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of Polish
Administrative
Courts

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Introduction

In Poland, the constitutional basis for applying the norms of primary and secondary EU law is provided under Articles 90 and 91 of the Constitution of the Republic of Poland. Article 91 of the Constitution is a *lex specialis* to Article 87 of the Constitution, which defines the catalogue of sources of mentioned law. Among the sources of generally applicable law, the said Article lists also international agreements. This, however, does not offer any definitive solution to the problem of the nature and position of the norms of secondary law.

The catalogue of sources of law set forth in Article 87 of the Constitution, is not a complete one and should be supplemented, by way of systemic interpretation, with acts of bodies of international organisations, as provided for in Article 91 paragraph 3 of the Constitution. Accordingly, the catalogue of the sources of national law includes the Constitution, Acts, Decrees, international agreements and, pursuant to Article 90 and Article 91 paragraph 3, also EU law.

The EU's primary law does not contain any provisions that would lay down the rules governing the operation of EU law within national legal orders or the relationship between national law and EU law. However, such rules are derived from the case-law of the Court of Justice of the European Union (formerly the European Court of Justice). The general rules of EU law form part of the *acquis* and, at the same time, the case-law of the Court. They are not codified as they have been established as judicial legislation.

The procedure by which EU law comes into full force and effect in national legal orders is determined by the principle of direct applicability, whereas the issue pertaining to the assignment of rights and obligations to the citizens of Member States under the relevant provisions of EU law is regulated by the principle of direct effect. Any situations where norms of national law conflict with those of EU law are dealt with by the principle of primacy of EU law.

The catalogue of the sources of law applicable in Poland has been extended to include the sources of EU law. This has required adjusting the interpretation practices to the nature of these sources. The interpretation principles stem from the nature of the sources of EU law and the relationship between EU law and national law, including the principle of primacy, the principle of direct applicability and the principle of direct effect.

In the pre-accession period, the interpretation strategy was adjusted to the nature of national law and its principal functions. The provisions applicable at the time reflected the reality of the Polish law system, the Polish legal culture and the related interpretation strategy. The adoption of the EU *acquis* has markedly changed the situation.

It follows from the case-law of Polish administrative courts that the process of interpretation employed by Polish judges is under particular influence of the Court of Justice of the European Union -- judgments of voivodship administrative courts and of the Supreme Administrative Court contained herein clearly exemplify that general trend.

By adopting its interpretations (the procedure of questions referred for a preliminary ruling), the Court substantially supplements the content of EU law and identifies the most efficient strategies related to the interpretation of law. Furthermore, it follows from the Grounds of judgments delivered by Polish administrative courts that the impact of the Court of Justice on the interpretation of law by Polish judges consists in: (1) influencing the interpretation of national law by means of its well-established judicial practice; (2) providing guidance as to the strategy for using particular types of interpretation; (3) setting interpretation guidelines through the general principles of EU law.

It can also be noticed that due to the special nature of the Court's judgments, the importance of its case-law as one of the sources of interpretation has also increased.

At the same time, the interpretation strategy applied by Polish judges and influenced by the EU's legal order is noticeably more complex and characterised by a higher level of difficulty.

It appears from judgments of Polish administrative courts that the importance of non-linguistic interpretation has been clearly increasing, both in systemic and teleological terms. Although linguistic interpretation initiates the interpretation process, as law is established by the written word, the interpretation process is characterised by a combination of linguistic interpretation and systemic interpretation. It can be concluded from the case-law of Polish administrative courts that the above process serves the following purposes: (1) enhancing the outcome of linguistic interpretation; (2) verifying the outcome of linguistic interpretation; and (3) correcting or changing the outcome of linguistic interpretation.

It clearly appears from the case-law of Polish administrative courts that year by year they increasingly tend to invoke EU law as well as the case-law of the Court of Justice and the interpretation strategy characteristic of the Court. Consequently, in cases with EU components, the case-law of the courts achieves a growingly high level in terms of the merits.

JUDGMENT OF THE VOIVODSHIP ADMINISTRATIVE COURT IN WARSAW

of 12 October 2005
(III SA/Wa 2219/05)

Presiding Judge: NSA Judge Bogdan Lubiński.

Judges: WSA assessor Sylwester Golec (rapporteur) WSA assessor Dariusz Turek.

The Voivodship Administrative Court (*Wojewódzki Sąd Administracyjny*) in Warsaw, having examined, at a hearing on 12 October 2005, the cases filed upon complaints by G. Sp. z o. o. with its registered seat in W. against the decisions of the Director of the Tax Chamber (*Dyrektor Izby Skarbowej*) in W. of [...] June 2005 No. [...] No. [...] No. [...] No. [...] concerning refusal to confirm overpayment of tax on goods and services for the months of June, July, August and September 2004, 1) repeals the appealed decisions, 2) confirms that the repealed decisions are not subject to enforcement in whole, 3) awards from the Director of the Tax Chamber in W., in favour of the complainant, the amount of PLN 15733 (fifteen thousand seven hundred and thirty-three zlotys) to refund the costs of the court proceedings.

Grounds

By letters of 24 November 2004, the limited liability company G. filed an application with the Head of the [...]Tax Office (*Naczelnik Urzędu Skarbowego*) in W. for confirmation of overpayment of the tax on goods and services for the months of June, July, August and September 2004. In the statement of reasons for its applications for confirmation of overpayment of the tax, the company asserted that under a contract made with the company G. established in the US, it had provided the latter with design services, technological/production support, examination of parts, and other engineering services involved in the development of gas turbines and jet engines. The Statistical Office (*Urząd Statystyczny*) in W. classified those services as “services in the area of research and analyses of integrated mechanical and electric systems” under PKWiU (*Polska Klasyfikacja Wyrobów i Usług* – Polish Classification of Goods and Services) 74.30.13-00 (KWiU 74.30.13). Together with its applications for conformation of overpayment, the company also filed copies of its enquiry filed with the Statistical Office as well as a letter form the said Office which indicated that the services, as described, were grouped un-

der number “PKWiU 74.30.13-00. The company asserted further that in Article 27 paragraph 3 subparagraph 1 of the Act of 11 March 2004 on the Tax on Goods and Services (*Journal of Laws* No. 53, item 545, as amended, hereinafter referred to as the Act on VAT), the legislator decided that for certain services supplied by taxpayers to natural persons, legal persons and organisational units without legal personality, established or having their place of residence on the territory of a third country, the place where the services are supplied is the place where the purchaser of the service is established, its regular place of business, for which the service is supplied and, in the absence of a regular place of business, its regular address or place of residence. In accordance with Article 27 paragraph 4 subparagraph 3 of the Act on VAT, the rule for determining the place of business, contained in Article 27 paragraph 3 of the Act on VAT applies to engineering services classified under the symbol PKWiU 74.2. Since the company supplied services classified under the symbol PKWiU 74.3, in accordance with Article 27 paragraph 4 subparagraph 3 of the Act on VAT, these services were not covered by the provision of Article 27 paragraph 3 of the Act on VAT, and, hence, they were governed by the general rule setting the place where services are supplied, contained in Article 27 paragraph 1 of the Act on VAT. Following this general regulation, for the supply of services, the place where services are supplied is the place where the service supplier is established, and for the regular place of business from which the services are supplied – the place where the service supplier has its regular place of business; in the absence of such a place of business or regular place of business, it is the regular place of residence. Because of this, on the basis of the legal regulations relied upon, the company concluded that the services concerned should be treated as supplied on the domestic territory, and hence, under Article 5 paragraph 1 subparagraph 1 of the Act on VAT, taxed in Poland and, raising invoices to document the supply of the services, the company charged the tax on goods and services due, which it declared in its VAT-7 tax return forms.

The company concluded, however, that the regulations of the Polish Act on VAT, as above described, were contrary to the provisions of the Sixth Council Directive. The company argued that the provision of Article 9 paragraph 1 of the Sixth Directive contains a general rule setting the place where a service is supplied. In terms of its contents, a corresponding provision in the Polish Act on VAT was Article 27 paragraph 1 of the Act on VAT which, just like the aforementioned provision of the Sixth Directive sets, in a general manner, the place where a service is supplied. The provision of Article 9(2)(e) of the Sixth Directive contains a regulation whereby for the services listed therein, supplied to customers established outside the Community or for taxable persons established in the Community but not in the same country as the supplier, shall be the place where the customer

has established his business or has a fixed establishment to which the service is supplied or, in the absence of such a place, the place where he has his permanent address or usually resides. The result of this regulation, which requires that the place where services of engineers are supplied, be the place where the service supplier is established or has a fixed establishment, and in the absence of such a place, the place where he has his permanent address or usually resides, is that the services are not supplied in the state in which the service supplier is established or has its fixed establishment, and in the absence of such a place, the place where he has his permanent address or usually resides.

Thus, if the services are not supplied on the territory of the state in which the service supplier has one of its fixed establishments listed in Article 9(1), because, in accordance with Article 9(2)(e) the services are supplied at the place of establishment, the place where the customer has established his business or has a fixed establishment to which the service is supplied or, in the absence of such a place, the place where he has his permanent address or usually resides, then, pursuant to the provisions of Article 2(1) of the Sixth Directive, the supply of services is not subject to taxation on the territory of the state in which the service supplier is established. In accordance with Article 2(1) of the Sixth Directive, the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such is subject to value added tax.

In the company's opinion, Article 27 paragraph 3 subparagraph 1 in conjunction with Article 27 paragraph 4 subparagraph 3 of the Act on VAT is contrary to Article 9(2)(e) of the Sixth Directive, because the scope of this provision is limited to engineering services with the symbol PKWiU 74.2, whilst the model provision of the Sixth Directive – Article 9(2)(e) – comprises all services supplied by engineers. Relying on ECJ case-law, the company pointed out that the services referred to in Article 9(2)(e) of the Sixth Directive should include services essentially and customarily supplied by the professionals referred to in that provision, services characteristic of the profession concerned and supplied as part of typical responsibilities following therefrom. In the company's view, the services it supplied, under the symbol PKWiU 74.3, were undoubtedly engineering services. The company asserted that if under the provisions of the Sixth Directive, the services it supplied to a party established in the US were to be deemed as not taxable in Poland and, under the regulations of the Polish Act on VAT, as cited above, these services were to be qualified as taxable in Poland, then, undoubtedly, the Polish regulations, as described, are in contravention of Article 9(2)(e) of the Sixth Directive since it had not been correctly implemented in the Polish legal system. It followed from the applications that, in the company's opinion, this provision,

concerning the services of engineers, had been implemented in the Polish legal system to an extent narrower than what follows from its provisions, because, even though the Polish legislator created a provision corresponding to Article 9(2)(e) of the Sixth Directive, as regards engineering services, it was limited to services with the symbol PKWiU 74.2. Furthermore, the company submitted draft amendments to the Decree of the Minister of Finance of 27 April 2004 on the Implementation of Certain Provisions of the Act on Goods and Services (*Journal of Laws* No. 97, item 970, as amended, hereinafter referred to as Decree) envisaging the addition, to the Decree, of § 4a, to contain regulations regarding the services with the symbol PKWiU 74.3 corresponding to the provisions of Article 27 paragraph 3 subparagraph 1 and Article 27 paragraph 4 subparagraph 3 of the Act on VAT as concerns the services with the symbol PKWiU 74.2. This amendment came into effect on 19 October 2004.

For these reasons, relying on incorrect implementation of Article 9(2)(e) of the Sixth Directive, the company claimed that in such a state of affairs, it was entitled to infer, directly from this provision of Community law, a legal effect in the form of non-taxation of the services provided with the symbol PKWiU 74.3 to a customer established in the US and, consequently, confirmation of tax overpayment.

Having examined the applications of the company for confirmation of overpayment, the Head of [...] Tax Office in W. gave four decisions in which the authority refused to confirm tax overpayment for the months of June, July, August and September 2004. In the statement of reasons for its decisions, the authority concluded that the provisions of the Council Directive could constitute the basis for claims of parties in relations with public authorities on condition that, despite the time limit for their implementation, the Directives had not been implemented into the national legal system and, further, the provisions of the Directives were unconditional and precise. In the opinion of the tax authority, the Polish provisions of Article 27 paragraphs 3 and 4 of the Act on VAT duly transposed to Polish law the regulations contained in Article 9(2)(e) of the Sixth Directive. It was as late as from 19 October 2004, that is from the date on which the amendment to the Decree came into force, that the same rules for the determination of the place where services are supplied as those set out in Article 27 paragraph 3 subparagraph 1 and Article 27 paragraph 4 subparagraph 3 of the Act on VAT as regards engineering services with the symbol 74.2 applied to services with the symbol 74.3, and hence it was only from that date that the services, to which the company's application for confirmation of overpayment pertained, were not subject to taxation in Poland.

The company filed appeals against these decisions with the Director of the Tax Chamber in W. In its appeals, the company pleaded violation, by decisions of the first-instance authority, of:

- Article 87 paragraph 1 and Article 91 paragraphs 1 and 3 of the Constitution of the Republic of Poland through failure to apply in the matter of universally applicable law under an international agreement constituting an international organisation – Article 9(3)(e) of the Sixth Council Directive of 17 May 1967 in conjunction with Article 53 and 54 of the Treaty of Accession of the Republic of Poland to the European Union of 1 May 2004 (Dz. U. No. 90, item 864, hereinafter referred to as the EU Accession Treaty) and in conjunction with Article 249 of the Treaty of Establishment of the European Community (*Journal of Laws* of 2004 No. 90, item 864/2, hereinafter referred to as TEC);
- Article 2, Article 7 and Article 8 paragraph 1 of the Constitution of the Republic of Poland, through the issuance of decisions based on regulations contrary to Article 87 paragraph 1 and Article 91 paragraph 3 of the Polish Constitution
- Article 120, 121 § 1 and Article 210 § 4 of the Act of 29 August 1997 on Tax Law (*Journal of Laws* No. 137, item 926 as amended, hereinafter referred to as Tax Law).

By letters of 10 May 2005, the company supplemented its appeals asserting, as in its applications for confirmation of overpayment, that the provisions of the Act on VAT, relied upon in the decisions of the first-instance authority, were contrary to Article 9(2)(e) of the Sixth Directive. The company pointed to the principle of supremacy of Community law over national law and the resulting necessity of direct application, in an individual case, by the authorities of a Member State, of Community regulations where the regulations contained in the national legal system are contrary to Community law.

On [...] June 2005, the Director of the Tax Chamber in W. gave four decisions in which the authority upheld the appealed decisions of the first-instance authority. In the grounds for its decision, the authority endorsed the position expressed in the appealed decisions of the first-instance authority. The former concluded that it was as late as from 19 October 2004, that is from the date on which the provision of § 4a of the Decree came into force, that the services supplied by the taxpayer to a customer in the US, with the symbol 74.3, were not taxable in Poland. In the opinion of the authority, there were no grounds for applying the provision of § 4a of the Decree to the services supplied before that date. The authority concluded

further that it was not competent to examine the compliance of national regulations with Community law.

The company filed complaints with the Voivodship Administrative Court in Warsaw against these decisions. In its complaints, the complainant asserted the same claims as in its appeal against the first-instance authority. In the statement of reasons for its complaints, the complainant relied upon ECJ judgments in cases C-41/74 Van Duyn, C-8/81 Ursula Becker, C-152/84 Marshal, C-91/92 in which the ECJ formulated the principle of direct effect of directives if they had not been implemented into the national legal system at all and also in the case of incorrect implementation. The complainant asserted that in its judgment in Case C-26/62 Van Gend & Loos, the ECJ found that not only does European law impose obligations upon nationals but it is also aimed at creating rights for them which have become part of their legal heritage. Relying on the judgment in Case C-103/88 Fratelli Constanzo Sp.A, the complainant pointed out that in a situation where the ECJ sets the conditions for the application, to individuals, of the provisions of directives, such provisions should be applied to such parties not only by national courts but by all public authorities.

In reply to the complaints, the Director of the Tax Chamber found the claims contained therein to be unfounded and, relying on the arguments contained in the appealed decisions, filed for the complaints to be dismissed.

The Voivodship Administrative Court has considered the following:

The complaints are justified.

It is to be pointed out, primarily, that the case heard is a Community case since it pertains to decisions given under Polish regulations on the tax on goods and services which, under Community law, constitute law harmonized with the Community legal system. Due to the fact that indirect taxation may lead to restricting the free flow of goods and services between Member States, the EEC Council, on the basis of Article 99 and 100 of the Treaty establishing the European Economic Community and in the First Directive of 11 April 1967, set the principal general characteristics of the common system of tax on goods and services to replace turnover taxes functioning to date in the legal systems of the Member States. In the provisions of the aforementioned Sixth Directive, the Council set detailed rules for the functioning of the common tax on goods and services on the territory of the Community, which is made up by the territories of the Member States.

In accordance with Article 249 TEC, next to regulations, decisions, recommendations and opinions, directives are sources of secondary Community law. A directive binds Member States to which it is addressed, as regards the result set out therein to be achieved by the Member State, whilst leaving national institutions freedom of choice of the form and means to attain this result. Directives also set the time limit for the fulfilment by their addressee – the Member State concerned – its obligations thereunder. A directive may not be addressed to parties other than Member States, in particular to natural or legal persons (cf. Z. M. Doliwa-Klepacki, *Wspólnoty Europejskie analiza and wybrane dokumenty*, Białystok 1993, p. 50 et seq.). The legal basis for a directive is the provision of substantive treaty law setting the subject matter of the regulation and the authority competent to issue the directive, and then the provisions of systemic treaty law setting the tasks of the competent authority. Article 249(3) TEC only sets the form of the act and the legal consequences it causes, and hence the failure to implement a directive or incorrect implementation thereof do not form an infringement of Article 249 TEC. The direct effect of a directive involves the issue of the time period for its implementation and non-implementation or incorrect implementation of the directive within the prescribed time period. Until the expiry of its implementation into the national legal system, a directive is a conditional act which may not have direct effect. In its judgment in the van Duyn case, relied upon by the complainant, the ECJ found that if a directive were deprived of its direct effect, it would challenge its binding force. The effectiveness of a directive imposing upon a state the obligation to take an action in the direction set therein would be limited if an individual could not rely upon it in a court of law of a Member State and the court could not take account of this issue as a Community law matter; therefore the direct effect of a directive is also supported by the principle of effectiveness of Community law. The ECJ pointed out that Article 177 TEC, which authorises Member States to submit legal questions, applies to all acts of Community law without an exception, and hence all these acts can be relied upon by individuals before national courts. In its judgment of 5 April 1979, in Case 148/78 Criminal proceedings v. Tullio Ratti, the Court confirmed the arguments relied upon in the van Duyn case and found, besides, that a Member State which had not adopted the implementing measures required by the Directive in the prescribed periods might not rely, as against individuals, on its own failure to perform the obligations which the Directive entailed. In its judgment of 14 July 1994 in Case C-91/92 Paola Faccini Dori v. Recreb Srl., the Court found that a Member State might not benefit from the non-implementation or incorrect implementation of a directive within the prescribed period. In addition to the time period prescribed for implementation, other prerequisites for direct application include: a direct link between the provisions of the directive and the subject matter of the individual's

rights, and the precise and unconditional nature of the provisions of the directive (cf. A. Wróbel, *Stosowanie prawa Unii Europejskiej przez sądy* ed. A Wróbel, Kraków, 2005, p. 97 et seq.).

In the view of the adjudicating panel, all prerequisites, as herein described, for direct application of Article 9(3)e of the Sixth Directive are present in the case heard. It follows from the provisions of Article 53 and 54 of the Treaty of Accession to the European Union that for Poland the time limit for implementing the provisions of the Sixth Directive into our legal system expired on 30 April 2004.

In the opinion of the court, in the matter of dispute between the complainant and the tax authorities, the provisions of the Sixth Directive were incorrectly and incompletely implemented in the Polish legal system. The provision of Article 9(3)(e) sets the rule of place of supply of services for all engineering services, as a result of which these services are not taxed upon general terms at the place where the service supplier is established. Articles 27 paragraph 3 subparagraph 1 and 27 paragraph 4 subparagraph 3 of the Polish Act on VAT required that the rule, favourable to taxpayers, be applied only to services under the symbol PKWiU 72.4, which, as the reality of the present case demonstrated, do not comprise all engineering services. It is beyond doubt that the materials scope of the provisions of the Sixth Directive, referred to above, was wider than its Polish counterpart – Article 27 paragraph 3 subparagraph 1 in conjunction with Article 27 paragraph 4 subparagraph 3 of the Act on VAT and it was only the amendment to the Decree, as described in the introduction hereto, that eliminated these non-compliances between the national law and the provisions of the Sixth Directive. It follows from the statement of reasons for the amendments to the Decree, which came into effect on 19 October 2004, as submitted during the course of the fiscal proceedings by the complainant, that the Polish legislator had been aware of that non-compliance, because it concluded in the statement of reasons that the addition to the Decree of § 4a would enable the same taxation of engineering services in Poland and in other EU Member States.

As regards engineering services, the provision of Article 9(3)(e) undoubtedly applies to services supplied by the complainant and is precise as well as unconditional, since it comprises services to be supplied, which require engineering expertise and which are supplied by engineers. It followed from the documents submitted by the complainant that the services to which the present case pertained, were technical services done by persons holding the professional title of an engineer and the scientific degree doctor.

In this state of affairs it is appropriate to conclude that claiming confirmation of tax overpayment, the complainant was entitled to rely on the consequences of Article 9(3)(e) of the Sixth Directive to the effect that the services supplied by the complainant and described in its applications for confirmation of overpayment should have been qualified as supplied outside of the territory of Poland and hence not taxed with the tax on goods and services – a contrario Article 5 paragraph 1 subparagraph 1 of the Act on VAT. For these reasons, it should be concluded that acting in breach of Article 72 § 1 subparagraph 1 Tax Law, the tax authorities denied confirmation of tax overpayment to the complainant company.

In order to completely clarify the issues arising in the present case and relating to the application of Community law, it is appropriate to point out that Community law with direct effect has priority in application over national law.

