

REFUND OF TRANSACTION TAX ON SHAREHOLDER LOANS

Companies that paid Polish transaction tax (i.e. the tax on civil-law transactions) in 2007–2008 on shareholder loans to the company may now apply for a refund, following the ruling by the European Court of Justice in *Logstor ROR Polska sp. z o.o. v Director of the Katowice Tax Chamber* (Case C-212/10, judgment of 16 June 2011).

When were shareholder loans subject to transaction tax?

From 1 January 2001, the effective date of the Act on the Tax on Civil-Law Transactions dated 9 September 2000, through 30 April 2004, loans to a company by its shareholders were subject to transaction tax. (Before 1 January 2000 such loans were subject to stamp duty.) The rate was regressive and, depending on the principal amount of the loan, ranged from 1.0% to 0.1%.

When Poland joined the EU on 1 May 2004, an amendment to the act went into effect under which shareholder loans to a commercial company (i.e. limited-liability company or joint-stock company) were exempt from transaction tax. According to the justification for the bill, the amendment was intended to bring the act into compliance with Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital: "Since under the directive loans to a commercial company by

a shareholder are not subject to capital duty, the bill proposes exempting such transactions from the tax."

Then, effective 1 January 2007, the provision of the act exempting shareholder loans from transaction tax was repealed, and such loans were again subject to the tax, this time at a flat rate of 0.5%. According to the justification for that bill, "An amendment is introduced withdrawing the exemption for an agreement on a loan to a commercial company by a shareholder, and at the same time, in compliance with the directive, such transaction is added to the list of transactions considered to be an amendment of the articles of association of a commercial company."

Effective 1 January 2009, shareholder loans were again exempted, and now they are not subject to transaction tax. The exemption was reinstated in order to implement Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital.

What are the consequences of the ECJ ruling?

The issue before the ECJ was reinstatement of the transaction tax on shareholder loans from 1 January 2007 through 31 December 2008.

The court held that once Poland repealed the tax on shareholder loans upon EU accession, it had no right to reinstate

the tax. This follows from Art. 4(2) of Directive 69/335/EEC and the purposes stated in Directive 85/303/EEC for amending that article. Art. 4(2) lists transactions—including shareholder loans—that “may, to the extent that they were taxed at the rate of 1% as at 1 July 1984, continue to be subject to capital duty”. This is interpreted as a standstill provision, meaning that the tax on such items under national law had to remain in force from that day forward without interruption. Thus a member state could not reinstate such a tax once it had repealed it, which would be inconsistent with the wording of Art. 4(2) as well as the aim of the directive to limit or—ideally—abolish capital duty.

The ECJ thus concluded, “Article 4(2) of Directive 69/335 must be interpreted as precluding a Member State from reintroducing a capital duty on a loan taken up by a capital company, if the creditor is entitled to a share in the profits of the company, where that Member State has previously waived the levying of that tax.”

Therefore Poland’s transaction tax on shareholder loans in 2007–2008 must be regarded as contrary to EU law.

How to reclaim the tax?

Based on the *Logstor* ruling, companies that paid transaction tax in 2007–2008

on shareholder loans and have not yet applied for a refund may file a motion for declaration of overpayment of the tax. The overpayment should be refunded within 30 days after filing of the motion for declaration of overpayment. The overpayment is also subject to interest at the rate charged on tax arrears.

If the motion for declaration of overpayment is filed more than 30 days after publication of the *Logstor* judgment in the EU *Official Journal* (i.e. 6 August 2011), interest will be due for the period from the date of the overpayment through the date of publication.

Proceedings involving this issue that are still pending before tax authorities and administrative courts should be resolved in favour of the taxpayer. It cannot be ruled out, however, that the tax authorities may refuse to admit overpayment of the transaction tax, by arguing—as the Polish government did before the European Court of Justice in the *Logstor* case—that Poland never waived the right to levy transaction tax on shareholder loans. Nonetheless, that argument should not prevail before the administrative courts.

For more information on this topic, please contact Aleksandra Faderewska-Waszkiewicz (aleksandra.faderewska@laszczuk.pl).