (listed in Annex 5 to the VAT Act).

The ban relates not only to the cases of paying the amount due directly to such an entity (e.g. purchasing consultancy services from an entity from the Cayman Islands) but also to situations where the entity from the so-called "tax haven" receives the payment indirectly.

In the course of proceedings conducted before the Supreme Administrative Court between Oasis East Sp. z o.o. and the Minister of Finance, the Supreme Administrative Court referred a preliminary question to ECJ, asking whether the ban on deducting VAT described above is compliant with the Community law.

The Court pointed out that Member States could exclude from the system of deduction certain goods and services, in particular those capable of being exclusively or partially used for the private needs of the taxable person or his staff. However, Member States were not authorised to exclude all, or virtually all, goods and services from the right to deduct VAT. ECJ ruled that the ban on deducting VAT on services imported from tax havens, provided for in Article 88 sec. 1 item 1 of the Polish VAT Act, is such a prohibited general exclusion of the right to deduct VAT and is not compliant with the Community law.

The judgement of the Court means that the above-mentioned provisions of the Polish act may not be applied to the disadvantage of Polish tax payers as not compliant with the Community law. **In consequence, the taxpayers who did not deduct VAT on account of the import of services from tax havens may apply for the refund of the tax. It will be refunded together with interest accrued from the moment of non-deducting the tax in the past.**

VAT - Exchange rate differences have no impact on the VAT amount

Tax authorities emphasise that a discrepancy between the VAT amount indicated on an invoice and the one actually received does not give rise to revenue or a tax-deductible expense.

Pursuant to the interpretation of 1 September 2010 issued by the Tax Chamber in Poznań (ref. no. ILPB4/423-52/19-2/DS), exchange rate differences affecting the VAT amount which arise by using the tax method of determining exchange differences on the basis of Article 15 a of the CIT Act are neither a revenue nor a tax-deductible expense in accordance with the CIT Act.

Consequently, differences arising when paying an amount due between the amount being the result of a conversion of the VAT value from a foreign currency and indicated on the invoice in PLN and the VAT value after conversion into PLN at the moment of payment are not a revenue or a tax-deductible expense in accordance with the CIT Act.

Pursuant to Article 12 sec. 4 items 9 and 10 of the CIT Act, VAT and the refunded VAT are not a revenue. Article 16 sec. 1 item 46 of the CIT Act emphasises that VAT is not a tax-deductible expense, either.

To sum up, exchange rate differences following from the VAT amount, being neutral pursuant to provisions of the CIT Act, will not be a revenue or a tax-deductible expense, either.

VAT- Retail voucher and the obligation to charge VAT

According to the latest judgement of the European Court of Justice (ECJ), offering an employee a retail voucher in exchange for a part of remuneration constitutes a supply of services for consideration and is subject to VAT.

According to the ECJ judgement of 27 July 2010 (in case C-40/09 Astra Zeneca), providing a retail voucher to an employee in exchange for a part of remuneration should be considered as a supply of services for consideration by the employer. The consequence of the above stand is including VAT in the amount which is deducted from the employee's remuneration and the employer's entitlement to deduct as input tax the VAT it had paid in purchasing the vouchers.

The stand presented by ECJ constitutes a departure from the established approach and practice, including the previous stand of ECJ itself (cf. judgement in case C-288/94 Agros Distributors), according to which the sale of vouchers is not subject to VAT.

According to the stand of ECJ, provision of vouchers (at any stage – i.e. to the employer, to an employee, etc.) constitutes supply of a service, and on the other hand ECJ claims that the provider of goods or services issuing vouchers should pay the output VAT only when the consumer purchases the goods or services (i.e. at the moment of using the voucher). At the same time, the taxable amount should not be the face value, but the amount actually received by the seller of the voucher.

It should be emphasised that the ECJ judgement does not relate directly to the issue of employers' providing vouchers free of charge. However, it is not possible to exclude the possibility that it will have impact on the current practice of VAT settlements in this regard. To avoid any doubts, it might be good to consider applying for an individual interpretation of tax regulations.

VAT - Judgement of the European Court of Justice in case EMI (C-581/08) - a chance to issue more samples in a greater quantity and of greater value without VAT

In the judgement of 30 September 2010 in the case of the British record label EMI (C-581/08), the European Court of Justice (ECJ) defined more precisely the terms "sample" and "gift of small value" contained in the Sixth VAT Directive.

According to ECJ, a „sample" should be understood as a specimen of a product which is intended to promote the sales of that product and which allows the characteristics and qualities of that product to be assessed without resulting in final consumption, other than where final consumption is inherent in such promotional transactions. National legislation cannot limit the concept of a sample exclusively to:

- specimens presented in a form which is not available for sale;
- the first of a series of identical specimens given by a taxable person to the same recipient.