In its *van Gend en Loos* and *Flaminio Costa v. E.N.E.L.* judgments, the ECJ pointed to special characteristics of Community law in support of the adoption of this principle. In the Court's view, the following are in support of the supremacy of Community law over national law:

- creation by the EC Treaty of its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply;
- by creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the community, the Member States have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves;
- the integration into the laws of each Member State of provisions which derive from the Community and more generally the terms and the spirit of the Treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The law stemming from the Treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however, framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

- the transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights

- notwithstanding national law, Community law can impose obligations upon individuals, but also accord them rights; the basis for these rights is constituted not only by direct provisions in this regard contained in the Treaty but also the obligations imposed in this regard by the Treaty on the Member States, individuals and Community institutions (A. Wróbel *ibidem*, p. 108 et seq.).

The issue of the relationship between Community and national laws is not regulated in the TEC. The constitutions of certain Member States regulate this issue, and examples include the Constitution of the Republic of Austria, the Constitution of the French Republic. The writings on the subject have presented a view about the purposefulness of adding similar provisions to the Constitution of the Republic of Poland, which would comprehensively regulate the issues of Poland's membership in the EU (J. Barcz, *Członkostwo Polski w Unii Europejskiej a Konstytucja z 1997. [in] Czy zmieniać konstytucję? Ustrojowo-konstytucyjne aspekty przystąpienia Polski do Unii Europejskiej*, ed. J. Barcz, Warsaw 2002, p. 21 et seq.).

The Constitution of the Republic of Poland contains provisions relating to international law. The preamble to the Constitution contains provisions on the state being bound, in internal and external relations, by the principles following from truth, justice and good. In its Article 9, the Constitution stipulates that the Republic of Poland shall respect international law binding upon it. This provision applies not only to its external but internal relations as well. In its Article 87 paragraph 1, the Constitution sets the sources of binding law, which include international agreements. Under Article 90 paragraph 1 of its Constitution, the Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters.

In its Article 91, the Constitution of the Republic of Poland stipulates that

1. After promulgation thereof in the *Journal of Laws* of the Republic of Poland (*Dziennik Ustaw*), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute.

2. An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.

3. If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws.

For these reasons, it is appropriate to conclude that the complainant was right to claim, in its complaints against the tax authorities, the issuance of the appealed decisions in breach of Article 9, Article 87 paragraph 1, Article 90 paragraph 1 and Article 91 of the Constitution. The court has not endorsed, however, the plea, contained in the complaints, of breach by the tax authorities, of the provisions of Article 2, Article 7 and Article 8 of the Constitution because these are general provisions and, if, as demonstrated, the actions of the tax authorities had been in breach of the constitutional provisions regulating straightforwardly the application of international law, it had been unreasonable to refer to them provisions of general nature either.

Neither has the court endorsed the plea of breach of Article 120 of the Tax Law. In the present case, the tax authorities had given the decisions on the basis of universally applicable legal regulations, and the very fact that the authorities had not applied Community law directly applicable in the matter cannot prove that the authorities had not acted on the basis of the law at all. The tax decisions given in the case had relied on legal provisions, but, as already demonstrated, the authorities had interpreted these provisions in an incorrect manner. For the same reasons, the court has not endorsed the plea of breach of Article 121 of the Tax Law. It is to be concluded, furthermore, that the ECJ judgments cited herein attest to the fact that the application of Community law by authorities of Member States may often result in erroneous judgments. The plea of breach, by the appealed decisions, of the provision of Article 210 § 4 Tax Law as regards erroneous grounds for the decisions did not deserve to be allowed either, because in the statement of reasons for its decisions, the authority had explained the basis therefor, and the fact that the reasons proved to be the wrong interpretation of the provisions may attest to a breach of Article 210 § 4, which needs to be interpreted in the context of Article 210 § 1 of the Tax Law setting the components of a decision. Breach of the provision of Article 210 paragraph 4 of the Tax Law may be demonstrated by the absence of the statement of reasons for the decision or incomplete reasons which the court has not found in the case heard.

Having regard to the foregoing, it is to be concluded that the appealed decision was given in breach of Article 9(3)(e) of the Sixth Directive in conjunction with Article 53 and 54 of the Treaty of Accession to the European Union, Article 72 § 1(1) of the Tax Law and Article 9, Article 87 paragraph 1, Article 90 paragraph 1 and Article 91 of the Constitution of the Republic of Poland.

In this state of affairs, under Article 145 § 1 subparagraph 1 letter a), Article 152 and Article 200 of the Act of 30 August 2002 on the Law of Procedure before Administrative Courts (*Journal of Laws* No. 153, item 1270, as amended), it is hereby ruled as in the operative part of the judgment.

JUDGMENT OF THE VOIVODSHIP ADMINISTRATIVE COURT IN WARSAW

of 15 July 2008
(III SA/Wa 183/08)

Presiding Judge: WSA judge Grażyna Nasierowska (rapporteur).

Judges: NSA judge Krystyna Chustecka, WSA judge Barbara Kołodziejczak-Osetek.

The Voivodship Administrative Court (*Wojewódzki Sąd Administracyjny*) in Warsaw, after examining, at a hearing on 15 July 2008, the case filed by C. S.A. with its registered seat in W. against a decision of the Director of the Tax Chamber (*Dyrektor Izby Skarbowej*) in W. of [...] November 2007 No. [...] concerning the provision of written interpretation as regards the scope and method of application of the Tax Law 1) reverses the appealed decision and the order, preceding the same, given by the Head of the [...] Tax Office (*Naczelnik Urzędu Skarbowego*) in W. of [...] November 2006, No. [...], 2) finds that the reversed decision and the order preceding the same cannot be enforced in whole, 3) awards, against the Director of the Tax Chamber in W., in favour of C. S.A. with its registered seat in W., the amount of PLN 440 (four hundred and forty zlotys) to refund the costs of the court proceedings.

Grounds

1. By application of 18 August 2006, C. S.A., hereinafter as company or complainant, requested – under Article 14a of the Act of 29 August 1997 on Tax Law (*Journal of Laws/ No. 137, item 986, as amended*) – hereinafter Tax Law – interpretation as regards the scope and method of application of tax regulations. In particular, the company requested confirmation that: I a/ the company is entitled to deduct the input tax related to the goods in stock, acquired for pursuing taxed operations (production and sales of beer), to be contributed to a commercial law company, as part of its branch making its own balance sheet; b/ the company retains the right to deduct the input tax on the said stock also where, in accordance with the provisions of the Act on Corporate Income Tax of 15 February 1992 (*Journal of Laws of 2000 No. 54, item 564*) – hereinafter CIT, the party entitled to include the expenditure relating to the said stock in its operating expenses will

be the company to which the in-kind contribution will be made; II the company is entitled to deduct the input tax on capital outlays concerning assets under construction also where such assets are not used by the company but, where, before they are given for use and before their depreciation starts under the Act on CIT, they are brought, as an in-kind contribution, into another commercial law company, as part of a branch which makes its own balance sheet; III a/ the company is entitled to deduct the input VAT under invoices for the purchase of goods and services, raised to the company before the date on which the in-kind contribution was made also where it receives invoices documenting the purchase of these goods and services after the date on which the in-kind contribution is made, b/ due to the relationship between the purchases and VAT taxed sales, the company retains the right to deduct the input tax under the invoices concerned also where, in accordance with the provisions of the CIT Act, the party entitled to include the expenses relating to the stock in its operating expenses, is the company to which the in-kind contribution is made; IV a/ the company is entitled to deduct the input VAT under the invoices which confirm the receipt of advances paid to contractors before the date of the in-kind contribution, b/ the company retains its right to deduct the input tax under the invoices concerned also where, in accordance with the provisions of the CIT Act, it is not entitled to include the advances paid in its operating expenses. The statement of reasons for the application points out that C. S.A. is an undertaking which engages in the production and sales of beer. Within the company, there is a marketing and sales office – hereinafter Office or Branch. As a result of restructuring, C. S.A. will bring the Office – as its in-kind contribution – into C. sp. z o.o. The assets of the Office include goods in stock which were purchased to engage in taxed operations, i.e. production and sales of beer. The invoices for the purchased goods were raised to a company which deducts the VAT on these invoices. After the Branch is brought in, as an in-kind contribution, the goods in stock will be taken over by C. sp. z o.o. and, because revenue on the goods in stock is generated in C. sp. z o.o., the costs of their purchase will be recognised upon the generation of the revenue. Hence, items will be included in the operating expenses in C. sp. z o.o. As for the assets under construction, the complainant pointed out that the invoices for the purchase of goods and services necessary for generating or purchasing the items were raised to the company which deducted the input tax under these invoices. After the Branch is brought in as an in-kind contribution, the assets under construction will be the property of C. z o.o. which, after the capital project is complete, will take them over for use and will be making depreciation charges – in accordance with the CIT Act. The complainant noted the fact that the company is making purchases of goods and services which are documented by VAT invoices. Some of the invoices are received by the company after the date of making the in-kind contribution of the

Branch. The related expenses are included in the operating expenses in the company – or in C. sp. z o.o. – depending on which of the parties declares revenue. The complainant advised, at the same time, that it is paying its contractors advances on account of the sales of goods and services, and the recipients of the advances raise VAT invoices which confirm the receipt of the advances. The company deducts the input tax under these invoices. It does not, however, include the amounts paid in its operating expenses where it is possible that the goods or services will be supplied during later accounting periods – e.g. after the date of the in-kind contribution. In the company’s opinion, the fact of subsequent supply of goods or services may mean the impossibility for the company to make inclusions in its operating expenses because the consideration of the advance recipient may be performed for another party, i.e. the company to which the in-kind contribution has been made. In the complainant’s view, the burden of the VAT is borne by the party which is the “last-in-the-chain” that is one which does not purchase taxed goods and services to use the same for further operations charged with the VAT. In the opinion of the complainant, this conclusion is supported by the following judgments of the Supreme Administrative Court (NSA): of 7 June 2004 File No. FSK 87/04, of 7 June 2004 File No. I FSK 179/05, decisions of the Tax Chamber in Opole of 3 March 2005 No. PP-II-005/549/BL/04, Head of the Podkarpacki Tax Office (*Naczelnik Podkarpackiego Urzędu Skarbowego*) of 13 January 2006 No. PUS.II/443/188/2005/JZ, Director of the Tax Chamber (*Dyrektor Izby Skarbowej*) in Rzeszów of 12 January 2005 No. IS.II/2-443/386/04. The complainant pointed out that the principle of neutrality was included in the provisions of the First Council Directive of 11 April 1967 (67/227/EEC) and in the provisions of the Sixth Council Directive of 17 May 1977 (77/388/EEC), and developed further in the judgments of the Court of Justice of the European Community C-50/87 (European Commission v. France); C-37/95 (Belgium v. Ghent Coal Terminal); C-268/83 (D.A. Rompelman and E.A. Rompelman van Delen v. Minister van Financien); C-165/86 (Leesportefeuille Intiem CV v. Staatssecretaris Van Financien). The complainant noted that the company would be entitled to deduct the input tax where “the invoices [are] raised before the date of the in-kind contribution and received after that date”, in evidence of which it relied on ECJ judgment in Case I/S Fini H C-32/03. In the company’s view, the regulation under Article 88 paragraph 1 subparagraph 2 and paragraph 3 should be regarded – as an exception to the right to deduct the input tax – as a special regulation introducing restrictions to the basic rights of a VAT payer. In the opinion of the company, Article 88 paragraph 1 subparagraph 2 of the Act on VAT refers to expenditure which could not be – objectively and hypothetically – included in the operating expenses in the meaning of the CIT Act, and not to expenditure which, in the particular case, was not included in the costs because the related revenue was realised in a party other

than the party incurring the expenses. In the opinion of the complainant, the non-deductibility of expenses as operating expenses, of the complainant, is due to the fact that the revenue involved in the purchases will be realised by C. sp. z o.o.: this fact may not have an effect on the hypothetical and objective qualification of these expenses as operating expenses under Article 88 paragraph 1 subparagraph 2 of the Act on VAT. The complainant noted further that even though the assets under construction were not formally received by the company for use (entered in the register of fixed assets) and, as a result of the planned bringing in of the branch as an in-kind contribution, this will not be done by the company but by another party, this fact may not restrict the company's right to deduct the VAT assessed on the expenses relating to the assets under construction. It pointed out in particular that there is no provision in the Act on VAT which would restrict the company's right in this regard and the correctness of its views was confirmed by the judgment of the Supreme Administrative Court (NSA) of 22 June 2005 File No. FSK 228/05. Furthermore, in the opinion of the company, the impossibility for the company to deduct the tax receivable under the invoices for the advance on account of the sale of goods or supply of services, would be contrary to the basic principle of the VAT, i.e. the principle of tax neutrality. It pointed out that – as a rule – amounts of advances paid are not considered to be operating expenses, which may not result in the absence of the right to deduct the same because – in accordance with Article 17(1) of the Sixth Directive, the right to deduct shall arise at the time when the deductible tax becomes chargeable to the seller. In the company's view, the possibility to deduct the input tax in the invoices documenting the receipt of advances will not be limited by the possibility to include the said expenditure in its operating expenses of the company or the party to which the in-kind contribution is made, and such interpretation is in compliance with Article 86 paragraph 2 subparagraph 1 letter b) of the Act on VAT.

2. By decision of [...] November 2006, under Article 14a § 4, read in conjunction with Article 14a § 1 of the Tax Law, the Head of the [...] Tax Office in W. considered the position of the company incorrect. In the view of the first-instance authority, where goods in stock are brought in by a tax-payer as an in-kind contribution to another company, there are no grounds for concluding that such taxpayer loses its right to deduct the input tax on the purchase of such goods. Where, at the time of purchase, the taxpayer had the intention of using the goods to perform taxed operations and met the requirements of Article 86 paragraph 1 of the Act on VAT – to the extent to which goods and services are used to perform taxed operations – the company will be entitled to reduce the amount of the tax due by the amount of the input tax. There are no grounds for excluding the right to deduction where the company received, after the date of the in-kind con-

tribution, the invoice raised before such date. The first-instance authority pointed, at the same time, that Article 88 paragraph 2 subparagraph 1 of the Act on VAT contains a restriction of the taxpayer's right to reduce the amount of the tax due by the amount of the input tax where the expenses on the purchase of goods and services could not be included in the operating expenses in the meaning of the CIT Act. In the situation in question, expenses could be or are operating expenses not for the applicant but for another party, in this particular case, for the company to which the in-kind contribution will be made, because the goods in stock purchased before will become its property. These expenses will therefore be related to the company's business operations and may have an effect on the amount of its revenue generated by this very company – hence the restriction on deduction under Article 88 paragraph 1 subparagraph 2 of the Act on VAT to such a situation. As regards the right to deduct the input tax on the capital outlays relating to assets under construction, to be brought in as an in-kind contribution before they are given for use and before depreciation starts, the first-instance authority concluded that Article 88 paragraph 3 subparagraph 1 of the Act on VAT contains an exception to the application of the limitation of the right to deduct the input tax, as formulated in Article 88 paragraph 1 subparagraph 2 of the Act on VAT. The aforementioned limitation does not apply, amongst other things, to expenses relating to the purchase of goods and services referred to in Article 87 paragraph 3 of the Act on VAT. It follows from the taxpayer's application that it is the company to which the in-kind contribution is to be made that will enter the capital project in the register of fixed assets. Thus, the said capital projects are not and will never be included by the taxpayer in fixed or intangible assets to be depreciated, and the exclusion from the application of Article 88 paragraph 3 subparagraph 1 will not apply to purchases of fixed assets under construction.

3. In its complaint of 1 December 2006, C. SA upheld its position expressed in its application for interpretation, asserted breach of Article 86 paragraph 1, Article 88 paragraph 1 subparagraph 2 and Article 88 paragraph 3 of the Act on VAT and filed for a decision to be given changing the challenged decision of the Head of the [...] Tax Office.

4. In its letter of 3 January 2007, C. SA relied on the judgments of the Supreme Administrative Court (NSA) of 7 June 2004 File No. FSK 87/04, of 21 October 2005 File No. I FSK 179/05, ECJ judgments C-497/01 Zita Modes, C-305/97 Royscot Leasing Ltd, C-184/04 Uudenkaupungin kaupunki, C-37/95 Belgium v. Ghent Coal Terminal NV, C-268/83 Rompelman, C-50/87 Commissions v. French Republic, C-475/03 Banca popolare di Cremona Soc. Coop. Arl, C-439/04 Axel Kittel, C-255/02 Halifax and the judgments of the Voivodship Administrative Co-

urt (WSA) in Lublin of 18 October 2006 File No. I SA/Lu 225/06. The complainant pointed – in particular – to the fact that it was not the end recipient of the goods and services but an undertaking pursuing operations taxed with the VAT, and hence the VAT should be neutral to it. Furthermore, the exemptions as regards the right to deduct the input VAT, in the case of goods and services not included in the operating expenses, in the meaning of the regulations on corporate income tax, do not meet the criteria set out in Article 17(6) of the Sixth Directive, because the principle of continuation of limitations in VAT deductions (standstill clause) should not apply to these exemptions. In the company's view, Article 88 paragraph 1 subparagraph 2 of the Act on VAT should not apply to the expenses mentioned in the application for interpretation.

5. By the appealed decision, the Director of the Tax Chamber changed the order of the first-instance authority. In the statement of reasons, the former pointed to the necessity of direct and indisputable link between expenses and taxed operations, which follows from ECJ case-law, e.g. Case C-4/94 BLP Group v. Commissioner of Custom and Excise. It noted that even though the purchase of goods and services had been done with the intention of using the same in taxed operations, such goods – as part of the Branch's assets – had subsequently been brought in, as an in-kind contribution, to another company. The making of the in-kind contribution, in turn, is VAT exempt. Consequently, at no point in time did the commercial goods purchased with the intention of further taxed re-sale, subsequently brought, as an in-kind contribution, to a company, serve the purpose of pursuing taxed operations but only became the subject of an exempted operation – hence the requirement for obtaining the right to deduction under Article 86 paragraph 1 of the Act on VAT was not fulfilled. This comment also applies to outlays on assets under construction, which had not been taken for use before they were brought, as an in-kind contribution to another company, as well as to advances paid on account of future purchase of goods and services. All these expenses were not related to the company's taxed operations and, finally, to an exempted transaction in the form of the in-kind contribution. In the Director's view, the position of the Head of the Tax Office as to the absence of the obligation to adjust the input tax on the purchase of commercial goods, subsequently brought, as an in-kind contribution, to another company, is wrong and subject to change because the adjustment obligation follows from Article 91 paragraph 7 of the Act on VAT. In particular, the change in the intended use of the fixed assets, consisting of them being used to perform an exempted operation which is the making of an in-kind contribution to a commercial law company, results in a change of the right to deductions and necessity to apply the said regulation. The hypothetical possibility of including the said expenses in the operating expenses is not relevant because

the right of deduction arises to the extent to which goods and services are used to perform taxed operations, which follows from Article 86 paragraph 1 of the Act on VAT and from Article 168 of Directive 112 – regardless of the requirement of a link between purchases and taxed operations.

6. In its complaint filed with the Court, C. S.A. asserted breach of Article 6 paragraph 1 and Article 91 paragraph 9 of the Act on VAT through the failure to apply the same to the transaction of bringing in, as an in-kind contribution, of a branch which makes its own balance sheet; § 8 subparagraph 5 of the Decree of the Minister of Finance of 27 April 2004 on the Implementation of Certain Provisions of the Act on VAT (*Journal of Laws* of 2004 No. 97, item 970) through their incorrect application consisting in the presumption that the bringing in, as an in-kind contribution, of a branch which makes its own balance sheet, is a VAT exempt transaction and that the party making such an in-kind contribution is obliged to adjust its input tax; Article 86 paragraph 1 of the Act on VAT through the presumption that the company did not have the right to deduct the amount of the input tax in the factual situation it described; Article 233 § 1 subparagraph 2 letter a) read in conjunction with Article 208 and Article 14b § 3 of the Tax Law, through the failure to reverse a decision given after the expiry of 3 months from the date the company's application was received. In the company's opinion, ECJ case-law points out clearly that the making of an in-kind contribution in the form of a branch which makes its own balance sheet does not have any consequences as regards the input tax on the part of the seller. In the opinion of the complainant, it follows from Article 6 paragraph 1 of the Act on VAT that the sale of a branch which makes its own balance sheet is exempted from the scope of taxation with the VAT, and hence the definition of supply of goods for consideration, under Article 5 paragraph 1 subparagraph 1 of the Act on VAT does not apply thereto. The company claimed that the fact that § 8 subparagraph 5 of the Decree, concerning tax exemption, could not modify the statute was relevant for the matter. Furthermore, the distinction between "exemption from taxation" and "not being taxable" is relevant from the viewpoint of the consequences for the company: in the case of exemption, the right to deduction does not apply (ECJ Case C-4/94). The complainant noted that with the presumption of a link between an item of expenditure and a transaction which is not subject to VAT – but not an exempt one – where the expense can be reasonably attributed to the entirety of taxable operations of a taxpayer – the taxpayer is entitled to deduction. The complainant relied on the Cases *Abbey National* C-408/98 and *Faxworld* C-137/02, *Kretztechnik AG* C-465/03, *KapHag* C-442/01; in the view of the complainant, it follows from the foregoing that the bringing of a branch which makes its own balance sheet, as an in-kind contribution to C. sp. z o.o., does not have any consequences on the part

of the company as regards tax deductions. The obligation of a tax adjustment, if any, will rest, in accordance with Article 91 paragraph 9 of the Act on VAT, on the purchaser of the branch, if it is justified by the type of its operations. In the opinion of the complainant, Article 91 paragraph 7 of the Act on VAT, relied upon by the Director, does not apply in the case because the consequences of the transfer (including in the form of an in-kind contribution) of an undertaking or an establishment (branch) are comprehensively covered by Article 91 paragraph 9 of the Act on VAT. C. SA noted that the matter pertained to a transaction which was not taxable with the VAT, and, hence, Article 91 paragraphs 1 – 5 of the Act on VAT did not apply in the case, and the consequences of bringing a branch as an in-kind contribution are comprehensively covered by Article 6 paragraph 1 and Article 91 paragraph 9 of the Act on VAT. Because of this, the matter of including certain items of expenditure in operating expenses on the part of the purchaser of the branch does not have an effect on the company's right to deduct the input tax relating to such expenses. In the company's opinion, the principle of neutrality does not manifest itself through the obligation of "neutralising" the input tax where the tax due does not arise – but through releasing a VAT payer from the economic burden of the tax. This is precisely the purpose of the deduction mechanism. It would be contrary to the principle of neutrality to adjust previous deductions and then tax the same goods by the purchaser of the branch – even though they were purchased as part of a non-taxable transaction, and hence the purchaser did not have the right to deduct the input tax.

