BULLETIN

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Łaszczuk & WSPÓLNICY
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ATTORNEYS-AT-LAW RECHTSANWÄLTE

VAT DEDUCTION FOR PURCHASE OF SERVICES FROM ENTITIES REGISTERED IN TAX HAVENS

The European Court of Justice has ruled that the limitation in the Polish VAT Act of 11 March 2004 on the right to deduct VAT on goods and services is too general and is inconsistent with the VAT Directive. In the judgment dated 30 September 2010 (*Oasis East sp. z o.o. v Minister Finansów*, Case C-395/09) the court ruled that Art. 17(6) of the Sixth VAT Directive does not allow a Member State to retain regulations (in this case, Annex 5 to the Polish VAT Act) which make it impossible for VAT payers to deduct input VAT on the purchase of services from entities registered in a territory regarded by the Member State as a tax haven.

The dispute in this case arose from issuance by the Polish Minister of Finance of an individual interpretation of tax law at the request of Oasis East sp. z o.o. In the request for the interpretation, the company asked whether, starting from 1 May 2004, when Poland joined the EU, the company had the right to reduce the amount of the output VAT by the amount of input VAT from invoices for purchase of administrative services for which the payment was made to an entity registered in a country deemed to be a tax haven under a regulation of the Minister of Finance. The company took the view that from 1 May 2004, introduction of a provision in the VAT Act containing a general prohibition of deducting such input VAT was inconsistent with Art. 17(6) the Sixth VAT Directive then in force (Sixth Council Directive 77/388/EEC of 17 May 1977, since incorporated into Art. 176 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax).

The Minister of Finance rejected the company's position, and the company challenged the minister's decision in the Polish administrative court. The case reached the Polish Supreme Administrative Court, which sought a preliminary ruling on this issue from the European Court of Justice.

In the justification for its judgment of 30 September 2010, the ECJ indicated that a Member State may limit the right to deduct input VAT, but only on consent of the Council of the EU. EU law prohibits Member States from retaining national legislation in force which excludes in general the right to deduct input VAT. Exclusion of the right to deduct input VAT must pertain to a particular kind of goods or services, and cannot be of general nature.

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IN-HOUSE LAWYERS NOT COVERED BY ATTORNEY-CLIENT PRIVILEGE

The European Court of Justice has ruled that legal professional privilege does not protect communications between

an enterprise and its in-house lawyers in the course of an antimonopoly inspection carried out by the European Commission. In the judgment dated 14 September 2010 (*Akzo Nobel Chemicals Ltd v Commission*, Case C-550/07 P), the court dismissed an appeal filed by two related companies with the Court of First Instance (now known as the General Court) and decided that the actions of the Commission, which in the course of the inspection seized correspondence between the enterprise and an in-house lawyer, were lawful.

The lawyer was a member of the Netherlands Bar Association and was hired under an employment contract pursuant to Dutch law. As the employer and related companies argued on appeal, both Dutch law and the employment contract itself guaranteed independence to the lawyer. The situation is comparable to that of a Polish legal adviser (*radca prawny*) hired under an employment contract, but the court's reasoning pertains generally to in-house lawyers within enterprises.

The court ruled that despite certain changes in the laws of the Member States, the holding in the 1983 judgment in *AM&S Europe v Commission* still remains relevant. According to the *AM&S* holding, communication with a lawyer is subject to protection under two conditions: the communication is connected with the exercise of the right to defence, and it comes from an independent lawyer. The court explained that subordination under an employment contract by definition excludes the in-house lawyer's independence from his or her employer. Thus, communications with a lawyer employed by the company or another company from the group are not privileged.

This ruling pertains to the overall EU legal system and does not leave room for differences between the situations of in-house lawyers in different Member States. Potential differences, e.g. as to the level of independence and protection of professional confidentiality in particular Member States, do not affect the lack of protection under EU law. Thus communications with in-house lawyers are not subject to protection in the case of exercise by the European Commission of its inspection authority in the field of competition law.

The judgment of the court resolves controversies with respect to communications with in-house lawyers. On the other hand, it raises doubts from the point of view of the right to defence and the right to a fair trial guaranteed in the European Convention on Human Rights.

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NOTE: The bulletin contains information prepared for our clients. The information pertains to legal issues and provisions of law which may have an impact on the business you operate. This information does not constitute a legal opinion or legal advice.