This is because each time account should be taken of the specific business context of sample distribution. ECJ put emphasis on the purpose of provision of the sample – promotion of the product and assessment of its qualities. What is not important, however, is its appearance (it does not have to differ from products intended for sale) and the quantity.

If the context of distribution makes it necessary to provide a greater number of samples for their qualities to be properly assessed (as was the case in the described judgement, where hundreds of records were distributed to the so-called opinion-forming entities – radio and TV stations), such provision should still not be considered business activity and be subject to VAT. This judgement conclusion seems to be extremely favourable for entities distributing samples in large quantities and of considerable value in the situation where tax authorities are used to consider such distributions as business activity subject to VAT and in the context of unfavourable regulations amendments with regard to provision of goods which will come into force in 2011.

ECJ also provided a more precise definition of “gifts of small value”, ruling that using fixed monetary ceilings is not contrary to the Sixth Directive. At the same time, ECJ ruled that making gifts of small value to different persons employed with one employer should not be treated as making gifts of small value to the same person.

TRANSFER PRICING - VAT turnover of a tax capital group cannot be adjusted

No possibility of upward adjustment in the case of using non-market prices in transactions concluded inside tax capital groups applies not only to corporate income tax but also to the tax on goods and services.

The Voivodship Administrative Court, after reviewing a complaint against an individual interpretation of the Head of the Tax Chamber in Poznań (ref. no. I SA/Po 522/10), emphasised that tax capital groups have freedom to set prices both pursuant to the CIT Act and VAT Act. Although Article 32 of the VAT Act does not refer directly to transactions between entities creating tax capital groups, the systemic interpretation and coherence of the legal system lead to the conclusion that the indicated provision is not applicable in the case of transactions concluded between entities creating a tax capital group. The key right of companies functioning within tax capital groups is the freedom to set prices inside the group (with regard to income tax it is acceptable to use non-market prices), so an interference of tax authorities in determining a possible additional VAT turnover would remove the potential benefits arising from the creation of a tax capital group. The stand presented by the Court is compliant with the Community law, which allows determining an additional turnover only in order to prevent tax evasion or tax avoidance.

Lower tax limits in 2011

After the National Bank of Poland announced the average exchange rate of euro as at 1 October 2010 to be PLN 3.9465, we know the tax limits which will apply in 2011.

Tax limits		Amount (EUR)	Amount (PLN)	
			2011	2010
VAT	Amount of sales (incl. VAT) entitling to the <u>status of a small VAT taxpayer</u>	1 200 000	4 736 000	5 067 000
	Amount of commission entitling to the <u>status of a small VAT taxpayer</u>	45 000	178 000	190 000
CIT PIT	Amount of revenue from sales for the previous year (including the output VAT) which – if not exceeded – makes the taxpayer eligible for the <u>status of a small taxpayer</u> entitled to one-time depreciation and making quarterly advance payments	1 200 000	4 736 000	5 067 000
	Value of fixed assets from which a <u>one-time depreciation write-off</u> can be made	100 000 (2010) 50 000 (2011)	197 000	422 000
Lump sum (Ryczałt)	Amount of revenue for the previous year entitling to <u>taxation on registered income without deductible costs</u> (ryczałt ewidencjonowany)	150 000	591 975	633 420
	Amount of revenue for the previous year entitling to quarterly payments of ryczałt ewidencjonowany	25 000	98 662,50	105 570
	Amount of revenue for the previous year obliging to <u>maintain accounting books</u>	1 200 000 ¹	4 784 400	5 067 120

An analysis of the above amounts indicates that in the upcoming fiscal year a smaller number of companies will enjoy fiscal facilitations, particularly those involving one-time depreciation write-offs for new companies and small taxpayers, due to the decrease of the turnover limit defining the small taxpayer status by over 300 thousand PLN. Moreover, the limit of one-time depreciation write-offs (which had been increased for the years 2009-2010 to counteract the aftermath of the crisis) was more than halved, which is especially important in the context of fixed asset purchases planned for the nearest months.

Due to the exchange rate of euro announced on 30 September 2010, in 2011 the number of companies obligated to maintain accounting books will increase.

¹ Amount converted using the exchange rate of 30 September of the year preceding the fiscal year (exchange rate as at 30.09.2010 = 3.9870 PLN/EUR).

EVENTS

We would like to invite you for thematic breakfasts and seminars conducted by Mazars tax experts:

➔ **3 December 2010 r., Radisson Blu hotel, Cracow**

“Optimalisation of Vat payments”

For more information and registration: <http://bpcc.org.pl/en/content/view/2744>

Please be informed that this newsletter is of general character and cannot replace specific consulting in individual cases.

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