7. In its reply to the complaint, the Director of the Tax Chamber filed for it to be dismissed.

8. In its letter of 3 June 2008, the complainant pointed out that the application set out explicitly that the question had applied to the contribution of a branch and not of goods. This fact was pointed out by the Director itself too, in the contents of the appealed decision. Furthermore, it follows from Article 19 of Directive 112 and Article 5(8) of the Sixth Directive, read in conjunction with Article 6 paragraph 1 of the Act on VAT, that also the making of an in-kind contribution in the form of a branch which makes its own balance sheet also constitutes a sale transaction. In the opinion of the complainant, transfer of an undertaking, whether for consideration or not, is tax exempt, and the form of the transfer – sale, in-kind contribution, exchange, donation, etc. – is irrelevant.

9. The Voivodship Administrative Court in Warsaw considered the following:

10. In accordance with Article 1 § 1 and § 2 of the Act of 25 July 2002 – Law on the System of Administrative Courts (*Journal of Laws* No. 153, item 1269), the court administers justice through reviewing the activities of public administration for its observance of the law. Hence, the court reviews the compliance of acts, including, in this particular case, written interpretation of tax law regulations given in an individual matter, with both substantive and procedural law. In accordance with Article 134 of the Act of 30 August 2002 – Law on Procedure before Administrative Courts (*Journal of Laws*, No. 153, item 1270, as amended) – the court decides within the limits of the case concerned without being bound, however, by the pleas and claims in the complaint and the legal basis relied upon.

The complaint deserves to be allowed.

11. In the opinion of the Court, the dispute in the matter amounts to resolving the issue of whether the bringing by the Company of an office which makes its own balance sheet – as an in-kind contribution – is a transaction which is VAT exempt, that is not subject to the VAT, that is to determining the method of application in the matter of the provisions of the Decree and the provisions of the statute which regulates this matter. The application of other Polish regulations is a result of the correct adoption by the tax authorities of one of the aforementioned presumptions. At the same time, for the matter to be resolved it is not possible to rely directly on European law, primarily the Sixth Directive, because the disputable issues are not regulated straightforwardly therein, in particular in Article 5(8) of the Sixth Directive, and the guidelines in the matter follow from the case-law of the European Court of Justice. Neither is it possible to apply directly in the matter the judgments of the European Court of Justice, relied upon in the application and in other pleadings, because the judgments referred to in the pleadings had been given in specific factual circumstances, and the complainant – apart from quoting the citations of its choice from the grounds therefor – did not demonstrate what the identity of the cases consisted in, also with reference to the facts of the case, with the one analysed herein.

12. In accordance with Article 5 paragraph 1 subparagraph 1 of the Act on VAT, the tax on goods and services, hereinafter referred to as “tax”, applies to the supply of goods and services for consideration and the supply of services for consideration, domestically. In accordance with Article 6 paragraph 1 of the Act on VAT, the provisions of the Act do not apply to the transfer of an undertaking or an establishment (branch) which makes its own balance sheet. On the other

hand, under § 8 subparagraph 1 point 6 of the Decree of the Minister of Finance of 27 April 2004 (*Journal of Laws* No. 97, item 970) non-cash (in-kind) contributions brought into commercial law and civil law companies shall be VAT exempt. In accordance with Article 217 of the Constitution of the Republic of Poland (*Journal of Laws* of 1997 No. 78, item 483) – hereinafter “Constitution” – the imposition of taxes, as well as other public imposts, the specification of those subject to the tax and the rates of taxation, as well as the principles for granting tax reliefs and remissions, along with categories of taxpayers exempt from taxation, shall be by means of statute. It is a disputable matter, even though not identified precisely by either party to the proceedings, whether the making of non-cash contributions may be treated as tax exempt and whether it means modification of the provisions of a higher-ranking act (statute), by the provisions of a decree that is a lower-ranking act.

13. The Court points out that Article 6 paragraph 1 of the Act on VAT, which excludes from the scope of this statute the taxation of transfer of an undertaking and an establishment, should be understood to mean implementation of Article 5(8) and Article 6(5) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ EU L.77.145.1 as amended) – hereinafter Sixth Directive. This provision stipulated that in the event of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof, Member States may consider that no supply of goods has taken place and in that event the recipient shall be treated as the successor to the transferor. Where appropriate, Member States may take the necessary measures to prevent distortion of competition in cases where the recipient is not wholly liable to tax. The Sixth Directive ceased to apply as of 1 January 2007, and was replaced with Council Directive 2006/112/EU of 28 November 2006 on the common system of value added tax (OJ EU L 06.347.1), hereinafter – “Directive 112”. It follows from the “Correlation Table” which forms Annex XII to Directive 112 that the equivalent to Article 5(8) sentence one of the Sixth Directive in the new Directive is Article 19(1) whilst the article which corresponds to sentences 2 and 3 of Article 5(8) of the Sixth Directive is Article 19(2) subparagraph 2 of Directive 112 (cf. judgment of the Voivodship Administrative Court (WSA) in Warsaw of 27 February 2008 File No. III SA/Wa 934/07). The convergence of regulation of the disputable matter in both acts of law demonstrates the stability of the legislator as to the manner of perceiving the VAT mechanisms.

14. The context for the assessment of the case was set by Poland’s acceding to the European Union as of 1 May 2004. One of the consequences of accession was

that Community law became part of the national legal system which follows from Article 2, Part 1 of the Treaty concerning the Accession of the Republic of Poland, signed in Athens on 16 April 2003 (*Journal of Laws* of 2004 No. 90, item 864), and since that day Poland has been bound by the provisions of the establishment treaties and the acts adopted by Community institutions and the European Central Bank before the date of its accession. In this way, Poland committed itself to take over the entire Community law and the Community's *acquis communautaire*. It follows therefore that in the interpretation of Polish law, the Community element – if any – must be taken into consideration. In a situation, however, where a specific provision of Polish law is the effect of implementation of a Community directive, the leaving out, upon the interpretation of national law, of the interpretation of these or relevant provisions of Community law provided by the ECJ, equals breach of the principles of Community law adopted by Poland and, in the first place, of the principle of its effectiveness. The obligation to duly apply Community law, account being taken of the need to ensure its supremacy and full effectiveness, rests not only with national courts but public administration bodies which apply the law as well. This does not mean, however, that the case-law of Polish courts developed during the period of application of the Act of 11 January 1993 on the Tax on Goods and Services – as in the judgments of the NSA of 7 June 2004 File No. FSK 87/04, or of 21 October 2005 File No. I FSK 179/07 should be left out – especially if the judgments concern elements of common construction with the Act on VAT and if they take account of the guidelines provided by the Court of Justice of the European Community.

15. The use of the delegation under Article 82 paragraph 3 of the Act on VAT to set exemptions requires that compliance with Community law be ensured; hence, applying the provisions of the Decree in which these exemptions are set, tax authorities should examine whether the issue of tax exemptions provided for in Community law has been taken full account of in the statute. In particular, it is to be considered whether the transactions which are listed as exempted in the Decree, in this particular case the contribution of an undertaking, are not subject to the VAT in the provisions of Community law. The fact of qualifying a transaction as VAT exempt or not subject to the VAT is of relevance for the degree of exercise of deduction of the input tax that is for the exercise of the taxpayer's right under the construction of the VAT and the fulfilment of the principle of neutrality. Hence, if the Polish legislator extended the catalogue of exemptions – e.g. in § 8 paragraph 1 subparagraph 6 of the Decree – without authorisation to do so contained in the provisions of Community law (in this particular case the provisions of the Sixth Directive and Directive 112), then a consequence of this action may be unjustified restriction of the right to deduction, that is breach of the principle

of neutrality and the principle of equality. The need to present the above conclusion is imposed upon the Court by the results of an analysis of judgments of the European Court of Justice available, in translation, from the Lex legal database, on www.curia.europa.eu/jurisp/cgi-bin/form.pl?lang=pl and on www.eur-lex.europa.eu/RECH_menu.do?ihmlang=pl, the meanings of which are provided in section 27 hereof. In particular, the Court notes that it follows from the case-law referred to in the said section that exemptions form a departure from the general principle to the effect that the VAT is charged on any supply of goods or a service supplied for consideration by a taxpayer. The exemptions provided for in the Sixth Directive 77/388/EEC, are autonomous concepts of Community law and should therefore be defined from the viewpoint of Community law. The situation is similar in the case of special requirements set for the exercise of such exemptions, which should be interpreted strictly – otherwise they are in breach of the principle of neutrality. The introduction of exemption from the VAT, despite the absence of authorisation in the Sixth Directive, means failure to meet the obligations of the State under Article 2 of the Sixth Directive.

16. Considering the application in the case of Article 6 paragraph 1 of the Act on VAT, the Court points out that transfer of an undertaking or an establishment which makes its own balance sheet, whether for consideration or not, should be qualified as transfer of an undertaking. The legislator did not narrow, at the same time, the application of the exemption to the form of transfer specified in the statute. For the same reason, neither sale, in-kind contribution, exchange and donation or other transactions having the effect of transfer are taxable – for instance also through the bringing in a company of an undertaking as an in-kind contribution (E. Norek, *Przedsiębiorstwo jako przedmiot obrotu gospodarczego*, Warszawa 1997, p. 125 et seq. Poźniak-Niedzielska, *Zbycie przedsiębiorstwa*, p. 37; S. Włodyka, *Umowy*, p. 89; J. Mojak (in:) *K.c. Komentarz 1997*, p. 1119), if their subject is an undertaking (its independent branch). The Court points, at the same time, to the fact that the transfer of an undertaking consists of transferring the title to the undertaking to another party and hence the conclusion that the legislator has allowed the attainment of this effect through other legal transactions.

17. The Court hearing the case points out that it is entitled to incidental review of all regulations which are situated below a statute (reference can be made, for instance, to resolutions of the Supreme Administrative Court of 30 October 2000, OPK 13/00 - ONSA of 2001 z.2, item 63, of 15 December 2000, OPK 20-22/00 - ONSA of 2001 z. 3, item 104, of 21 February 2000, OPS 10/99 - ONSA of 2000 z. 3, item 90, of 22 May 2000, OPS 3/00 - ONSA of 2000 z.4, item 136, see also A. Mączyński, *Bezpośrednie stosowanie Konstytucji przez sądy*, PiP of 2005,

No. 5, p. 12; L. Garlicki, *Trybunał Konstytucyjny a rola sędziów w ochronie konstytucyjności prawa*, PiP of 1986, No. 2, p. 40). The view of the Administrative Court that the provision of the Decree which is the legal basis for an administrative decision is contrary to the Constitution and the statute and the denial, based thereon, to apply such regulation in the case heard means that the administrative decision was issued in breach of specific provisions of law of the constitutional or statutory rank. Review of activities of public administration for compliance with the law in the meaning of Article 184 of the Constitution of the Republic of Poland and Article 1 of the Law on the System of Administrative Courts comprises a review of the administrative act an appeal against which was filed with the court for compliance with the law applicable in the administrative matter concerned. Issuance of an administrative act with reference to a provision of the Decree which is contrary to the Constitution and a statute equals the issuance of an act in breach of higher-ranking regulations (resolution of the NSA of 16 January 2006, File No. I OPS 4/05).

18. In accordance with Article 87 paragraph 1 of the Constitution, the sources of universally binding law of the Republic of Poland shall be: the Constitution, statutes, ratified international agreements, and decrees. It follows from Article 92 of the Constitution of the Republic of Poland that decrees are issued on the basis of specific authorization contained in, and for the purpose of implementation of, statutes by the bodies specified in the Constitution. The characteristics of a decree is its implementing nature. It means that a decree has to bear a substantive and functional relationship to statutory concepts. A statutory authorisation may allow modification of the provisions of a statute through a decree but such authorisation has to be expressed directly in the authorising provision which the Court has not found in the provisions of the Act on VAT. The correctness of such a position is confirmed by § 115 and § 116 of the Decree of the Prime Minister of 20 June 2002 on the “Principle of Legislative Policy” (Dz. U. No. 100, item 908). In accordance with this regulation, an implementing regulation to a statute may not amend or modify, on its own, the provisions of hierarchically higher acts. A decree may not, however, supplement a statute, extend the prerequisites for the implementation of a legal provision set out in a statute, or such elements of the procedure which do not meet its statutory presumptions – not to mention the creation of a legal provision which is contrary to a provision of a statute.

19. Extension of the catalogue of exemptions from the VAT by § 8 subparagraph 1 point 6 of the Decree of the Minister of Finance of 27 April 2004 was unacceptable because a provision of a decree may not modify provisions of a statute, in this particular case Article 6 paragraph 1 of the Act on VAT.

The provision of § 8 subparagraph 1 point 6 of the Decree of the Minister of Finance of 27 April 2004 regulates the taxation of a transaction of bringing in an undertaking, as an in-kind contribution, in a manner different from the regulation under Article 6 paragraph 1 of the Act on VAT, and hence application of a provision of the Decree on taxation with the VAT of the contribution of an undertaking/branch should be denied. In none of the provisions referred to – as statutory delegation to issue a decree – i.e. in Article 19 paragraph 22, Article 28 paragraph 9, Article 41 paragraph 16, Article 86 paragraph 21, Article 92 paragraph 1, Article 99 paragraph 15, Article 106 paragraph 12, and, primarily, in Article 82 paragraph 3 of the Act on VAT, is there a regulation meeting the requirements set in Article 217 of the Constitution of the Republic of Poland, which could be the basis for issuing § 8 subparagraph 6 of the Decree, which has the consequence of denial to apply this provision of the Decree.

20. The provision of Article 217 of the Constitution is not uniform, because it sets the absolute exclusivity of the statute for the imposition of taxes, as well as other public imposts, the specification of those subject to the tax and the rates of taxation. On the other hand, the final part of Article 217 of the Constitution require the form of statute for regulating the award of reliefs and principles for granting tax reliefs and remissions along with categories of taxpayers exempt from taxation. This means leaving greater regulatory scope for implementing acts – indeed, if the exclusivity of the statute applies in an absolute manner to the setting of principles and categories, there are no constitutional obstacles for more detailed matters to be regulated in implementing acts. If, therefore, as regards the imposition of taxes, as well as other public imposts, the specification of those subject to the tax and the rates of taxation, the Constitution absolutely requires statutory regulation, then, as far as reliefs and remissions are concerned, this regime is made more lenient. It is not unlikely that these may be detailed in a decree (cf. judgment of 3 April 2001, K. 32/99, judgment of 6 March 2002 File No. P 7/00; cf. also Jerzy Szczęsny, *Rozporządzenie jako źródło prawa podatkowego*, in: *Przegląd Prawa Gospodarczego – Głosa*, No. 12/2002, p. 38n). At the same time, the place of the Constitution in the system of taxation law requires for the process of interpretation of a legal regulation to be conducted in such a manner that the interpretation is in compliance with the Constitution. Note should be made, in this regard, of the guidelines provided by the Constitutional Tribunal contained in its resolution of 6 September 1995, File No. W 20/94 (cf. *Orzecznictwo Trybunału Konstytucyjnego*, 1995, No. 1, item 6, part II, p. 258-265, or judgment, File No. K 2/94, OTK of 1994, part II, p. 48), where the Tribunal pointed out that in a situation where it is possible for a legal provision to be interpreted in a manner

which is in compliance with the Constitution, such a possibility should be used and a reading of the provision as unconstitutional should be rejected (cf. also letter from the Minister of Finance posted on: <http://podatki.wp.pl/kat,66236>). In particular, a decree is issued on the basis of a statutory authorisation and in order to implement the statute. It may not enter the sphere of legal matters regulated by statutes and may not, on their basis, repeat, transform, modify or synthesize the provisions thereof (judgments of the Constitutional Tribunal (TK) of 20 October 1986, P. 2/86, 9 April 1991, U. 9/90, 17 June 1997, U. 5/96, 5 October 2004, U 2/04; judgments of: 8 October 2002, K 36/00, 14 October 2002, U4/01, 10 December 2003, K 49/01, 29 June 2004, U 1/03, 26 July 2004, U 16/02). The subject-matter of a decree should not be extended by functional interpretation whilst the absence of a position of the legislator should be interpreted as non-granting of a legislative power (judgments of: 8 October 2002, K 36/00, 14 October 2002 U 4/01, 10 December 2003, K 49/01, 29 June 2004, U 1/03, 26 July 2004, U 16/02).

21. The Court notes that the presumption for the review of constitutionality – and compliance with statutory delegation – of implementing acts is whether a decree is lawful – whether it complies with the law – especially if it was issued by the authorised body, whether it serves the purpose of implementing the statute and whether it is within the scope of matters delegated by the latter to be regulated, and whether it meets the aim of the statute. The provisions and objectives of the decree should be determined and set by the aim and provisions of the statute. The implementing regulations should remain related, in substantive and functional terms, with the statutory concepts, because it is only in such a way that limits can be set for regulations contained in statutory provisions (*Proces prawotwórczy w świetle orzecznictwa Trybunału Konstytucyjnego – Wypowiedzi Trybunału Konstytucyjnego dotyczące zagadnień związanych z procesem legislacyjnym*, posted on the website of the Polish Constitutional Tribunal at - <http://www.trybunal.gov.pl/index2.htm>). The underlining of the need to take account of a functional interdependence is of considerable importance, particularly in situations where the delegation may raise doubts as regards its scope (judgments of: 16 February 1999, SK 11/98, 9 April 2001, U 10/00, 31 August 2006, K 25/06, 16 January 2007, U 5/06). The requirement contained in the Constitution of the Republic of Poland is for the detailed authorisation to be provided for in a statute and not in a specific statutory provision (judgment of 1 February 2005, U 14/02), especially that the shape of the delegation is set in Article 217 of the Polish Constitution as reference to the “principles for granting tax reliefs and remissions, along with categories of taxpayers exempt from taxation”.

The regulation authorising the issuance of a sub-statutory act should be considered to be in compliance with the legislative technique, also established in the legislative practice, if it reflects clearly the legislator's intentions, is not general in its nature and does not delegate matters which are not clarified or which pose difficulties in the drafting of the statute to be regulated in the implementing act (cf. judgment of 26 June 2001, U 6/00).

22. The Court notes that the putting into effect of tax reliefs as well as remissions, requires, pursuant to Article 217 of the Constitution, the form of a statute, whilst the Act on VAT does not set – in particular – the principles for awarding reliefs and the categories of taxpayers exempt from taxes, which could be referred to in the case analysed – i.e. in-kind contribution in the form of an undertaking. This fact is the reason why the Court has held that the provision of the Decree concerned is defective and that the requirements under Article 217 read in conjunction with Article 92 paragraph 1 of the Constitution are not fulfilled. This view is justified also by that exemption, in the aforementioned Decree, of an in-kind contribution means – in actual reality – the loss by the taxpayer of the right to deduction, that is the economic burden of the tax rests with the taxpayer. In the Court's view, it is not reasonable –having regard to this fact – to liberalise the requirements under Article 217 of the Constitution, which should be observed by the legislator as regards the in-kind contribution.

23. For these reasons, the view of the tax authorities was erroneous about the company's failure to have met the requirement set out in Article 86 paragraph 1 of the Act on VAT – as a result of the legislator exempting the transaction of bringing in an in-kind contribution which entitled the company to deduct the input tax in the Decree because it could not have been considered that the in-kind contribution in the form of undertaking was exempt from the tax on goods and services under § 8 subparagraph 1 point 6 of the Decree. In that connection, it was unreasonable for the tax authorities to assert that “the expenditure was not connected with the company's taxable operations and finally, with an exempt transaction in the form of an in-kind contribution”.

24. A consequence of the recognition of the supremacy of a statutory regulation and the application of Article 6 paragraph 1 of the Act on VAT and the refusal to apply § 8 subparagraph 1 point 6 of the Decree to the in-kind contribution in the form of undertaking, is the obligation – on the part of the tax authorities – to analyse the application of the right to deduct the input tax, with particular emphasis on the provision of Article 86 paragraph 1 of the Act on VAT and Article 5 paragraph 8 and Article 17(2) of the Sixth Directive. Tax authorities are obliged

to take into account – during re-examination of the matter – the general guidelines following from the case-law of the European Court of Justice, in particular in Cases C-137/02 Faxworld, C-408/98 Abbey National plc v. Commissioners of Customs and Excise, C-50/87, C-37/95, C-268/83, C-165/86.

25. What is of relevance for the decision of the Court in the matter is the jurisprudence of Polish courts and their contribution to the clarification of the mechanism of the tax on goods and services, in particular the guidelines contained in the judgments of the Administrative Courts: the Supreme Administrative Court (NSA) judgments of 23 April 2008 File No. I FSK 505/07, of 22 June 2005 File No. I FSK 228/05, of 7 June 2004 File No. FSK 87/04, judgment of the Voivodship Administrative Court (WSA) in Warsaw of 17 April 2008 File No. III SA/Wa 82/08, File No. III SA/Wa 232/08, of 11 February 2008 File No. III SA/Wa 1925/07, of 30 April 2008 File No. III SA/Wa 173/08. Having regard to the subject matter of the dispute in this matter, the tax authorities should in particular have considered the statements made in the grounds for the judgment of the WSA in Warsaw of 20 May 2008 File No. III SA/Wa 364/08 and of 27 February 2008 File No. III SA/Wa 934/07.

26. The Court points out, at the same time, that the mechanism for deductions and for making an in-kind contribution – including an undertaking – which applied at the time when the Act of 11 January 1993 on the Tax on Goods and Services and on the Excise Duty (*Journal of Laws* No. 11, item 50, as amended) was in force, may not justify the leaving out of the jurisprudence of administrative courts in these matters, referred to above, especially in view of the equivalence of the mechanism of deduction and the applicable regulation of the legal consequence in the provisions of the Tax Law, meeting the expectations of the complainant.

27. In the opinion of the Court, what was missing in the appealed decision were the findings of the tax authorities as to whether the right of a Member State to introduce an exemption of the making of an in-kind contribution in the form of an undertaking follows from the provisions of Community law – primarily from the provisions of the Sixth Directive – as in the aforementioned § 8 subparagraph 1 point 6 of the Decree. The tax authorities should have considered whether applying the VAT exemption to the making of an in-kind contribution, Poland had duly met its obligations under Article 2 of the Sixth Directive. The tax authorities will be obliged to consider whether exempting an in-kind contribution in the form of an undertaking under the Decree is a justified exception to the rule set in Article 2 of the Directive to the effect that any supply of services by a taxpayer for consideration is subject to the added value tax and whether § 8 subparagraph 1 point

6 of the Decree introduces an exemption which is not provided for under the Sixth Directive. Having established these circumstances, the tax authorities will be obliged to take into account, in their decision, the *acquis communautaire*, including the general guidelines following from the case-law of the ECJ (for instance, ECJ judgment of 20 June 2002 C-287/00 *Commission of European Communities v. Federal Republic of Germany*, or of 7 March 2002 File No. C-169/00 *Commission of the European Communities v Republic of Finland*, of 18 January 2001 File No. C-150/99 *Svenska staten (Swedish State) v Stockholm Lindöpark AB and Stockholm Lindöpark AB v Svenska staten (Swedish State)*, of 3 July 1997 File No. C-60/96 *Commission of the European Communities v French Republic*, of 17 October 1991 File No. C-35/90 *Commission of the European Communities v Kingdom of Spain*, of 8 July 1986 File No. 73/85 *Hans-Dieter i Ute Kerrutt p. Finanzamt Mönchengladbach – Mitte*). The tax authorities should take into account, in the provisions of re-enacted regulations, the statement to the effect that the maintenance of exemptions or reduced VAT rates, lower than the minimum rates envisaged in the Sixth Directive, is allowed only if it does not breach the principle of tax neutrality which is the foundation of the system (cf. similarly, judgment of 7 September 1999 in Case C-216/97 *Gregg*, ECR. I-4947, paragraph 19, similarly, judgment of 3 May 2001 in Case C-481/98 *Commission of the European Communities v French Republic*, ECR I 3369, paragraph 21). The above obligation is important especially that in accordance with Article 249 subparagraph 3 of the Treaty Establishing the European Community, a directive shall binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

28. The Court supports the view that regulations which prohibit deduction of the tax where the expense involved in the purchase may not be included in the operating expenses are in breach of the fundamental principle of Community law which is the principle of proportionality. Following this principle, regulations which restrict rights must be commensurate (proportional) to the aim for which they are introduced. Any departures, in national law, from the principles under the directives concerned, must be constructed so precisely as to achieve their aim whilst distorting the functioning of the VAT system to the least degree possible, i.e. they must be the least “invasive”. In the opinion of the Court, Article 88 paragraph 1 subparagraph 2 of the Act on VAT of 2004, as applied to the case under analysis, should not be interpreted in such a manner that the hypothetical inclusion (or non-inclusion) in the operating expenses determines the right to apply a deduction of the input tax. The view presented by the tax authorities is contrary to the principles and provisions of Community law contained in the Sixth Directive and in Directive 2006/112, and in particular, respectively, in Article 17 and

Article 168 of these Directives constituting the principle of primary importance for the VAT system under which for the exercise of the right to deduct the input tax from the tax due it is sufficient that there exists a relationship between this input tax and the taxed activities. This principle is reflected in Article 86 paragraph 1 of the Act on VAT of 2004.

29. The results of interpretation of Article 86 paragraph 1 of the Act on VAT of 2004, made in accordance with the provisions of Directive 2006/112 and of the Sixth Directive, should take account of the ECJ case-law, issued to Article 17 paragraph 2 of the Sixth Directive, according to which “to the extent to which goods and services are used for purposes of taxable transactions, the taxpayer is entitled to deduction from the tax due to be paid” (cf. ECJ judgments of 14 February 1985 in Case 268/83 D.A. Rompelman and E.A. Rompelman-Van Deelen v Minister van Financiën; of 8 March 1988 in Case 165/86 Leesportefeuille ‘Intiem’ CV against the Staatssecretaris van Financien). In its judgment of 22 February 2001 in Case C-408/98 Abbey National plc v Commissioners of Customs & Excise, the ECJ held that the absence of a direct link with a particular input transaction does not preclude the right to deduct the VAT in the case of so-called general costs of the taxpayer’s operations, because where these costs may be attributed to the taxpayer’s operations which are taxable, the taxpayer is entitled to deduct the tax: this element of the case should be considered by the tax authorities.

30. The tax authorities should bear in mind that the system of deductions is intended to completely release the undertaking from the burden of the VAT due or paid as part of its business operations. The common VAT system warrants in this way, as regards the tax burden, the neutrality of any business operations – regardless of what its aim or outcome are – on condition that, as a rule, it is subject itself to the VAT (cf. in particular judgments of 22 February 2001 in Case C 408/98 Abbey National, ECR. I 1361, paragraph 24, and of 21 April 2005 in Case C 25/03 HE, ECR I 3123, paragraph 70). It follows from the fundamental principle on which the common VAT system relies, and from Article 2 of the First and Sixth Directives, that the VAT applies to any transaction comprising the production or distribution after deduction of the tax which was charged directly to the costs of various price-creating elements (cf. in particular judgments of 8 June 2000 in Case C 98/98 Midland Bank, ECR I 4177, paragraph 29, and of 27 November 2003 in Case C 497/01 Zita Modes, ECR I 14393, paragraph 37, and the aforementioned judgment in Case Optigen et al., paragraph 54).

31. As noted by the ECJ, where an undertaking which performs taxable transactions is transferred with the observance of the principle of continuity, any costs

incurred by the transferor for services purchased in order to effect the sale are part of general costs incurred before the transfer and because of this, the VAT paid for such services is, as a rule, deductible from the tax due (judgments of 22 February 2001 in Case C 408/98 *Abbey National*, ECR I 1361, in particular paragraphs 35 and the following, of 29 April 2004 in Case C 137/02 *Faxworld*, ECR I 0000, paragraph 39).

32. The views of the Court presented above are not changed by the finding that the value added tax paid in connection with goods or services may be deducted only to the extent to which such goods and services are used for the purposes of taxable transactions (ECJ judgment of 29 April 2004 in Case C-137/02 *Faxworld*).

33. The Court notes in particular that in accordance with the case-law of the ECJ, preparatory activities – even – should also be qualified as business operations in the meaning of the Sixth Directive. Any taxpayer performing preparatory activities is, consequently, considered to be a taxpayer in the meaning of Article 4 of the Directive and is entitled to deduction (aforementioned judgment in the *Rompelman* case, paragraph 23 and the judgment of 29 February 1996 in Case C 110/94 *INZO*, ECR I 857, paragraph 18). The right to deduction continues to be enjoyed, as an inseparable element of the VAT construction, even if it is decided subsequently – as a result of a feasibility study – not to move on to the operative phase and close down the company concerned with the effect that the intended business operations did not result in any taxable transactions (the aforementioned judgment in the *INZO* case, paragraph 20). This circumstance does not hold in the case under dispute because it follows from the contents of the application for interpretation that business operations will be continued. The ECJ held – adjudicating in the matter of transfer of the assets of an undertaking – that where a taxpayer does not perform transactions anymore, having used services supplied for the purpose of the transfer, the costs of these services should be considered to be inseparably connected with the entire business operations of its undertaking before the transfer and that it should be awarded the right to such deduction. Any interpretation to the contrary would mean – in the opinion of the ECJ – an arbitrary distinction between, on the one hand, the expenses on the undertaking's needs before it actually takes up its business operations and those made during the course of such operations, and, on the other hand, the expenses incurred on the termination of the operations (cf. judgments of 22 February 2001 in Case C 408/98 *Abbey National*, ECR I 1361, paragraph 35 and of 29 April 2004 in Case C 137/02 *Faxworld*, point 39).

34. In the opinion of the Court, it follows from the provisions of Article 91 paragraph 9 of the Act on VAT that a consequence of the obligation for the tax authorities to apply in the case Article 6 paragraph 1 of the Act on VAT, is the application of Article 91 paragraph 9 of the same Act on VAT which sets the obligation to make the adjustment referred to in paragraphs 1-8 respectively, by the purchaser of the undertaking or the purchaser of the establishment (branch). Indication of the party obliged to make the adjustment under Article 91 paragraph 9 of the Act on VAT precludes, under the aforementioned regulation, the possibility of making the tax adjustment by the seller.

35. Concerning the company's plea and the issue of the postulated assessment of compliance of the obligation to adjust the company's input tax with the principle of neutrality, the Court points out that the principle of tax neutrality was first relied upon in the 5th recital to the First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes – OJ No. 71, p. 1301). This Directive was repealed as of 1 January 2007 and replaced with Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax – OJ L 347, p. 1) which reads as follows: “A VAT system achieves the highest degree of simplicity and of neutrality when the tax is levied in as general a manner as possible and when its scope covers all stages of production and distribution, as well as the supply of services. It is therefore in the interests of the internal market and of Member States to adopt a common system which also applies to the retail trade [...]”.

36. The principle of neutrality is relevant in various contexts: in relation to the right to deduct the input tax, the principle requires neutrality in terms of value. It means that there must be a possibility to fully deduct the input tax on earlier performances, which becomes due upon the performance to the end consumer (judgments of 14 February 1985 in Case 268/83 Rompelman, ECR 655, paragraph 19, of 21 March 2000 in Cases C-110/98 to C-147/98 Gabalfrisa et al., ECR I-1577, paragraph 44, of 27 September 2001 in Case C-16/00 Cibo Participations, p. I-6663, paragraph 27, and of 26 May 2005 in Case C-465/03 Kretztechnik, ECR p. I-4357, paragraph 34.5). The application of the said mechanism makes it possible to avoid multiple taxation of a performance depending on the number of previous stages of prior performances.

37. Furthermore, the principle of neutrality is a fundamental principle of the common VAT system (cf. amongst others, the judgment of 19 September 2000 in Case C 454/98 Schmeink & Cofreth and Strobel, ECR I 6973, paragraph 59), which, on the one hand, objects for similar goods which are therefore competitive

one to another, to be treated differently in VAT terms (judgments: of 11 June 1998 in Case C 283/95 Fischer, ECR I 3369, paragraphs 21 and 27, of 3 May 2001 in Case C 481/98 Commission v France, ECR I 3369, paragraph 22), and, on the other hand, for similar business transactions which are therefore competitive one to another, to be treated differently from the viewpoint of the VAT (cf. judgments: of 23 October 2003 in Case C-109/02 Commission v Germany, ECR I 12691, paragraph 20, of 16 September 2004 in Case C-382/02 Cimber Air, ECR I 8379, paragraph 24, of 18 October 2007 in Case C-97/06 Navicon, unpublished to date in the ECR, paragraph 21).

38. The Court also points out that the principle of tax neutrality is an expression of the principle of equal treatment in the area of VAT (cf. judgment of 8 June 2006 in Case C-106/05, paragraph 48, and the case-law referred to therein), which should find its expression in non-discrimination and non-privileging certain groups of taxpayers: either in restricting the right to deduction or unreasonable award thereof.

39. As already mentioned, the right to deduction referred to in Article 17 and the following of the Sixth Directive, is an integral part of the VAT system and, as a rule, may not be restricted. In accordance with the established case-law of the ECJ, any restrictions on the right to deduct the VAT have an effect on the tax burden and should be applied in a similar manner in all Member States (cf. judgment of 6 July 1995 in Case C 62/93 BP Soupergaz, ECR I 1883, paragraph 18 and 12th recital in the Preamble to the Sixth Directive). The Court points out, at the same time, that the methods and criteria followed by Member States must of the kind as to ensure respect for the objectives of the Sixth Directive. Thus, they may not remain in contradiction with the principle of tax neutrality on which the whole VAT system relies, as set by the Sixth Directive, and which objects to businesses which perform the same transactions, to be treated differently as regards the collection of the VAT (cf. judgments of 16 September 2004 in Case C 382/02 Cimber Air, ECR I 8379, paragraphs 23 and 24 and of 8 December 2005 in Case C 280/04 Jyske Finans, ECR p. I 10683, paragraph 39).

40. Leaving aside, in the interpretation, Article 6 subparagraph 1 of the Act on VAT, which forms the implementation of Article 5(8) and Article 6(5) of the Sixth Directive, the tax authorities breached Article 2 Part 1 of the Treaty concerning the accession of the Republic of Poland to the European Union, which obligated Poland, and hence its law applying authorities, to adopt Community law, and in essence, to ensure its effectiveness, inter alia, through due interpretation of regulations of national law. This breach had an effect on the outcome of the matter and

– because of this – the Court took it into consideration when making its decision, relying on Article 134 § 1 of the Law on Procedure before Administrative Courts, which makes it possible to take into account circumstances which are not raised in the application as a plea. Furthermore, the Court notes that the tax authorities did not take into account, in their considerations, the provisions of Article 93c of the Tax Law according to which the bidding legal persons or legal persons created as a result of division, step, as of the date of the division or as of the date of separation, into all rights and obligations provided for in the tax law and into the obligations of the divided legal person which relate to the assets allocated thereto in the division plan. In the opinion of the Court where the Polish legislator has decided to introduce, into the Polish legal system, a provision which, in accordance with the Directive, it could but did not have to adopt, it was obliged to do so to the extent set by the applicable provision of the Directive. In such an instance, the freedom of a Member State amounts to the decision as to whether such a provision should be used. If, on the other hand, the national legislator decided to adopt this provision, any aspects involved in its introduction into the national legal system, and then the application of the relevant provision of national law, must be viewed taking into account the contents, aim and interpretation, made by the ECJ, of the implemented provision of the Directive.

41. The Court points out that in the ECJ judgment of 27 November 2003, C-497/01 *Zita Modes Sarl v. Administration de l'enregistrement et des domaines* (ECR 2003/11B/I-14393), the scope of activities which may be considered by a Member State as not being the supply of goods, is set in broad terms. In the opinion of the Court, the principle of absence of supply, following from Article 5(8) of the Sixth Directive, applies to each transfer of an undertaking or an independent part thereof, including tangible assets and, where necessary, other assets, which, taken together, form an undertaking or a part thereof. As a condition for the application of this principle, the Court referred to the expression by the purchaser of the goods, of its intention to continue the acquired undertaking or the part thereof, and not its immediate liquidation and sale of inventories. The Court emphasized the retaining of the Member States' right to limit the scope of application of the principle of absence of supply in the circumstances specified in the second sentence of Article 5(8) of the Sixth Directive. An equivalent view was expressed in the aforementioned judgments of *Faxworld* and *Abbey National*, which were relied upon by the company too.

42. In the opinion of the Court, tax authorities should have considered and expressed the same in the grounds for their act, whether the application in the matter of Article 6 subparagraph 1 read in conjunction with Article 91 paragraph

9 of the Act on VAT and the indication, as the party obliged to make an adjustment, of the purchaser of the undertaking, secures the exercise of the right of the complainant and the branch brought in as an in-kind contribution, to deduction. In the process of proving, account should be taken of whether the company and the branch are the end consumer and whether the purchase of the goods/services was effected during the course of, and in connection with the business operations pursued.

43. The Court denies the attribute of correctness as regards the company's plea of breach of Article 233 § 1 subparagraph 2 letter a) read in conjunction with Article 208 and Article 14b § 3 of the Tax Law: in the view of the Court, the moment when the decision was given is, in the case concerned, the date on which the letter containing the interpretation was signed, which follows from the judgment of the NSA of 14 September 2007 File No. I FSK 700/07. The Court's opinion in this regard is not changed by the NSA filing, by decision of 4 June 2008 File No. I FSK 635/07, with the extended adjudicating panel, of a question – of whether, in the legal situation in 2006 the concept of failure to give a decision set out in Article 14b § 3 of the Act of 25 August 1997 on Tax Law (i.e. *Journal of Laws* of 2005 No. 8, item 60, as amended), means that it was not delivered within 3 months from the date of receipt of the application referred to in § 1 of the aforementioned article – due to the absence of differences in the case-law of the Supreme Administrative Court and the clear legal provisions regulating this matter – i.e. Article 14b paragraph 3 and 5, and Article 212 of the Tax Law.

44. Having regard to the foregoing, it was appropriate to rule, under Article 146 § 1 read in conjunction with Article 152 and Article 200 of the Law on Procedure before Administrative Courts, as in the operative part of the judgment.

JUDGMENT OF THE VOIVODSHIP ADMINISTRATIVE COURT IN WARSAW

of 27 August 2009
(III SA/Wa 527/09)

Presiding Judge: WSA judge Krystyna Kleiber.

Judges: WSA judge Marek Kraus, WSA judge Jolanta Sokołowska (rapporteur).

The Voivodship Administrative Court (*Wojewódzki Sąd Administracyjny*) in Warsaw, having examined, at a hearing on 20 August 2009, the case filed upon a complaint from I. sp. z o.o. with its registered seat in W. against the decision of Director of the Tax Chamber (*Dyrektor Izby Skarbowej*) in W. of [...] January 2009 No. [...] concerning the refusal to confirm overpayment of the tax on transactions under civil law 1) reverses the appealed decision, 2) finds that the repealed decision cannot be enforced in whole, 3) awards, against the Director of the Tax Chamber in W., in favour of I. sp. z o.o. with its registered seat in W., the amount of PLN 18,770 (in words: eighteen thousand seven hundred and seventy zlotys) to refund the costs of the court proceedings.

Grounds

By application of 5 August 2008, the Complainant – I. sp. z o.o. – requested from the Head of the [...] Tax Office (*Naczelnik [...] Urzędu Skarbowego*) in W. confirmation of overpayment and refund of overpayment of the tax on transactions under civil law of PLN 1,156,935.70 wrongly collected – in its opinion – in connection with an increase in its share capital. The increase in the share capital was effected, in accordance with the notary deed of 29 November 2007, Reg. A No. [...], through the creation of new shares which were covered by a shareholder of the Complainant, I. sp. z o.o., with a non-cash contribution in the form of undertaking in the meaning of Article 551 of the Civil Code. The Notary charged thereon the tax on transactions under civil law of PLN 1,156,935.70.

In the statement of reasons for its application, the Complainant pointed out that as of the date of its accession to the European Union, Poland was obliged to implement into the Polish legal system Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ EU L 249 of 3 October 1969, hereinafter: Directive 69/335). In accordance with Article 4(1)(c) of the

Directive, transactions such as an increase in the capital of a capital company by contribution of assets of any kind (in Poland, the tax on transactions under civil law and, before 1 January 2001, the stamp duty) are subject to capital duty. However, in accordance with Article 7(1) of the Directive, Member States are obliged to exempt from the tax transactions which, under national tax regulations in force on 1 July 1984 were not taxed with the capital duty or were taxed at a rate equal to or lower than 0.5%.

On 1 July 1984, Polish regulations on the capital tax were included in the Act of 19 December 1975 on Stamp Duty (*Journal of Laws* No. 45, item 226, as amended) and the Decree of the Council of Ministers of 16 May 1983 on Stamp Duty (*Journal of Laws* No. 34, item 161, as amended). Article 1 paragraph 1 of the Act on Stamp Duty referred, as the subject of stamp duty, only to a statement on company formation and did not mention a statement on an increase in share capital (amendment to the articles of association).

Since company formation and amendment to the articles of association are two separate subjects of taxation, each of them is taxed with the stamp duty (now the tax on transactions under civil law, PCC) only when this follows directly from the provisions of the statute. The result of any of these subjects being left out by the legislator is that it remains outside of the scope of taxation.

The foregoing conclusions are not changed by the provisions of § 54 subparagraph 3 point 2 of the Decree on Stamp Duty. This regulation indicates the method of calculating the basis for the stamp duty on an increase in a company's share capital. For such a basis to arise, however, there must first be the subject of taxation. As a result of the absence of the subject of taxation – failure to list in Article 1 of the Act on Stamp Duty an increase in the share capital as a transaction taxed with the stamp duty – § 54 subparagraph 3 point 2 of the Decree on Stamp Duty is in fact ineffective.

In view of the foregoing, the Complainant concluded that if an increase in the share (amendment to the articles of association) had not been taxed with the stamp duty on 1 July 1984, then also now – after 1 May 2004 – in accordance with Article 7 paragraph 1 of Directive 69/335 such transaction was not charged with the tax on transactions under civil law.

By decision of [...] October 2008, the Head of [...] Tax Office in W. denied confirmation, for the Complainant, of overpayment of the tax on transactions under civil law. It pointed out that the justifiability of paying the tax on transactions

under civil law on the increase in the company's share capital was supported by the provisions of Community law, i.e. Directive 69/335. In accordance with its Article 4(1)(c) thereof an increase in the capital of a capital company by contribution of assets of any kind is subject to capital duty (in Poland, the tax on transactions under civil law). The authority also held that Member States were obliged to exempt from the capital duty transactions other than listed in Article 9 of Directive 69/335, if on 1 July 1984 they had been tax exempt or taxed at the rate of 0.5% or less.

The Head of the Tax Office referred to the wording of Article 1 paragraph 1 subparagraph 3 letter d), Article 7 paragraph 1 subparagraph 1 of the Act on Stamp Duty and § 54 subparagraph 3 point 2 of the Decree on Stamp Duty concluding that the provisions of the Act on Stamp Duty did not make a separate mention of company formation and increase in the company's share capital as subjects of stamp duty. The implementing regulation issued on the basis of the Act on Stamp Duty sets the basis for calculating the stamp duty in the case of capital increase thus detailing the scope of the "statement on company formation" by setting the basis for the calculation of the stamp duty separately for company formation and increase in its share capital. In that connection, the subject of stamp duty referred to in Article 1 paragraph 1 subparagraph 3 letter d) of the Act on Stamp Duty, which is the statement on company formation comprises the company's articles of association which involves the contribution of its share capital which, in accordance with the Decree on Stamp Duty, is the basis for calculating the stamp duty, and an increase in the company's share capital through the relevant amendment to its articles of association, and the amount by which the share capital is increased is ultimately the basis for calculating the stamp duty.

Then, both company formation and an amendment to its articles of association were regulated differently in the Decree on Stamp Duty through detailing separately the basis for calculating the stamp duty on each of these transactions.

The authority also pointed out that in the catalogue of taxable transactions, the Act on Stamp Duty contained a general notion: "statement on company formation". Company formation involves its share capital. The Decree on Stamp Duty set the basis for calculating the stamp duty on company formation, which is its share capital and, at the same time, set the basis for the stamp duty on an increase in the share capital. The Decree was issued under the delegation contained in the statute, was not in contradiction with the Constitution of the People's Republic of Poland of 22 July 1952 which was in force at the time and which did not introduce the obligation to impose public imposts by statute only. It was therefore possible to make a reference in a statute to regulations contained in a decree.

In view of the foregoing, the Head of the Tax Office held Article 7(1) of Directive 69/335 would not apply in the case because the provisions of § 54 subparagraph 3 point 2 of the Decree on Stamp Duty, issued under Article 7 paragraph 1 subparagraph 1 of the Act on Stamp Duty concerning an increase in a company's share capital did not meet any of the requirements set in Article 7(1) of the Directive.

In its appeal against the said decision, the Complainant filed for its reversal and for a judgment as to the merits of the case. It asserted breach, by the appealed decision, of Article 72 § 1 subparagraph 2 and Article 75 § 1 of the Act of 29 August 1997 – Tax Law (*Journal of Laws* of 2005 No. 8, item 60, as amended, hereinafter Tax Law) read in conjunction with Article 1 paragraph 1 subparagraph 1 letter k), Article 1 paragraph 1 subparagraph 2 and Article 7 paragraph 1 subparagraph 9 of the Act of 9 September 2000 on the Tax on Transactions under Civil Law (*Journal of Laws* No. 86, item 959 as amended, hereinafter UPCC) read in conjunction with Article 7 paragraph 1 of Directive 69/335 and in conjunction with Article 1 subparagraph 3 letter d) of the Act on Stamp Duty and § 54 paragraph 3 subparagraph 2 of the Decree on Stamp Duty.

In the statement of reasons for its appeal, the Complainant upheld the arguments presented in its application for confirmation of overpayment. It emphasized that company formation was different from an increase in its share capital. It follows, on the other hand, from Article 1 paragraph 1 subparagraph 3 letter d) of the Act on Stamp Duty that on 1 July 1984 an increase in a company's share capital had been beyond the substantive scope of the Act on Stamp Duty and had not been taxed. Consequently, § 54 subparagraph 3 point 2 of the Decree on Stamp Duty could not have taxed an increase in the share capital because a share capital increase had not been covered by the substantive scope of the Act on Stamp Duty.

The Complainant did not agree with the claim of the authority that the statement on company formation (articles of association) comprised also a statement on an increase in the company's share capital (resolution on the increase). In its opinion, such reasoning was contradicted by the provision of § 54 subparagraph 3 point 2 of the Decree on Stamp Duty which stipulated expressly that the notion of "statement on company formation" was understood to mean "articles of association". In other words, the subject of taxation under Article 1 paragraph 1 subparagraph 3 of the Act on Stamp Duty comprised solely "articles of association" and did not include a resolution on increasing the company's share capital.

In the opinion of the Complainant, in the appealed decision, the authority arbitrarily used the notions of “subject of taxation” and “basis of taxation”.

Neither did the Complainant agree with the claim that in the Decree on Stamp Duty, the Council of Ministers had detailed the subject of taxation, based on the statutory delegation under Article 7 paragraph 1 subparagraph 1 of the Act on Stamp Duty. In its opinion, based on that provision, the Council of Ministers could only define more precisely the subject of taxation mentioned in Article 1. The absence of the taxation subject – resolution on increasing the share capital – both in the Act and in the Decree, absolutely precluded the possibility of taxing such an increase.

By decision of [...] January 2009, the Director of the Tax Chamber (*Dyrektor Izby Skarbowej*) in W. upheld the decision of the Head of [...] Tax Office in W. of [...] October 2008.

In the opinion of the authority, the provisions of the UPCC, regarding the taxation of the transaction of increasing a company’s share capital were not contrary to the provisions of the Directive. In order to examine Poland’s obligation to exempt, from the capital duty, transactions of capital increases through the making of an in-kind contribution in any form under Article 7(1) of Directive 69/335, it was necessary to establish the existence, scope of application and the rate in the tax law regulating that issue which had been in force in Poland on 1 July 1984. On 1 July 1984, the regulations in force in Poland were the Act on Stamp Duty and the Decree on Stamp Duty, issued under Article 7 paragraph 1 and Article 8 paragraph 7 of the Act on Stamp Duty.

The authority cited the wording of Article 7 paragraph 1, Article 1 paragraph 1 subparagraph 3 of the Act on Stamp Duty and § 54 of the Decree on Stamp Duty and concluded that the said provision of the Decree had all the characteristics of lawfulness. It was not contrary to the Constitution of 1952 which was in force as of the date of its issue, and which did not restrict the imposition of tax duties only through statutory provisions. It allowed, in that regard, the regulation of the tax relationship also under a lower-ranking act – a decree or order. In the view of the Director of the Tax Office, the provision of § 54 of the Decree on Stamp Duty did not exceed the limits of delegation contained in Article 7 of the Act on Stamp Duty. This is indicated by the use therein of the expression “The Council of Ministers shall set, by decree, the subjects of stamp duty listed in Article 1, the rules for determining the basis for calculating the stamp duty, the rates of the duty on its different items, as well as exemptions from the duty provided for

in the statute”. It means that the subjects of stamp duty listed in Article 1 of the Act on Stamp Duty and the other elements of the tax relationship were not specified in a comprehensive manner, but generally enough to require detailing in an implementing regulation.

Consequently, an increase in the company’s share capital was subject to taxation under the provisions of the Act on Stamp Duty and the Decree on Stamp Duty. By the same token, there is no justification for direct application in the matter of the provisions of the Directive whilst leaving out national law, i.e. the current provisions of the UPCC. The tax on transactions under civil law on the transaction of increasing the Complainant’s share capital was therefore collected in a correct manner.

In its complaint against the above decision, the Complainant filed for reversing the appealed decision and awarding the costs of court proceedings. It asserted, against the appealed decision, breach of Article 72 § 1 subparagraph 2 and Article 75 § 1 of the Tax Law read in conjunction with Article 1 paragraph 1 subparagraph 1 letter k), Article 1 paragraph 1 subparagraph 2 and Article 7 paragraph 1 subparagraph 9 UPCC read in conjunction with Article 7(1) of Directive 69/335 and read in conjunction with Article 1 subparagraph 3 letter d) of the Act on Stamp Duty and § 54 paragraph 3 subparagraph 2 of the Decree on Stamp Duty.

In its statement of reasons, it upheld its position presented to date that the provisions of the Act on Stamp Duty had not envisaged, on 1 July 1984, the subject of taxation defined as “increase in the share capital of a capital company”. Thus, such a transaction was not taxable.

In the opinion of the Complainant, the subject of taxation in the form of an increase in the share capital was not provided for either in the Act on Stamp Duty or the Decree on Stamp Duty. Indeed, Article 1 paragraph 1 subparagraph 3 letter d) of the Act on Stamp Duty listed, as the subject of taxation, only a statement on company formation, which could not be deemed equal with a statement on an increase in its share capital. On the other hand, § 54 of the Decree on Stamp Duty, relied upon by the authorities did not make the substantive scope of the stamp duty referred to in Article 1 paragraph 1 subparagraph 3 letter d) of the Act on Stamp Duty more precise in any way. Indeed, it only mentioned the method of calculating the basis for the stamp duty upon an increase in the company’s share capital, which, however, did not mean taxation of such transaction. Additionally, the statutory delegation to issue a decree on stamp duty stipulated that such decree could specify the subjects of taxation listed in Article 1 of the Act on Stamp Duty.

If, therefore, increase in the share capital was not listed in that provision, it could not have been the subject of an implementing regulation.

Neither did the Complainant agree with the view of the Director of the Tax Chamber that under the Constitution of 1952 the basic constructional elements of the tax could be regulated in a decree. Such a claim was contrary to the principles developed in this matter by the Constitutional Tribunal.

As a consequence of the foregoing – in the opinion of the Complainant – on 1 July 1984 a regulation did not apply in Poland which would provide for taxation of in-kind contributions. It cannot therefore be concluded that conditions had been fulfilled to enable the continuation of taxation of such transactions after 1 May 2004.

The Complainant continued to argue that the taxation, with the tax on transactions under civil law, of an increase in the company's share capital was contrary to Community law. In its view, the need to take account of the consecutive amendments of Directive 69/335 led to the conclusion that an increase in the share capital relating to an in-kind contribution in the form of an undertaking should enjoy, after 1 May 2004, full unconditional exemption from the tax on transactions under civil law. Failing to meet this obligation, Poland frustrated the effect of the changes made to the provisions of the Directive in the taxation of in-kind contributions in the form of an undertaking and taxed such in-kind contributions despite them being tax exempt. Hence the conclusion that the provisions of the UPCC envisaging the taxation did not transpose all provisions of the Directive into the national legal system.

The Complainant also pointed out that the adoption of the interpretation of the provisions of the Directive as presented by the Director of the Tax Chamber would cause an unjustified discrimination between the legal statuses of taxpayers from Poland and from other Member States. Depending on whether done in Poland or in one of the old Member States, the same transaction would have different tax consequences. In Poland, it would be taxed with the capital duty whilst in another state it would be tax exempt.

In reply to the complaint, the Director of the Tax Chamber in *W.* filed for the complaint to be dismissed whilst upholding its position contained in the appealed decision.

In its pleadings of 12 August 2009, the Complainant asserted that the arguments of the complaint concerning the interpretation of Article 7(1) of Directive 69/335 had

been confirmed by the European Court of Justice in its judgment of 9 July 2009 in Case C- 397/07 Commission of the European Communities v Kingdom of Spain. The Complainant discussed the grounds for that judgment and also referred to the Opinion of the Advocate General Juliane Kokott of 5 March 2009. Referring to certain judgments given by Voivodship Administrative Courts, the Complainant maintained that the aforementioned judgment of the ECJ was not in opposition to ECJ judgment of 21 June 2007 in Case C-366/05 Optimus - Telecomunicações SA v Fazenda Pública with Ministério Público (Portugal) as the intervening party, devoting the relevant argumentations thereto. It filed for direct application of Community law whilst leaving out the national regulations which were contrary thereto or, alternatively, if the arguments posed by the Complainant raised the Court's doubts, for filing with the ECJ a reference for a preliminary ruling pursuant to Article 234 of the Treaty establishing the European Community.

The Voivodship Administrative Court in Warsaw considered as follows:

The complaint deserves to be allowed. In the present case, the Complainant argued that the tax on transactions under civil law on the increase in its share capital through the creation of new shares which were covered by its shareholder, I. sp. z o.o., with a non-cash contribution in the form of an undertaking in the meaning of Article 551 of the Civil Code was unduly collected from it. In the opinion of the Complainant, Article 7(1) of Directive 69/336 requires exemption of an increase in the share capital related to an in-kind contribution in the form of an undertaking from taxation with the tax on transactions under civil law (according to the terms of the Directive – the capital duty).

The tax authorities were of the opinion that Poland was not obliged to apply the exemption from capital duty (tax on transactions under civil law) under Article 7(1) of Directive 69/335, of the aforementioned transaction because on 1 July 1984 in our country, the transaction of share capital increase was taxed at a rate higher than 0.5 %.

Hence, resolution of the dispute requires an interpretation of the provisions of Directive 69/335, in particular its Article 7(1). This provision stipulates that Member States shall exempt from the capital duty transactions mentioned in Article 9, which, on 1 July 1984, were exempted from the duty or which were taxed at a rate of 0.50 % or less. The exemption depends on the conditions applied on that date to the granting of the exemption or, depending on the circumstances, imposition of the tax at the rate of 0.50% or less. The Greek Republic shall determine which transactions will be exempted from the capital duty.

The position of the tax authorities was based on literal interpretation of the provision concerned. Linguistic interpretation, however, is only the starting point because the norm following from the text should be decoded taking into account the objectives, provisions of Community law and the circumstances of the case. In this case, without taking account of all these elements, it is impossible to give a correct interpretation of Article 7(1) of Directive 69/335. It is therefore necessary to take account of the aim of the Directive, the amendments to Article 7(1) before it was given the wording applicable as of the date the Complainant undertook the transaction the taxation of which was the foundation for the dispute, the provisions of the Treaty establishing the European Community (*Journal of Laws* of 2004, No. 90, item 864/2, hereinafter referred to as “TEC”) and the Act of Accession of the Republic of Poland and the adaptations in the Treaties forming the foundation of the European Union of 16 April 2003 (OJ EU L 236, p. 33, hereinafter referred to as the “Act of Accession”).

In the case heard, particularly significant are the acts (directives) amending Directive 69/335, which formed the provisions of Article 7(1) of the said Directive and which were not in force at the time when Poland acceded to the European Union. Because of this, the considerations in the present case should commence with providing an answer to the question whether Poland is obliged to apply these acts. In the opinion of the Court, the answer to such a question should be in the affirmative.

Indeed, in accordance with Article 249(3) TEC, a directive shall be binding as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. It follows from this regulation that the most important criterion for the assessment of due functioning of the provisions of directives in national law is to ensure their full practical effectiveness and, in such a manner, to fully achieve the intended result. The manner in which this aim is to be achieved is left to the Member States. In its judgment of 8 March 2001 C-97/00 (Commission of the European Communities v. French Republic), the ECJ held that the obligation set in Article 249(3) TEC as regards the achievement of the result includes, for each Member State, to which a directive is addressed, adoption, within its national legal system, all acts necessary for ensuring that such directive is fully effective in accordance with its aim. The position of the ECJ does not leave any doubt that Member States are obliged to apply the acts which are in force not only as of the date the State concerned accedes to the Community, but also acts which are not in force any more if it is necessary for ensuring the effectiveness of the directive.

The position of the ECJ is strengthened by the provision of Article 2 of the Act of Accession which stipulates that From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act. Thus, as of the date of accession, Poland committed to adopt and apply the entire *acquis communautaire*.

The requirement for Poland to achieve the result set in the different directives which were in force before accession to the European Union, was also expressed in Article 53 of the Act of Accession. According to these regulations, after accession, the new Member State is considered to be an addressee of directives in the meaning of Article 249 of the EU Treaty and Article 161 of the Euratom Treaty, if such directives are addressed to all existing Member States, which is a rule. Except directives and decisions which come into force in accordance with Article 254(1) and Article 254(2) of the EU Treaty, new Member States are considered to have been notified such directives and decisions upon accession.

Since it is a rule to address directives to all Member States (that also applied to Directive 69/335), it is to be concluded that Poland is an addressee of the directives amending Article 7(1) of Directive 69/335, which shaped the final wording of this provision and without including which the aim of Directive 69/335 cannot be attained.

Moving on to the provisions of Directive 69/335, it is to be noted, above all, that in accordance with the first and second recitals of this Directive, it serves the purpose of supporting free flow of capital. To this effect, the Directive aims to harmonise the taxes on raising capital (capital duty) through the introduction of a harmonised capital duty which May be charged only once within the common market, and also through the abolishment of all other indirect taxes with the same characteristics as this tax (recitals sixth to eight). In accordance with Article 1 of the Directive, Member States Member States shall charge on contributions of capital to capital companies a duty harmonised in accordance with the provisions of Articles 2 to 9.

Article 4(1) of Directive 69/335 sets a list of transactions which must be charged with the capital duty by the Member States. In accordance with Article 4(1)(c), an increase in the capital of a capital company by contribution of assets of any kind is subject to capital duty. Article 4(2) contains a list of transactions which the Member States can charge with the capital duty. The rates of the capital duty are set in Article 7 of the Directive.

In its original wording, Article 7(1) stipulated that Until the entry into force of the provisions to be adopted by the Council in accordance with paragraph 2:

(a) the rate of capital duty may not exceed 2 % or be less than 1 %;

(b) this rate shall be reduced by 50 % or more when one or more capital companies transfer all their assets and liabilities, or one or more parts of their business to one or more capital companies which are in the process of being formed or which are already in existence.

Council Directive 73/80/EEC of 9 April 1973 (OJ L 103, p. 15) introduced a reduction in the rate of the capital duty set out in Article 7(1)(b) of Directive 69/335 (in its original wording) to between 0% and 0.5%.

Council Directive 73/79/EEC of 9 April 1973 (OJ L 103, p. 13), on the other hand, extended the scope of application of the reduced capital duty rates. It added, to Article 7(1) of Directive 69/335 (in its original wording), letter bb) offering the Member States a possibility to apply the same taxation as in the case of company mergers “where a capital company which is in the process of being formed or which is already in existence acquires shares representing at least 75 % of the issued share capital of another capital company”. Reduction in the capital duty rate or exemption from this duty is conditioned on the fulfilment of certain requirements.

Another Council Directive 85/303/EEC of 10 June 1985 (OJ L 156, p. 23) amending Directive 69/335 modified the aim of this Directive. It follows from the second and third recitals of the said Directive that the economic effects of capital duty are detrimental to the regrouping and development of undertakings; such effects are particularly harmful in the present economic situation in which there is a paramount need for priority to be given to stimulating investment; the best solution for attaining these objectives would be to abolish capital duty. A recommendation is contained in the fourth recital that for this reason, mandatory exemption should be established for transactions which are now subject to the reduced capital tax rate. Council Directive 85/303 also amended the provisions of Article 7, wording paragraphs 1 and 2 as follows:

“1. Member States shall exempt from capital duty transactions, other than those referred to in Article 9, which were, as at 1 July 1984, exempted or taxed at a rate of 0,50 % or less.

The exemption shall be subject to the conditions which were applicable, on that date, for the grant of the exemption or, as the case may be, for imposition at a rate of 0,50 % or less.

The Hellenic Republic shall determine which transactions it shall exempt from capital duty.

2. Member States may either exempt from capital duty all transactions other than those referred to in paragraph 1 or charge duty on them at a single rate not exceeding 1 %.”

Following the amendments to Directive 69/335, it is possible to establish the “role” assigned by the legislator to the date of 1 July 1984 in Article 7(1); in other words, what its origin was. Without taking account of these changes, it is not possible to correctly decode the meaning of this legal provision. Indeed, this regulation does not, in itself, give the answer to the question whether transactions, which were charged with the rate of 0.50 % or less under national law or under Community law are exempt from the tax. If, however, it is considered that by virtue of Directive 73/80, all Member States were obliged to tax, on 1 July 1984, the transactions set out in Article 7(1)(b) with a rate of no more than 0.50%, whilst Directive 85/303 ordered mandatory exemption from the capital duty of all transactions which were charged with the rate of 0.50% or less, it should be concluded that the transactions set out in Article 7(1)(b) are exempted regardless of whether and at what rates these were taxed in the State concerned. In other words, the transactions referred to in Article 7(1)(b), are exempt under Directive 69/335.

The situation is different as regards the transactions set out in Article 7(1)(bb). These transactions must be mandatorily exempted from the capital duty only where they were exempted or taxed at a rate of no more than 0.50% on 1 July 1984 in the country concerned. Indeed, as of that date, these transactions were not covered harmoniously by a single rate of the capital duty resulting in their mandatory exemption under Directive 85/303. Such a position was taken by the ECJ in its judgment of 21 June 2007 in Case C-366/05 *Optimus – Telecomunicações*; it was repeated in the judgment of 9 July 2009 in Case C-397/07 *Commission of the European Communities v. Kingdom of Spain*. It is worth adding too that in the aforementioned judgments, providing an interpretation of Article 7(1) of Directive 69/335, the ECJ relied upon Directives 73/79, 73/80 and 85/303. In its judgment in Case C-397/07, the ECJ held that: „The original version of Article 7(1)(b) provided for a rate of tax of 1%, which was reduced to between 0% and 0.50% by Directive 73/80. It follows that all the Member States were under an obligation to tax transactions subject to Article 7(1)(b) at a maximum rate of 0.50% no later than 1 July 1984. Since Directive 85/303 stipulated that it was mandatory to exempt all transactions that were subject to a rate of capital duty of 0.50% or less, there was an *automatic* requirement to exempt transactions subject to Article 7(1)(b), as a result of the earlier reduction in the rate of tax”. The ECJ emphasised that Directive 69/335 provided for exemption from the capital duty of transactions covered by its Article 7(1)(b), pursuing the aim in the form of support for free flow of capital through harmonization and, as far as possible, through gradual aboli-

shment of the duty. This exemption is mandatory and unconditional, and for the companies concerned it is a right the exercise of which must be guaranteed at the national level in a straightforward and clear manner.

It can also be added that in its judgment in Case C-366/05, the ECJ held that regarding a state which, like the Kingdom of Spain, had not become a member of the European Communities until 1 January 1986, the date of 1 July 1984, which is taken as the reference date for the purposes of mandatory exemption provided for under Article 7(1) of Directive 69/335, in its wording following from Directive 85/303, applied also to Member States which acceded to the Communities after that date. Referring that stance to the position of Poland, it is to be concluded that even though it acceded to the Community as of 1 May 2004, Poland is obliged to apply Directive 69/335 taking into account its legislative evolutions because these, as already demonstrated, enable correct interpretation of the provisions of the Directive.

The Complainant should be deemed to have rightly asserted that the judgment in Case C-366/05 had been given in a factual state different from the one in the present case. In the present case, the increase in the share capital involves an in-kind contribution in the form of an undertaking, whilst in Case C-366/05, the company increased its capital through cash contributions only. Such an increase was not subject to the mandatory exemption from the capital duty under the provisions of Directive 69/335, but, because of the provisions of Article 7(1) thereof, Portugal, as the ECJ held, should exempt this transaction from the capital duty because on 1 July 1984 the transaction was tax exempt in that State.

It is also worthwhile to point to the position of the Advocate General of 5 March 2009 expressed in the opinion to Case C-397/07, who asserted that any interpretation different from the one presented above would result, contrary to the aim of the directive, in capital duty being inconsistently applied in the existing and new Member States. The existing Member States were required to apply a reduced rate of tax to transactions covered by Article 7(1)(b) on 1 July 1984, with the result that it was mandatory to exempt such transactions from capital duty by virtue of Directive 85/303. If, in relation to Member States which acceded later, the point of reference for transactions covered by Article 7(1)(b) was their actual taxation as at 1 July 1984 and not, hypothetically, the taxation obtaining under the *acquis communautaire* at that date, the effect would be to undermine the directive's declared aim of achieving harmonization. The Court adjudicating in the present case, shares this view in full.

It is to be concluded that the transactions referred to in Article 7(1)(b) of Directive 69/335, i.e. when one or more capital companies transfer all their assets and liabilities, or one or more parts of their business to one or more capital companies which are in the process of being formed or which are already in existence, are exempted from the capital duty under Article 7(1) in its wording given to it in Directive 85/303. It is to be underlined that neither in the Act of Accession or in any other legal act, did Poland reserve the possibility to depart from the obligatory exemption from the tax of the transactions concerned as of 1 May 2004, and hence the tax on transactions under civil law existing under national regulations must be deemed to be contrary to Community law to the extent following from Article 7(1)(b) of Directive 69/335.

It is accepted in the court case-law, including the jurisprudence of the ECJ and in legal writings that implementation of a directive which is inaccurate and disadvantageous to a taxpayer or the absence of such implementation at all (with an effect which is disadvantageous to a taxpayer) offers the possibility to rely on a provision of the directive as long as such provision is characterised by sufficient degree of preciseness or absolute application, i.e. the directive does not leave the State a choice of one of many solutions (e.g. A. Wróbel, *Wprowadzenie do prawa Wspólnot Europejskich (Unii Europejskiej)*, Kraków 2004, ECJ judgments in Cases: Costa C-6/64, Simmenthal C-106/77, Van Gend C-26/62, Amministrazione C-106/77, Fratelli Costanzo C-103/88, Commission of the European Communities C-383/00, C-236/99, C-450/00, C-494/99, Marks & Spencer C-62/00). In this case, conditions have occurred for the application of Community law because this law prohibits, precisely enough, taxation of a capital transaction executed by the Complainant, and the national legislator may not disregard this prohibition. In that connection, re-examining this matter, the tax authority is obliged to take account of Article 7(1) of Directive 69/335 and the position of the Court expressed in this regard.

In light of the foregoing, the pleas of the complaint should be deemed well-founded provided that the Court has found it unnecessary to engage into considerations as regards the plea of non-compliance with the Constitution of the provisions on stamp duty in force on 1 July 1984. Indeed, as already demonstrated, in the case of transactions in the meaning of Article 7(1)(b) of Directive 69/335, it is irrelevant whether and at what rate they were taxed in Poland on 1 July 1984.

Having regard to the foregoing, under Article 145 § 1 subparagraph 1 letter a), Article 152 and Article 200 of the Act of 30 August 2002 – the Law of Procedure before Administrative Courts (*Journal of Laws* No. 153, item 1270, as amended), it is decided as in the operative part of the judgment.

JUDGMENT
of
THE SUPREME ADMINISTRATIVE COURT

of 8 September 2010
(II OSK 189/10)

Presiding Judge: NSA judge Włodzimierz Ryms (rapporteur).

Judges: NSA judge Jacek Chlebny (delegated), WSA judge Małgorzata Master-nak-Kubiak.

The Supreme Administrative Court (*Naczelny Sąd Administracyjny*) after hearing in its General Administrative Chamber, on 8 September 2011, the appeal in cassation filed by M. D. K. against judgment of the Voivodship Administrative Court in Warsaw (*Wojewódzki Sąd Administracyjny w Warszawie*) of 27 October 2009, File No. V SA/Wa 1046/09, concerning the complaint of M. D. K. against Decision of the Refugees Council of 2 June 2009 No. RdU-152-3/S/08 on the revocation of refugee status, refusal to grant subsidiary protection and tolerated residence permit and on expulsion from the territory of Poland 1. sets aside the contested judgment, 2. repeals the contested decision of the Refugee Council of 2 June 2009, 3. awards the appellant, i.e. M. D. K., an amount of PLN 790 (say seven hundred and ninety zlotys) from the Refugee Council as reimbursement of the legal costs, including PLN 390 (say three hundred and ninety zlotys) on account of the cassation proceedings.

Grounds

By the contested judgment of 27 October 2009, the Voivodship Administrative Court in Warsaw repealed the complaint of M. D. K. against the decision of the Refugee Council of 2 June 2009 on the revocation of refugee status, refusal to grant subsidiary protection, the ruling that there are no circumstances justifying the award of tolerated residence permit, and on expulsion from the territory of Poland.

In the grounds of the judgment, the Court invoked the following factual and legal circumstances of the case.

By Decision of 24 December 1997, the Minister of Internal Affairs and Administration granted the appellant, a national of G., a refugee status. In view of the documents available to the administration indicating that the appellant voluntarily re-accepted the protection of the state of his nationality, a procedure was instigated to revoke his refugee status. By Decision of 3 April 2007, the President of the Office for Repatriation and Foreigners, revoked the appellant's refugee status and concluded that there are no circumstances justifying the award of tolerated residence permit. After examining the appeal, by decision of 21 May 2008, the Refugee Council revoked the decision of 3 April 2007 and referred the case for re-examination, pointing that there was a need to hear the foreigner. After re-examining the case, by Decision of 20 October 2008, the Head of the Office for Foreigners revoked the appellant's refugee status, refused to grant him subsidiary protection and tolerated residence permit, and decided on his expulsion from the territory of Poland, pointing that the appellant, using a passport issued by the authorities of G. after the refugee status was granted to him, freely left and entered G. on several occasions in 2003, which indicates that he benefits from the protection of the country of origin. According to the authority, such behaviour is contrary to the appellant's assertion that he was persecuted by the authorities of the country.

After examining the appeal, by Decision of 2 June 2009, the Foreigner Council upheld the decision of the Head of the Office for Foreigners of 20 October 2008. In the grounds of the decision the authority stated that a foreign national's refugee status is revoked under Article 21 paragraph 1 subparagraph 1 of the Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland (Dz. U. No. 128, Heading 1176, as amended), if the foreign national voluntarily has re-accepted the protection of the country of his nationality. According to the authority, the fact that the appellant requested a G. passport, used it and travelled to the country of origin on several occasions (as confirmed by stamps in his Guinea passport) prove beyond doubt that he accepted protection of the country of origin. It is unjustified to claim that the foreigner is under threat of death, torture, inhuman or degrading treatment or punishment or serious and individualised threat of life and health resulting from widespread use of violence against civilians in a situation of an international or internal armed conflict. The situation in G. is stable. Furthermore, a case is pending against the foreign national concerning the termination of his custody rights over his minor son. The appellant does not meet the son on a regular basis, hardly knows him, and what is more, fails to fulfil his maintenance obligation, in view of which he cannot claim violations of his rights to family life.

The Voivodship Administrative Court in Warsaw repealed the complaint, sharing the view of the authorities of both instances that the appellant voluntarily accepted the protection of the country of his nationality. If a refugee applies for a passport or its renewal and obtains them, it must be assumed that he has entrusted his protection to the country of origin. The photocopy of the appellant's passport attached to the case file issued on [...] 2003 suggests that the appellant stayed in G. from 15 April 2003 till 17 April 2003, and from 23 April 2003 till 11 June 2003 and from 13 June 2003 till 12 July 2003. According the Court, the use of passport of R. G. and the entry into the country of origin on several occasions proves that the foreigner benefits from the protection of the country of his nationality and disproves that the appellant was under threat of persecution by the authorities of the country of origin. The Court decided that the appellant's claims that he had never used the passport and that the document was issued on the basis of a residence card he had lost are irrelevant. The appellant did not explain how the passport found itself in Poland and was kept by the appellant's partner, who brought it to the police, if, as he claims, he had never used it. The photocopy of another G. passport attached to the case file, with a stamp certifying that the appellant had left his country of origin on [...] January 1997, cannot be considered as evidence excluding the foreigner's stay in Guinea after 1997. The refusal to award tolerated residence permit is justified by the absence of any reasons whatsoever for assuming that the appellant's return to the country of origin would lead to a breach of any provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, drafted in Rome on 4 November 1950. Moreover, the foreigner is not eligible for subsidiary protection under Article 15 of the Act on granting protection to foreigners within the territory of the Republic of Poland. The Voivodship Administrative Court in Warsaw held that the decision was issued on the basis of correctly collected evidence, and the authorities carefully examined all the circumstances of the case, as expressed in the reasons of the decision.

In the appeal in cassation against the judgment, the appellant claimed that the authority acted in breach of Article 21 paragraph 1 subparagraph 1 of the Act on granting protection to foreigners within the territory of the Republic of Poland by concluding that the appellant voluntarily accepted the protection of the country of his nationality, and of Article 145 § 1 subparagraph 1 letter c) of the Act of 30 August 2002 „Law on Procedure before Administrative Courts” by repealing the complaint in a situation when the procedure before the public administration authorities was affected by defects, making it impossible for the authorities to establish the facts of the case. According to the appellant, the Voivodship Administrative Court defectively concluded that the findings of the public authorities in the case were correct, since the complainant's personal details were different

from those in the passport. The appellant had never lived in C., the capital city of G., because he had spent all his life in N Z. Ny-39, and such data features in his real passport. The case required additional evidence to be obtained based on an analysis of the authenticity of the passport supplied to the authority by the appellant's partner and of the stamps in it. The defective findings as to the facts led to the misapplication of Article 21 paragraph 1 subparagraph 1 of the Act on granting protection to foreigners within the territory of the Republic of Poland. When examining the case, the authorities failed to establish the situation in the country of origin. G. is ruled by a dictator and there was a political coup there in 2008, while the government fights and persecutes the opposition, which is confirmed by the Council of the European Union. Thus, in the present case, there is a well-founded threat of acts of persecution or actual risk of a serious harm to the appellant, including loss of life in the country of origin.

The Supreme Administrative Court considered the following:

The appeal in cassation is based on justified grounds, particularly the claimed breach of Article 21 paragraph 1 subparagraph 1 of the Act on granting protection to foreigners within the territory of the Republic of Poland.

The essential problem in the case under review concerns the correct understanding of the circumstance of „voluntary re-acceptance of protection of the state” referred to in Article 21 paragraph 1 subparagraph 1 of the Act on granting protection to foreigners within the territory of the Republic of Poland. According to the provision, a foreigner's refugee status is revoked, if after the award of such status the competent authority concludes that the foreigner voluntarily re-accepted protection of the country of his nationality. „Accepting protection of the state”, within the meaning of Article 21 paragraph 1 subparagraph 1 of the Act on granting protection to foreigners within the territory of the Republic of Poland, means that a foreigner has access to the protection of the country of his nationality and may benefit from that protection. In other words, accepting state protection translates into an actual access by the foreigner to such protection of the country of origin. Considering the consequences of deciding that a foreigner voluntarily re-accepted the protection of the country of his nationality, it is not sufficient to base such a decision on an incidental occurrence, but instead on a range of circumstances of the case. An assessment of the circumstances that may suggest that a foreigner has re-accepted protection of the state of origin must take into account the time when the events took place and their impact at the time when the refugee's status is being revoked, which also requires considering the foreigner's current position as well as the social, political

and legal situation in the country of origin. This is of particular importance when the time difference between the events indicating that the protection of the country of origin was accepted and the decision on the revocation of refugee status spans a long period. A different interpretation of Article 21 paragraph 1 subparagraph 1 of the Act on granting protection to foreigners within the territory of the Republic of Poland, disregarding the question whether accepting the protection of the country of origin means the foreigner's actual capacity to benefit from such protection should his refugee status be revoked and should he be sent back to the country of origin, is defective. Concluding that a foreigner voluntarily re-accepted protection of the state as a result of the 2003 events, given that the authorities decided on the revocation of refugee status in 2008, required establishing the current situation in the country of origin. Thus, the authority was incorrect to assume in its position, with which the Voivodship Administrative Court in Warsaw concurred, that in order to revoke the appellant's refugee status, it was sufficient to establish that the appellant re-accepted the protection of the country of his nationality, in view of the fact that he resided in G. from 15 April 2003 till 17 April 2003, and from 23 April 2003 till 11 June 2003 and from 13 June 2003 till 12 July 2003 under a passport issued by the authorities in G. on [...] 2003, without establishing any facts as to the events that took place between 2003 and the date on which the contested decision was issued. The appellant's residence in G. in 2003 does not mean in itself that on the date of the decision delivered by the authority of second instance the appellant had access to the protection of the country of his nationality and could benefit from it, and that he is under no threat of acts of persecution. This follows from the fact that it cannot be assumed that it is completely irrelevant that the time that lapsed between the passport issuance data and the appellant's stay in G. and the decision of [...] June 2009 is 6 years. In such a case, it was necessary to establish the circumstances of the case pertaining to the events that had taken place between the appellant's stay in G. in 2003 and the instigation of the procedure and issuance of the contested decision, including in particular the circumstances relating to the fact whether there were reasons justifying a fear of acts of persecution against the appellant in the country of origin. These circumstances were disregarded both by the administrative authorities and by the Voivodship Administrative Court in Warsaw.

Cases concerning refugees are governed by the provisions of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ L 304, p.12). When interpreting Article 11 (1) (e) of the directive, in its judgment of 2 March 2010 in Cases C-175/08; C -176/08, C-178/08 and C-179/08, the

European Court of Justice explained that the revocation of refugee status requires establishing whether there are well-founded fears of acts of persecution within the meaning of Article 2 (c) of the directive and whether the foreigner will have access to actual protection against such acts of persecution in the country of origin if he ceases to have refugee status. In cases concerning revocation of refugee status, Article 4 (1) of the directive may apply, if a refugee invokes circumstances other than those under which he was granted the refugee status in order to demonstrate further existence of well-founded fear of an act of persecution. The administrative organs concerned and the Court of first instance failed to examine the case in view of Directive 2004/83/EC and made an erroneous interpretation of Article 21 paragraph 1 subparagraph 1 of the Act on granting protection to foreigners within the territory of the Republic of Poland.

To sum up, acceptance of the protection of the state of the foreigners nationality may constitute a basis for depriving the citizen of his refugee status pursuant to Article 21 paragraph 1 subparagraph 1 of the Act on granting protection to foreigners within the territory of the Republic of Poland, if the citizen has access to the protection of that state and may take advantage of the protection and there are no well-founded fears of acts of persecution.

Considering the demonstrated breach of substantive law resulting from erroneous interpretation of Article 21 paragraph 1 subparagraph 1 of the Act on granting protection to foreigners within the territory of the Republic of Poland, the correct course of action is to uphold the appeal in cassation and repeal the contested judgment and examine the complaint filed by the appellant against the decision revoking his refugee status.

In the light of the above, the Supreme Administrative Court has repealed the contested judgment and examined the complaint pursuant to Article 188 of the Law on Procedure before Administrative Courts. After examining the complaint of 2 June 2009, the Supreme Administrative Court concluded that the contested decision was issued in breach of Article 21 paragraph 1 subparagraph 1 of the Act on granting protection to foreigners within the territory of the Republic of Poland, which will warrant its repeal under Article 145 § 1 subparagraph 1 letter a) of the Law on Procedure before Administrative Courts. The defective interpretation of the provision of Article 21 paragraph 1 subparagraph 1 of the Act on granting protection to foreigners within the territory of the Republic of Poland resulted in a breach of procedural provisions (Article 7, Article 77 § 1, Article 80 and Article 107 § 3 of the Code of Administrative Procedure) in the course of the administrative procedure, because the authority did not explain and did not consi-

der all the circumstances required for the case to be dealt with conclusively. In the case under review, the authority limited itself to establishing that from 15 April 2003 till 17 April 2003, and from 23 April 2003 till 11 June 2003 and from 13 June 2003 till 12 July 2003, the appellant stayed in G. under a passport issued by the country's authorities on [...] 2003, which meant that the foreigner re-accepted protection of the state of his nationality, and that the situation in the country is stable. As a consequence, the Council refrained from carrying out a fact-finding procedure to establish the current situation in G. and failed to make its own factual findings in this respect as at the date of the contested decision. As indicated above, the appellant's stay in G. in 2003 does not in itself suffice to conclude that the appellant actually had access to and could take advantage of the protection of the state as at the date of the decision. The time period was so long that the circumstances which took place between the appellant's stay in G. in 2003 and the issuance of the contested decision could by no means be disregarded. The appellant pointed that in December 2008 a military junta came into power in G., and on 28 September 2009 the city of K. saw bloody riots, as a result of which the situation in G. became very tense. In this connection, on 22 October 2009, the European Parliament adopted Resolution of 22 October 2009 on the situation in G, in which it condemned the bloody and murderous repressions of unarmed demonstrators. It is not possible to respond to the appellant's claims about the situation in the country of origin and the threats of persecution, because the authority did not make any findings in this respect, limiting itself to a general statement that the situation in G. is stable. In cases concerning revocation of refugee status, it is necessary to collect up-to-date and complete information about the situation in the country of origin as required for the case to be decided conclusively. In the absence of findings in this respect, the reasons for granting tolerated residence permit are impossible to be assessed, either, as in such a case, it is crucial to establish whether or not fundamental human rights are breached in the country to which the party is to be expelled. In each and every case, correctly conducted administrative proceedings require the competent authority to collect and analyse evidence in an exhaustive manner, and in refugee-related cases, it is crucial that full factual findings are made as at the date of the contested act. When re-examining the case, the authority should have assessed the situation in view of the 2008 and 2009 events in G.

On the other hand, it cannot be concluded, as the appellant claims, that the authority had insufficient reasons to establish that in 2003 the appellant, using a passport issued by the authorities of G. left for G. The examination of the evidence related to that circumstance, which the authority was competent to carry out, does not breach Article 80 of the Code of Administrative Procedure.

In view of the above, it is hereby ruled as in the operative part of the sentence.

The Supreme Administrative Court ordered the appellant's legal costs to be reimbursed pursuant to Article 203 subparagraph 1 of the Law on Procedure before Administrative Courts and Article 200, in conjunction with Article 193, of the Law on Procedure before Administrative Courts. The reimbursement covers the legal costs, including the costs of the cassation proceedings.

JUDGMENT
of
THE SUPREME ADMINISTRATIVE COURT

of 10 March 2011
(I FSK 517/10)

Presiding Judge: NSA judge Janusz Zubrzycki

Judges: NSA judge Krystyna Chustecka, WSA judge Izabela Najda-Ossowska (delegated)

The Supreme Administrative Court (*Naczelny Sąd Administracyjny*), after hearing in its Financial Chamber, on 10 March 2011, the appeal in cassation filed by P. O. W. C. D. Spółka z o. o. in B. against the judgment of the Voivodship Administrative Court in Poznań (*Wojewódzki Sąd Administracyjny w Poznaniu*) of 3 December 2009, file No. I SA/Po 909/09, concerning the complaint of P. O. W. C. D. Spółka z o. o. in B. against the individual interpretation of the Minister of Finance of 3 July 2009 No. [...] concerning the tax on goods and services, hereby sets aside the appeal in cassation.

Grounds

1. Judgement of the court of first instance and procedure before the tax authorities as presented by the Court.

1.1. In its judgement of 3 December 2009, file No. I SA/Po 909/09, the Voivodship Administrative Court in Poznań rejected a complaint brought by P. O. W. C. D. sp. z o.o. in B. against the individual interpretation of the Minister of Finance of 3 July 2009, No. [...] in respect of the tax on goods and services.

1.2. The court noted that by the application of 8 April 2009, the company requested the Minister of Finance to issue an individual interpretation of the provisions of the tax law. The interpretation was to be issued with respect to the provisions of Article 86 paragraphs 3 and 7) and 13 and Article 88 paragraph 1 subparagraph 3 of the Act, and Article 70 paragraph 1 of the Act of 29 August 1997 “the Tax Law” (*Journal of Laws* No. 8, item 60, as amended, hereinafter “the Tax Law”). The company pointed out that since 1 May 2004 it had acquired and used, under hire, rental and leasing contracts, passenger vehicles and petrol engine fuel and

diesel fuel for those vehicles. Consequently, the company requested the authority to clarify whether after 1 May 2004, a taxable person had the right to deduct input tax on the purchase and use of vehicles under a hire, rental and leasing contract, and of petrol engine fuel and diesel fuel, regardless of the type of vehicle. Moreover, the party requested the term “prescription of the right to deduct tax on the purchase and use of vehicles and fuel” to be clarified.

When submitting its position, the applicant invoked in particular the judgment of the European Court of Justice of 22 December 2008 in Case C-414/07 *Magoora*, claiming on its basis that any restrictions specified in the Act of 11 March 2004 on the tax on goods and services (*Journal of Laws* No. 54, item 535 as amended, hereinafter “the Act on VAT of 2004”) with respect to the deduction of input tax on the purchase and use of vehicles and fuel to power those vehicles were inconsistent with Community law. The party claimed that a taxable person has the right to deduct input tax in respect of any vehicle and fuel for a vehicle purchased after 1 May 2004 and used for the purposes of its business activity. According to the company, the type of vehicle and date of purchase are irrelevant.

1.3. In its interpretation of 3 July 2009, the authority considered the company’s position to be incorrect, explaining in the written reasons that the provisions of the Act on VAT of 2004 relating to the right to deduct input tax in respect of the purchase of vehicles and engine fuels for those vehicles applicable in Poland following its accession into the European Union extend the scope of the previously applicable national exclusions from the right and are contrary to the standstill principle as set out in Article 176 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 2006.347.1, as amended, hereinafter “Directive 2006/112/EC”), and earlier in Article 17 (6) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ L.1977.145.1, as amended, hereinafter „the Sixth Directive”), in which the principle provides for the retention of national exclusions from the right to deduct taxes that were applicable before the Sixth Directive entered into force. After analysing the national provisions in the light of EU regulations and the judgment of the ECJ in Case C-414/07 *Magoora*, the authority concluded that the company has the right to a full deduction of input tax on the purchase and use of vehicles under a leasing contract, as provided in Article 86 paragraph 1 of the Act on VAT of 2004, i.e. in so far as they are used for the purposes of taxable transactions, taking into account, however, the provision of Article 25 paragraph 1 subparagraph 2 of the Act of 8 January 1993 on the tax on goods and services and on excise duty (*Journal of Laws*

No. 11, item 50, as amended, hereinafter “Act on VAT of 1993”), read in conjunction with § 10 subparagraph 1 of the Decree of 22 March 2002 on the implementation of certain provisions of the Act on tax on goods and services and on excise duty (*Journal of Laws* No. 27, item 268, as amended, hereinafter the “Decree of MF of 22 March 2002”), applicable until 30 April 2004. According to the authority, the party is also entitled to deduct input tax as set out in the invoices documenting the purchase of engine fuel for the vehicles referred to in the request, pursuant to Article 86 paragraph 1 of the Act on VAT of 2004, taking account of the provision of Article 25 paragraph 1 subparagraph 3a of the Act on VAT of 1993, applicable until 30 April 2004. Thus the authority pointed out that the party’s claim that it has the right to deduct input tax for each vehicle and in respect of all fuel for the vehicles purchased after 1 May 2004 and used for the purpose of its business (with no obligation to hold the necessary type-approval) is erroneous. At the same time the authority held that the inquiry concerning the period of prescription of the right to deduct input tax on the purchase or use of a passenger vehicle and fuel to power the vehicle is irrelevant.

2. Complaint to the court of first instance.

2.1. The company contested the above interpretation of the Minister of Finance, arguing that the authority acted in breach of Article 86 paragraphs 3 and 7 and Article 88 paragraph 1 subparagraph 3 of the Act on VAT of 2004, read in conjunction with Article 17 (6) of the Sixth Directive and Article 176 of Directive 2006/112/EC, by disregarding the judgment of the ECJ in the *Magoora* case when issuing the interpretation. Moreover the complainant pointed that in the case under review the application of the provisions of Article 25 paragraph 1 subparagraph 2 and subparagraph 3a of the Act on VAT of 1993 and § 10 of the Decree of the Minister of Finance of 22 March 2002, which are no longer in force, is unwarranted. It also held that – in the light of the *Magoora* judgement – Article 86 paragraphs 3 and 7 and Article 88 paragraph 1 subparagraph 3 of the Act on VAT of 2004 were implemented erroneously, and that Article 2, Article 7, Article 31 paragraph 3, Article 87 paragraph 1 and Article 217 of the Polish Constitution were misapplied, as they were disregarded in the interpretation and application of the tax law. The authority was also accused of disregarding in the interpretation concerned, Article 86 paragraph 1 of the Act on VAT of 2004, despite its effectiveness and applicability, and of disregarding Article 120 of the Tax Law. The complainant maintained that due to the inapplicability in the current case of the provisions of Act on VAT of 1993 and Article 86 paragraphs 3 and 7 and Article 88 paragraph 1 of the Act on VAT of 2004, due to their inconsistency with Article 17 (6) of the Sixth Directive (Article 176 of Directive 2006/112/EC), the determination of the

facts should have taken into account Article 86 paragraph 1 of the Act on VAT of 2004 and consider the legal assessments presented in the request for interpretation to be correct.

2.2. In response, the Minister of Finance requested the complaint to be dismissed, thus maintaining his previous position in the case.

3. Grounds for the ruling of the court of first instance.

3.1. The Voivodship Administrative Court in Poznań ruled that there is no basis for revoking the contested interpretation.

3.2. In its written grounds for the judgement, the court of first instance invoked the judgment of the European Court of Justice of 22 December 2008 in Case C-414/07 *Magoora Sp. z o.o. v. Dyrektor Izby Skarbowej w Krakowie* (Director of the Tax Chamber in Kraków) and the “standstill” principle provided for in the second subparagraph of Article 17 (6) of the Sixth Directive. When analysing the national provisions, i.e. Article 25 paragraph 1 subparagraph 2 of the Act on VAT of 1993, applicable before 1 May 2004, as well as Article 86 paragraph 3 of the Act on VAT of 2004, which superseded the former provision on that date, the Court pointed that the pre-accession legal regime for input tax deduction in respect of the purchase of the vehicles covered by the contested interpretation was less favourable for the taxable person than that applicable in the post-accession period. This appears from the fact that Article 86 paragraph 3, read in conjunction with Article 86 paragraph 4 subparagraph 7 letter a) of the Act on VAT of 2004 reduces the scope of deductions of input tax due to the taxable person, as buyers of cars can actually deduct an amount of input tax of up to PLN 6000 (until 21 August 2005 – PLN 5000), whereas, as a rule, Article 25 paragraph 1 subparagraph 2 of the Act on VAT of 1993 did not provide for any right of deduction in respect of the purchase of cars. On the other hand, following a comparative analysis of Article 86 paragraph 4 subparagraph 7 letter a) of the Act on VAT of 2004 and Article 25 paragraph 1 subparagraph 2 of the Act on VAT of 1993 (the text of the sentence after the comma) the Court concluded that the right to deduct VAT on purchases of cars is retained in full when the taxable person’s business consists in the resale of the cars. Consequently, the Court concluded that by reducing the restrictions of the right of deduction and maintaining the scope of the restrictions applicable on the date of entry into force of the Sixth Directive, Article 86 paragraph 3, read in conjunction with Article 86 paragraph 4 subparagraph 7 letter a) of the Act on VAT of 2004, does not breach the second subparagraph of Article 17

(6) of the Sixth Directive, and thus restricting the right of deduction for passenger vehicle buyers not engaged in vehicle resale is permissible and consistent with the Sixth Directive.

In the present case, the Court pointed that if the company purchased a passenger vehicle in the period between 1 May 2004 and 21 August 2005, it has the right to deduct input tax corresponding to 50 % of the amount of the tax set out in the invoice for the purchase of the passenger vehicle, not more, however, than PLN 5000, except when the resale or making such vehicles available for use for consideration under a leasing contract is the company's business. On the other hand, pursuant to the provisions of the Act on VAT of 2004, as amended on 22 August 2005, if the complainant purchased a passenger vehicle for the purpose of its business after that date, it has the right to reduce the input tax by an amount corresponding to 60 % of the input tax set out in the purchase invoice, not more, however, than PLN 6000, except when the resale or making such vehicles available for use for consideration under a leasing contract is the company's business. As a result, as concerns the right to deduct input tax in respect of the purchase of a passenger vehicle, the Court concluded that the tax authority rightly considered the applicant's position to be incorrect.

3.3. As concerns the right to deduct input tax in respect of the purchase of fuels used to power passenger vehicles, the Court held that the Minister of Finance rightly rejected the complainant's claim that the restriction of the right of deduction in respect of fuels used to power passenger vehicles regulated by the provisions of the Act on VAT of 2004 constitutes an extension of the restrictions actually applied prior to the transposition of the Sixth Directive into Poland's legal order. According to the Court, the above position is justified by the fact that such a restriction was already provided for in the Polish legislation before 1 May 2004, and thus – pursuant to Article 17 (6) of the Sixth Directive (Article 176 of Directive 2006/112/EC) – it could be retained after that date.

4. Appeal in cassation

4.1. The Company appealed against the judgement in its entirety, arguing that the court of first instance breached substantive law. It contested the following:

1. erroneous interpretation of Article 86 paragraphs 1, 3 and 7 and Article 88 paragraph 1 subparagraph 3 of the Act on VAT of 2004, as applicable between 1 May 2004 and 21 August 2005, read in conjunction with Article 17 (2) (a) and

Article 17 (6) of the Sixth Directive, as applicable between 1 May 2004 and 21 August 2005, read in conjunction with Article 2, Article 7, Article 31 paragraph 3, Article 87 paragraph 1 and Article 217 of the Polish Constitution,

2. erroneous interpretation of Article 86 paragraphs 1, 3 and 7 and Article 88 paragraph 1 subparagraph 3 of the Act on VAT of 2004, as applicable since 22 August 2005, read in conjunction with Article 17 (2) (a) and Article 17 (6) of the Sixth Directive, as applicable between 1 May 2004 and 31 December 2006, read in conjunction with Article 2, Article 7, Article 31 paragraph 3, Article 87 paragraph 1 and Article 217 of the Polish Constitution,

3. erroneous interpretation of Article 86 paragraphs 1, 3 and 7 and Article 88 paragraph 1 subparagraph 3 of the Act on VAT of 2004, as applicable since 22 August 2005, read in conjunction with Article 168 (a) and Article 176 of Directive 2006/112/EC, as applicable since 1 January 2007, read in conjunction with Article 2, Article 7, Article 31 paragraph 3, Article 87 paragraph 1 and Article 217 of the Polish Constitution.

According to the appellant, the erroneous interpretation of the above provisions consists in making, on their basis, a defective assumption – in view of the judgment of the ECJ of 22 December 2008 in Case C-414/07 *Magoora* and Article 25 paragraph 1 subparagraph 2 and subparagraph 3a of the Act on VAT of 1993 as well as § 10 (1), (3) and (4) of the Decree of the Ministry of Finance of 22 March 2002 – “(...) that a VAT taxable person does not have the right to deduct input tax in full, irrespective of vehicle type, and on the purchase of leasing services with respect to a vehicle, irrespective of vehicle type, or in respect of the purchase of fuel for the vehicle, irrespective of vehicle type – in the case when the vehicle, irrespective of its type, is used by the taxable person for the purposes of VAT taxable transactions (...)”, while the correct interpretation of the provisions should lead to a conclusion that in the case described the taxable person has the right to deduct input tax.

The appellant – fundamentally maintaining the reasons presented in the complaint against the interpretation – requested the contested judgment to be repealed, and the case to be referred back to the court of first instance for retrial, demanding further that its legal costs be reimbursed.

5. The Supreme Administrative Court considered the following.

The appeal in cassation should be set aside.

5.1. The dispute in the case under review consists basically in evaluating the impact of the judgment of the European Court of Justice of 22 December 2008 (hereinafter: ECJ) in Case C-414/07 *Magoora sp. z o.o. v. Dyrektor Izby Skarbowej w Krakowie* on the applicability and implementation of the provisions of Article 86 paragraphs 1, 3 and 7 and Article 88 paragraph 1 subparagraph 3 of the Act on VAT of 2004, as applicable from 1 May 2004 till 21 August 2005, and further since 22 August 2005 (the provisions of Article 86 paragraphs 3 and 7 and Article 88 paragraph 1 subparagraph 3 of the Act on VAT were repealed as of 31 December 2010).

The appellant maintains that in the legal state existing after the publication of the judgment, precedence should be given to the rule on ensuring effectiveness of the judgment of the ECJ, by derogating from the application of Article 86 paragraphs 3 and 7 and Article 88 paragraph 1 subparagraph 3 of the Act on VAT of 2004 in full, as reflected by the judgment, which states that “the standstill principle precludes the existence of the above provisions.”

5.2. This position expressed in the appeal of cassation cannot be accepted.

First of all, the judgment of the ECJ in Case C-414/07 *Magoora sp. z o.o.* does not state that the “the standstill principle precludes the existence of the above provisions.”

The argument presented in the judgment is as follows:

”The second subparagraph of Article 17(6) of Sixth Directive 77/388 precludes a Member State from repealing in their entirety, when that directive is transposed into national law, national provisions concerning restrictions on the right to deduct input tax on purchases of fuel for vehicles used for a taxable activity, by replacing, on the date on which that directive entered into force on its territory, those provisions by provisions laying down new criteria in that regard, if – which it is for the national court to determine – the latter provisions have the effect of extending the scope of those restrictions. It precludes, in any event, a Member State from subsequently amending its legislation which entered into force on that date, so as to extend the scope of those restrictions as compared with the situation existing prior to that date.”

In this argument the ECJ determined the interpretation and application of Article 17 (6) of the Sixth Directive, and obliged the national court to examine a possible breach of the interpretation of the provision in view of evaluating the post-accession restrictions of the right to deduct VAT in respect of purchases of vehicles used for the purposes of taxable transactions as compared to the corresponding pre-accession restrictions.

Consequently the ECJ concluded (Recital 44), that “it is for the national court to interpret domestic law, so far as possible, in the light of the wording and the purpose of the Sixth Directive with a view to achieving the results sought by the latter, favouring the interpretation of the national rules which is the most consistent with that purpose in order thereby to achieve an outcome compatible with the provisions of the directive (see, to that effect, Case C212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 124), setting aside, if necessary, any contrary provision of national law (see, to that effect, Case C144/04 *Mangold* [2005] ECR I-9981, paragraph 77).”

However, at the same time, in Recital 44, the ECJ indicated that “it must be held that the repeal of national provisions, on the date of entry into force of the Sixth Directive in the national legal system concerned, and their replacement on the same date by other national provisions does not in itself give rise to the presumption that the Member State concerned has stopped applying exclusions on the right to deduct input tax. Neither does such a legislative amendment automatically lead to the conclusion that there is an infringement of the second subparagraph of Article 17(6) of that directive, provided, however, that it has not led to an extension, from the said date, of the previous national exclusions.”

The above arguments of the ECJ clearly imply that when the evaluation by the national court of the post-accession restrictions of the right to deduct VAT in respect of the purchase of vehicles used for the purposes of taxable transactions compared to the corresponding pre-accession restrictions implies an extension of the scope of the applicable restrictions compared to the pre-accession situation, the court is obliged to interpret its national law – so far as possible – in the light of the wording and purpose of the Sixth Directive with a view to achieving the results sought by the directive, favouring the interpretation of the national rules that is the most consistent with that purposes, in order thereby to achieve an outcome compatible with the provisions of the Directive. The goal of the national court is therefore to ensure such interpretation and application of the internal provisions as to make them consistent with the EU directive – in the present case – with the provision of Article 17 (6) of the Sixth Directive. This is because, as determined

above, in Recital 41 of the judgment, the ECJ did not question Member States' right to continue to apply the restrictions of the right to deduct tax to the extent applicable before the accession, but due to the principle expressed in Article 17 (6) of the Sixth Directive it objected to extensions of earlier restrictions.

5.3. It must be held at the same time that a national legal norm inconsistent with a Community legal norm does not become void in the national legal order, but it cannot be applied in so far as it is inconsistent with the respective Community legal norm. This does not lead, however, to a repeal of the national provision or loss of its legal force.

5.4. Thus, when analysing the impact of the judgment of the ECJ in Case C-414/07 *Magoora sp. z o.o.* on the application of the post-accession national provisions restricting the right to deduct input tax, it must be concluded, above all, that although the judgment relates directly to the restriction of the right to deduct input tax in respect of the purchase of fuel for company vehicles (used for taxable activity), it has a wider applicability, as it concerns any restrictions related to the ban on deduction of input tax on any expenditure linked to those vehicles in so far as the regulations adopted after 1 May 2004 aggravated the situation of taxable persons compared to the regulations applicable pursuant to the Act on VAT of 1993 before the date of its repeal (e.g. in respect of the purchase or leasing of such vehicles).

5.5. Thus, considering the recommendations for national courts ensuing from the judgment of the ECJ in Case C-414/07 *Magoora sp. z o.o.*, it must be assessed whether and to what extent the post-accession provisions of Article 88 paragraph 1 subparagraph 3, read in conjunction with Article 86 paragraph 3 of the Act on VAT of 2004 – in the case of a restriction of the right to deduct input tax in respect of the purchase of fuels for company vehicles, and Article 86 paragraphs 3 and 7 of the Act on VAT of 2004 – in the case of a restriction of the right to deduct input tax on the purchase, hire, rental and leasing of such vehicles, extended the scope of application of such restrictions compared to the pre-accession situation. In such a case, the task of the national court is to determine to what extent the norms of such provisions – provided they extended the pre-accession restrictions of the right to deduct tax in the above cases – are applicable, and conversely, to what extent they are ineffective. The evaluation should take into account the criterion derived from the restrictions of the right to deduct tax in respect of the purchase of company vehicles (their hire, rental and leasing) and fuels for those vehicles as specified in the VAT provisions applied before 30 April 2004, i.e. the norms of Article 25 paragraph 1 subparagraph 2, subparagraph 2a and Article 25 pa-

paragraph 1) subparagraph 3a of the Act on VAT of 1993 and § 10 (1)-(4) of the Decree of the MF of 22 March 2002. In no circumstances does it imply that those provisions, which are no longer in force, are applied. The national court is obliged to invoke such norms exclusively to determine on their basis the scope of the restrictions of the right to deduct input tax applicable as at 30 April 2004, in view of defining – with respect to the application of Article 88 paragraph 1 subparagraph 3, read in conjunction with Article 86 paragraph 3 and Article 86 paragraphs 3 and 7 of the Act on VAT of 2004 – the limit beyond which the provisions will lose their effect as being contrary to the standstill rule referred to in Article 17 (6) of the Sixth Directive.

5.6. Thus the effects of the standstill principle ensuing from Article 17 (6) of the Sixth Directive (Article 176 of Directive 2006/112/EC) should be construed as such that the provisions of Article 88 paragraph 1 subparagraph 3, read in conjunction with Article 86 paragraph 3 of the Act of 11 March 2004 on the tax on goods and services (*Journal of Laws* No 54, item 535 as amended), applicable from 1 May 2004 till 31 December 2010 – in the case of a ban on the deduction of input tax in respect of the purchase of fuels used to power vehicles used for taxable activity, and Article 86 paragraphs 3 and 7 of the Act – in the case of a restriction of other right to deduce input tax on the purchase and hire, rental and leasing of such vehicles, are applicable in so far as they do not extend the criteria of such restrictions effective and actually applied as at 30 April 2004 pursuant to the provisions of Article 25 paragraph 1 subparagraph 2, subparagraph 2a and Article 25 paragraph 1 subparagraph 3a of the Act of 8 January 1993 on tax on goods and services and on excise duty (*Journal of Laws* No. 11, item 50, as amended) and § 10 (1)-(4) of the Decree of the Minister of Finance of 22 March 2002 on the implementation of certain provisions of the Act on tax on goods and services and on excise duty (*Journal of Laws* No. 27, item 268, as amended). The provisions can only be considered ineffective in so far as they extend beyond the restrictions applicable and actually applied as at 30 April 2004 pursuant to the above provisions of the Act on VAT of 1993 and the Decree of the Minister of Finance of 22 March 2002.

This means that one cannot share the view expressed in the appeal in cassation that the judgment of the ECJ of 22 December 2008 in Case C-414/07 implies that, as from 1 May 2004, any national legal restrictions of the deduction of input tax on the purchase, hire, rental or leasing of vehicles used for VAT taxable activity, and on the purchase of fuel for those vehicles, are ineffective, except as specified in Article 86 paragraph 1 of the Act on VAT.

5.7. Thus, when comparing the restrictions of the right to deduct input tax on the purchase, hire, rental and leasing of passenger vehicles used for VAT taxable activity and in respect of the purchase of fuel for such vehicles, the Court was right to observe that the provisions of Article 88 (1) Subparagraph 3, read in conjunction with Article 86 paragraph 3 of the Act on VAT of 2004 – as regards the right to deduct input tax in respect of the purchase of fuels for such company vehicles, and Article 86 paragraphs 3 and 7 of the Act on VAT of 2004 – with respect to the restrictions of the right to deduct input tax on the purchase, hire, rental and leasing of such vehicles, have by no means extended the restrictions applicable and actually applied in this respect as at 30 April 2004 pursuant to the provisions of Article 25 paragraph 1 subparagraph 2, subparagraph 2a and Article 25 paragraph 1 subparagraph 3a of the Act on VAT of 1993 and § 10 (1)–(4) of the Decree of the Minister of Finance of 22 March 2002. On the contrary, as regards the restriction of the right to deduct input tax on the purchase, hire, rental and leasing of such vehicles (passenger vehicles), since 1 May 2004, the provisions of Article 86 paragraphs 3 and 7 of the Act on VAT of 2004 have been more favourable than the provisions applicable as at 30 April 2004, which banned taxable persons from deducting such input tax. This can be inferred from the fact that in the case of passenger vehicles used for VAT taxable activity, in the period between 1 May 2004 and 21 August 2005, taxable persons had the right to deduct input tax corresponding to 50 % of the tax amount as set out in the invoice in respect of the purchase of the passenger vehicle, not more, however, than PLN 5000 (50 % of the amount of input tax in respect of the rent (rental) or other payments under the respective hire, rental, leasing contract, as documented by the invoice, not more, however, than PLN 5000), while since 22 August 2005 such right applies with respect to an amount corresponding to 60 % of the input tax as set out in the purchase invoice, not more, however, than PLN 6000 (60 % of the input tax in respect of the rent (rental) or other payment under the respective hire, rental, leasing agreement, as documented by the invoice, not more, however, than PLN 6000).

5.8. If then, in the case of the restriction of the right to deduct input tax on the purchase and hire, rental or leasing of passenger vehicles used for VAT taxable activity, as well as on the purchase of fuel to power such vehicles, after 1 May 2004, there has been no extension of the restrictions applicable and actually applied as at 30 April 2004 pursuant to the provisions of Article 25 paragraph 1 subparagraph 2, subparagraph 2a and Article 25 paragraph 1 subparagraph 3a of the Act on VAT of 1993 and § 10 (1)–(4) of the Decree of the Minister of Finance of 22 March 2002, the provisions of Article 88 paragraph 1 subparagraph 3, read in conjunction with Article 86 paragraph 3 of the Act on VAT of 2004 – in the case of the restriction of the right to deduct input tax in respect of the purchase

of fuels used to power such (passenger) vehicles and Article 86 paragraphs 3 and 7 of the Act on VAT of 2004 – in the case of the restriction of the right to deduct input tax on the purchase and hire, rental and leasing of such vehicles, were fully applicable until 31 December 2010.

5.9. The scope of the applicability of these provisions is different for vehicles other than passenger vehicles. When determining the applicability of the provisions, taking into account the restrictions applicable and applied with respect to such vehicles as at 30 April 2004, it must be noted that the reduction of the amount or the refund of the tax due were not to be applied between 1 May 2004 and 31 December 2010 with respect to non-passenger vehicles with an authorised carrying capacity of up to 500 kg, taking into consideration, however, the wording of Article 86 paragraphs 3 and 4 of the Act on VAT as applicable since 1 May 2004, in cases more favourable for the taxable persons which allow them to deduct tax also in respect of the purchase of such vehicles, even when the criterion of the authorised carrying capacity of up to 500 kg was not met. This also applies to the restriction of the right to deduct input tax on the hire, rental and leasing of such vehicles and the purchase of fuels to power them.

On the other hand, the restrictions introduced in the provisions of Article 88 paragraph 1 subparagraph 3, read in conjunction with Article 86 paragraph 3 of the Act on VAT of 2004 – in the case of the restriction of the right to deduct input tax in respect of the purchase of fuel for non-passenger vehicles used for VAT taxable activity, and Article 86 paragraphs 3 and 7 of the Act on VAT of 2004 – in the case of the restriction of the right to deduct input tax on the purchase and hire, rental and leasing of such vehicles in so far as they concern non-passenger vehicles with an authorised carrying capacity of up to 500 kg, given that they extend the restrictions applicable and actually applied as at 30 April 2004 pursuant to the provisions of Article 25 paragraph 1 subparagraph 2, subparagraph 2a and Article 25 paragraph 1 Subparagraph 3a of the Act on VAT of 1993 and § 10 (1)-(4) of the Decree of the MF of 22 March 2002, cannot be applied as they are contradictory to the standstill principle established under Article 17 (6) of the Sixth Directive, and since 1 January 2007 – Article 176 of Directive 2006/112/EC.

5.10. The circumstance that the purchase concerns a non-passenger vehicle with the carrying capacity of more than 500 kg must result from a type approval of the manufacturer or importer as required for such vehicles. When vehicles purchased or used under a hire, rental or leasing contract or other contract of a similar nature, such a requirement is expressly formulated in § 10 (3) and (4) of the Decree of the MF of 22 March 2002.

On the other hand, when fuel is purchased for such vehicles, the requirement to demonstrate by the relevant type approval certificate that the fuel purchased is to power a non-passenger vehicle and that its carrying capacity exceeds 500 kg ensued from the interpretation of Article 25 paragraph 1 subparagraph 3a of the Act on VAT of 1993. According to the provision, the reduction of the amount or the refund of the difference of the tax due does not apply to such items purchased by the taxable person as engine fuels, diesel fuels and gas used to power passenger vehicles and other motor vehicles with a carrying capacity of up to 500 kg. Therefore in order to obtain an exclusion from the application of the provision, the taxable person was required to demonstrate that the fuel was purchased for non-passenger vehicles with the admissible carrying capacity of more than 500 kg. This could be done exclusively on the basis of the vehicle registration number or relevant type approval. It must be noted, however, that already under the legal state existing as at 30 April 2004, under Article 72 (1) Subparagraph 3 of the Act of 20 June 1997 "the Road Traffic Law" (i.e. *Journal of Laws* of 2005 No. 108, item 908, as amended), in order to register a vehicle, the document required for the first registration was an extract from the type-approval certificate or a copy of the decision granting an exemption from the obligation to obtain a type-approval certificate. It must be noted, however, that Resolution of 5 NSA Judges of 23 October 2000 (OPK 17/00) provided that in the light of Article 68 paragraph 9, Article 72 paragraph 1 subparagraph 3 and Article 78 paragraph 2 subparagraph 2 of the Act of 20 June 1997 "the Road Traffic Law" and § 14 (2) of the Decree of the Minister of Transport and Maritime Affairs of 19 June 1999 on the registration and marking of vehicles (*Journal of Laws* No. 59, item 632, as amended), a change in the vehicle registration document of the type and designation of the vehicle from a passenger vehicle to a specialised lorry is permissible on condition that a new type-approval is attached for the vehicle type concerned.

5.11. Thus, in view of the above, it must be concluded that the non-compliance in the period between 1 May 2004 and 31 December 2010 with the ban on the deduction of input tax in respect of the purchase of fuels used to power passenger vehicles and other motor vehicles used for taxable activity under Article 88 paragraph 1) subparagraph 3, read in conjunction with Article 86 (3) of the Act of 11 March 2004 on the tax on goods and services (*Journal of Laws* No. 54, item 535, as amended) requires demonstrating that the fuel was purchased for a non-passenger vehicle and that its carrying capacity exceeded 500 kg, which should be done on the basis of a relevant type approval of the producer or importer required for such a vehicle (at least on the basis of a vehicle registration document indicating that the registration authority received the type approval required for the vehicle to be registered).

5.12. In view of the above, the claims submitted in the appeal in cassation as to the erroneous interpretation of Article 86 paragraphs 1, 3 and 7 and Article 88 paragraph 1 subparagraph 3 of the Act on VAT of 2004, read in conjunction with Article 17 (2) (a) and Article 17 (6) of the Sixth Directive as well as Article 168 (a) and Article 176 of Directive 2006/112/EC, read in conjunction with Article 2, Article 7, Article 31 paragraph 3, Article 87 paragraph 1 and Article 217 of the Polish Constitution, should be dismissed. This is justified by the fact that the restrictions on input tax deductions applicable in the cases specified by the taxable person in the request for the tax interpretation are based on the provisions of EU directives (the Sixth Directive and Directive 112) and national statutory provisions, i.e. *inter alia* Article 88 paragraph 1 subparagraph 3 and Article 86 paragraphs 1, 3 and 7 of the Act on VAT of 2004, as interpreted in the light of the standstill principle, the applicability of which is specified in the judgment of the ECJ of 22 December 2008 in Case C-414/07 *Magoora sp. z o.o.* The interpretation of these provisions presented by the court of first instance does not breach in any manner the above-mentioned constitutional norms and is consistent with them.

5.13. Having regard to the foregoing, the Supreme Administrative Court concluded that the appeal in cassation under review does not provide justified reasons to accept the requests presented therein, as the submissions formulated therein must be considered erroneous.

Therefore, acting under the provisions of Article 184 of the Law on Proceedings before Administrative Courts, it is hereby ruled as in the operative part of the judgment.

JUDGMENT
of
THE VOIVODSHIP ADMINISTRATIVE COURT
IN WROCLAW

of 29 April 2011
(I SA/Wr 1465/10)

Presiding Judge: NSA judge Anetta Chohuj

Judges: WSA judge Dagmara Dominik-Ogińska (rapporteur), WSA judge Zbigniew Łoboda

The Voivodship Administrative Court (*Wojewódzki Sąd Administracyjny*) in Wrocław, having examined, at a hearing held on 19 April 2011 in its 1st Division with a participation of –, the case brought under an appeal lodged by A Sp. z o.o. with its registered office in L., against a decision of the Director of the Tax Chamber (*Dyrektor Izby Skarbowej*) in Wrocław, Local Office in L., dated [...] October 2010 No. [...], concerning the tax on goods and services for the period September-November 2008, hereby: I. revokes the decision appealed against; II. rules that the decision referred to in item I) above shall not be subject to enforcement; III. decides that an amount of PLN 5,617 (in words: five thousand six hundred and seventeen Polish zlotys) be paid by the Director of the Tax Chamber in W. to the Appellant as reimbursement of the costs of the court proceedings.

Grounds

The subject of the Appeal is Decision No. [...] of the Director of the Tax Chamber in W., Local Office in L., dated [...], whereby Decision No. [...] of [...], concerning the tax on goods and services for the period September-November 2008 was upheld.

It follows from the grounds for the decision appealed against that by virtue of the decision referred to in the introductory part hereof, the tax authority of first instance established the difference in the tax to be deducted from output tax for the periods: September-November 2008 at PLN 0 and the amount of the difference in VAT for October and November 2008 to be returned at PLN 0. In the decision referred to an account was taken of recommendations of the appellate authority, contained in its decision No. [...] dated [...], by virtue of which Decision No. [...]

dated [...] of the tax authority of first instance was revoked. The tax authority of first instance invoked the content of Article 5 paragraph 1, Article 86 paragraph 1 of the Act of 11 March 2004 on the tax on goods and services (*Journal of Laws* of 2004 No. 54, item 535, as amended, hereinafter “the VAT Act”) and Article 2 paragraph 2 of the First Directive and Article 17 paragraph 2 of the Sixth Directive, as well as Article 199a paragraph 1 of the Act of 29 August 1997 – the Tax Law (*Journal of Laws* of 2005 No. 8, item 60, as amended, hereinafter “the Tax Law”) and judgments of the ECJ of 21 February 2006 in Case C-255/02 *Halifax and Others*; C-419/02 *Bupa Hospitals*, and C-223/03 *University of Hadersfield*, related to the abuse of the law, to ascertain that the Appellant acted in abuse of the law. To support that thesis, it was held that “A” Sp. z o.o. is a non-public health care unit providing comprehensive medical care for individual and institutional patients. The services provided by it are in whole exempt from VAT, hence any investment expenditure or costs related to the company’s operation are to be incurred in full (inclusive of VAT). VAT is a cost of the company’s core activity. The company at issue established a wholly-owned subsidiary, “B” sp. z o.o. The subsidiary was incorporated in order to extend the premises and expand equipment resources, in particular to build segments C, C1 and D intended to house hospital activities. As an active VAT payer, “B” Szpital sp. z o.o. deducts input VAT or claims return of VAT invested in the investment project. Furthermore, as the owner of both the medical equipment and the newly built facilities, it provides lease services (not only to its parent company, but also to its current partners), thus generating regular income for the company. The lease has been entered into under agreements which secure any possible repayment of investment credits taken out. It stems from the investment plan of “A” sp. z o.o. that spinning off of a new entity and organisation of work related to the construction of the Hospital does not affect the founding entity in any disorganisational manner but co-operates with same. In contrast to its previous experience gained while establishing “C”, at present the newly established company will be a self-financing entity conducting its activity in the area of hospital operation and in the other areas specified in its registered scope of business.

The tax authority noted that the scheme referred to above is similar to one that took place earlier with respect to the same company. Namely in 2001 a company “C” sp. z o.o. was established in which “A” sp. z o.o. held 100% of shares: 70 shares paid in cash and 160 in the right of perpetual usufruct to the plot of land situated in La. at L. [...] street. It followed from the report on control activities that the subsidiary carried out investment work related to a construction and furnishing of a building situated at at L. [...] street in La. which was intended to constitute the subsidiary’s fixed asset. Part of the building was intended to be let to “A” sp. z o.o.,

whereas the remaining premises were to be let to other entities as office space and garages. On 4 April 2007 the companies were merged, with “A” sp. z o.o. acting as the acquiring entity. The tax authority pointed that in the period from June 2001 to December 2006 “C” sp. z o.o. purchased fixed assets in the net amount of PLN 5,945,744 plus VAT of PLN 604,075. The company’s sales in that period from June 2001 to April 2007 stood at PLN 4,793,558 plus VAT of PLN 927,694. It was also noted that from January 2005 to January 2007 “C” sp. z o.o. made an adjustment of input tax amounting to PLN 159. In addition, reference was made to the information furnished by the above-named subsidiary to the effect that in the years 2004-2006 the said company purchased fixed assets (and incurred investment expenditure on real properties). The input tax on that account, as shown in VAT-7 statements, was PLN 148,631. The amount of input tax was initially deducted in full and, subsequently, the company made adjustments to the input tax pursuant to Articles 90 to 91 of the VAT Act. It further follows from the calculations contained in the supplementary information that “A” sp. z o.o. will make annual adjustment of input VAT on the purchase of fixed assets starting in January 2008 until January 2016 – the aggregate value thereof will be PLN 110,690.

The tax authority of first instance takes the view that if “A” Sp. z o.o. implemented an investment project consisting in a construction of an out-patient clinic, in fact it would have no right to deduct any input tax related to that investment project as taxable sale in “A” sp. z o.o. approximated 1-2%. Therefore, in 2001 “A” sp. z o.o. deliberately established a new company, “C” sp. z o.o., to implement the investment project consisting in a construction of the out-patient clinic and to make full use of the opportunity to deduct input tax, whereas the economic activity in that company was and still is in fact conducted by “A” Sp. z o.o. Following completion of the investment project, the companies were merged. The merger took place in April 2007 and in September 2008 a new company, “B” sp. z o.o., was established to implement another investment project consisting in an extension of the out-patient clinic and construction of a hospital, and the facts of the case presented lead to a conclusion that the entities concerned have employed the same scheme of operation. In 2007, “A” sp. z o.o. generated sales for the net amount of PLN 14,909,738, of which sales exempt from VAT were PLN 14,564,368, sales subject to 7% VAT: PLN 8,926, and sales subject to 22% VAT: PLN 336,444. The percentage share of sales subject to VAT relative to total sales in 2007 was 2.316%, which has been established based on the VAT-7 statements filed by the company with no account being taken of the fact whether there were any transactions not included in the sales volume for the purposes of calculating the proportions. Relying on Article 90 of the VAT Act, the tax authority of first instance pointed that if it were “A” sp. z o.o. instead of “B” sp. z o.o. (curren-

tly “D” sp. z o.o.) to implement the investment project, namely extension of the out-patient clinic and construction of the hospital, then assuming the proportion of taxable sales relative to total sales for the previous year, it would have the right to deduct 3% of input tax in 2008 – this being on assumption that it is impossible to separate the portion of the investment project to be related to taxable activities and the portion to be related to activities exempt from VAT. In accounting terms, this would translate into the following amounts: in September 2008: PLN 38.07 (instead of PLN 1,269 actually deducted); in October 2008: PLN 1,356.36 (instead of PLN 45,212 actually deducted); in November 2008: PLN 2,168.70 (instead of PLN 72,290 actually deducted). It was recapitulated that the entire evidence showed that “A” sp. z o.o., drawing on its previous experience, had established “B” sp. z o.o. (“D” sp. z o.o.) which:

- was intended to conduct taxable business activity;
- had received, as an in-kind contribution, a plot of land previously contributed to “C” sp. z o.o., on which it would carry out the extension of the existing out-patient clinic and construct a hospital;
- had purchased advertising media from its parent company in order to provide lease services with respect to same, where these services are subject to VAT, and thus to have, from the onset of the investment project implemented, the right to recover the surplus of input tax over output tax;
- in a subsequent period had purchased a real property in J. on which a hospital building and a laboratory and office building were situated; currently let by it to “E” sp. z o.o. (from which it had previously purchased the said real property) and “A” sp. z o.o.;
- had obtained a permit from the Starost (*starosta* – head of county administration) of J. for the re-construction of the building of the old hospital; accordingly while implementing the investment project concerned it would have the right to deduct input tax.

Faced with the legal prohibition to deduct the input tax accrued on the implementation of the investment project consisting in the extension of the existing out-patient clinic and construction of the hospital, “A” sp. z o.o. evades it by means of establishing another company, “B” sp. z o.o. (“D” sp. z o.o.), hence it enters into another transaction not formally prohibited in order to achieve the result related to a prohibited act. Thus the law was abused as “A” sp. z o.o., assisted by its subsidiaries, entered into a number of transactions referred to above, which, when

analysed as a whole, have created a situation serving solely to enable deduction of input VAT. Therefore, “B” sp. z o.o. (“D” sp. z o.o.) has no right to input tax related to the investment project concerned. It is an undisputed fact that supply of goods or provision of services took place as the transactions specified in the invoices issued by the issuers were indeed entered into, however the actual recipient thereof was not “B” sp. z o.o. (“D” sp. z o.o.) but “A” sp. z o.o. The tax authority has given no credence to the Company’s statement to the effect that it would conduct solely activities subject to VAT and related to a lease of real properties and would not take any action so as to conduct medical activity exempt from VAT. It concluded that, in its opinion, the company would generate taxable sales only as long as its statement filed for the purposes of VAT settlement would show an amount payable and at that point it would merge with its parent company. Then, while conducting only activities exempt from VAT, it will make adjustments of input tax pursuant to Article 91 of the VAT Act for a few years just as it was the case with respect to the “A” and “C” companies, thus treating the State budget as a lender and input tax as an interest-free credit, namely the cheapest credit available on the market.

As a result of the appeal lodged, dated 15 July 2010, the appellate authority, invoking Article 86 paragraph 1, Article 99 paragraph 12, and Article 109 paragraph 3 of the VAT Act, upheld the decision of the tax authority of first instance by virtue of the decision appealed against. The appellate authority established that there were grounds to find abuse of the law as it ascertained that actions taken by the companies “A” and “B” sp. z o.o. (“D” sp. z o.o.) were intended to achieve a tax advantage, i.e. to recover input tax to which “A” sp. z o.o. had no right since services falling within the scope of health care were exempt from VAT, which, in consequence, conferred no right to deduct input tax related to the provision of same. The principal goal underlying incorporation of a new economic operator by “A” sp. z o.o. was to recover input tax related to the planned investment project. That thesis was further corroborated by an analysis and manner of implementation of the previous investment project, namely construction of an outpatient clinic by a related entity, i.e. “C” sp. z o.o. No credence has been given to the statement made by the Company’s President to the effect that the purpose for which the Company was established was to organise the tasks and introduce a new distribution of competencies, as under such an assumption the parent company, “A” sp. z o.o., would not have merged with its subsidiary, “C” sp. z o.o., which implemented the first investment project, i.e. construction of the outpatient clinic situated in La. at L. [...] street. At that point the tasks could have been divided by means of a spin-off of entities involved in medical activities and those related to real properties. The governing bodies of “A” sp z o.o. and “C” sp. z o.o.

adopted a resolution on the merger of the companies since the input VAT related to the construction of the outpatient clinic had already been recovered and VAT statements filed by “C” sp. z o.o. showed tax payable on account of a provision of lease services and thus it became more profitable for the company to make adjustments of input tax under Article 91 paragraph 2 of the VAT Act by the acquiring Company which provided VAT-exempt services rather than to pay VAT on further lease. Therefore, a situation was reconstructed which would have existed if no transactions constituting abuse of the law were entered into [and] “A” sp z o.o. was considered to be the recipient of the services related to the investment project and the input tax was calculated taking into account the 3% proportion. The Appellant’s assurance as to the possibility of providing solely lease services was not considered reliable given the scheme of operation previously employed by “A” sp. z o.o. and “C” sp. z o.o. Neither was the Appellant’s standpoint shared that in the case at issue the party had the right to choose the option that would be more advantageous to it in legal and fiscal terms. Further, the party also pointed to the obligation to adjust the input tax. However, the appellate authority argued that in a situation where the building’s intended purpose was changed, if the adjustment obligation occurred after a lapse of 10 years, the taxpayer would evade the obligation to make the adjustment.

In its Appeal filed with the Voivodship Administrative Court in Wrocław, the Appellant requested that the decision appealed against be revoked and payment of the costs of the court proceedings be ordered from the counterparty. The party claimed breach of the provisions of Article 86 paragraph 1 of the VAT Act in that the party’s right to deduct input tax related to the performance of activities subject to VAT was contested on grounds of an alleged abuse (evasion) of the tax law; Article 191 paragraph 1 of the Tax Law, i.e. the principle of independent assessment of evidence, provided for therein, by issuing a decision based on a subjective conviction as to the probability of a particular future event, which may not be considered to be an element of the facts of the case established on the basis of the evidence ascertained in this case. In the grounds for the Appeal it was held that the assertion of the abuse of the tax law was unjustified. [...] A comprehensive analysis of the actual VAT-related consequences of the transactions entered into by the Company precludes the thesis whereby any tax advantages were obtained contrary to the principles governing operation of that tax, whereas it is only such situations that the concept of abuse of the tax law can be applied to. It is unacceptable to recourse to that concept to contest economically justified actions intended to employ a model that is effective in tax terms, where such actions do not lead to any results contrary to the VAT system. And the latter situation is the case here. The party has held that it also follows from the ECJ case-law that

taxpayers may structure their undertakings in such a manner so as to reduce their tax liabilities. On the other hand, the concept of abuse of the tax law with respect to VAT should apply to cases where in order to achieve tax advantages running counter to the VAT system, structures (transactions) with no economic justification are established (entered into), when actions taken by entrepreneurs have no reasonable business justification, are economically unfounded, would not occur were it not for the purposes of achieving any tax advantages. Undoubtedly, actions taken by the Appellant and “A” sp. z o.o. were not of that kind. Furthermore, a business model whereby the Appellant invested in buildings and, subsequently, provides, on arm’s length terms, services of lease of space in those buildings, fully respects these principles. The Company does not contest the fact that it is entitled to exercise the right to deduct input tax with respect to investment purchases related to the construction and re-construction of buildings to be leased for non-residential purposes. Some part of these buildings was to be leased to the parent company for the purposes of conducting medical activity exempt from VAT. A prevailing part of the real property was originally (and still is) intended to be leased to third parties. Following completion of the investment project, “B” sp. z o.o. (“D” sp. z o.o.) has already commenced provision of lease services subject to VAT (in June 2010 the first invoice was issued). Acknowledgment of the Appellant’s right to deduct VAT is in such a situation a natural consequence of the principles underlying the VAT system and the entity’s business profile. In turn, “A” sp. z o.o., in order to be able to use the part of the building owned by the company, makes payments in the form of rent. It is not entitled to deduct input tax set out in the invoices issued by the Company on account of the rent. Assuming that the lease rent is established on arm’s length terms, it would be groundless to claim that “A” sp. z o.o. took over any VAT amounts due to the State Treasury and this was what the tax authorities accused it of. Such transactions lead to the consequence provided for in VAT regulations, namely to the entity entering into transactions exempt from VAT being economically burdened with the costs of VAT. The same consequence would occur if “A” leased space for the purposes of the activity it conducted from any entity not related to it. The Appellant is of an opinion that there are no grounds to conclude that conferring the Appellant with the right to deduct tax is contrary to the purpose of VAT regulations. In addition, even if it were to be hypothetically assumed that in the future merger of the companies would be effected, one could not claim that any tax advantage was achieved (or that tax law was abused) in a situation where there was a mechanism of adjustment of the input tax employed as stipulated in Article 91 of the VAT Act. The fact that the Act provides for a 10-year period is an intentional decision of the legislator. An analogous “advantage” will be derived by a taxable person who acquires a real property for the purposes of taxable activity and, following a lapse of the adjustment period, chan-

ges its business profile and starts to use the real property solely for the purposes of any activity exempt from VAT. It will not be then obliged to make any adjustments of tax deducted on the acquisition of the real property. Further, the Appellant did not agree with the reconstruction of a situation compliant with the purpose of the provisions of the VAT Act. The business objective behind the investment project was to intend a substantial part of the buildings for lease to unrelated entities. If the investment project was implemented by “A” sp. z o.o., the position of that company would be much worse than that of other entities implementing investment projects involving real properties to be leased and enjoying full right to deduct VAT. Moreover, the party holds that the principal arguments to corroborate any alleged occurrence of the abuse of the tax law are based either on facts that took place in the past, or on conjectures as to the occurrence of certain events in the future. The party does not contest the argument that easier settlement of VAT is one of the reasons for which a special-purpose company was established to implement the investment project and manage the facilities, yet it is not the only reason since the other ones are business reasons. The number of facilities managed by “A”, in which outpatient clinics were located, increased to 9. [...]

In response to the appeal, the counterparty requested dismissal thereof and upheld its standpoint presented in the decision appealed against.

In its pleading of 7 February 2011, the Appellant supplemented its arguments put forward in the appeal in that it invoked the judgment of the ECJ of 22 December 2010 in Case C-103/09 *Weald Leasing*. While referring to the above judgment, it was pointed that the interpretation of the Community regulations, made by the Court in said judgment, applies directly to the case at issue as it was related to an analogous situation, which should affect interpretation of Article 86 paragraph 1 of the VAT Act. It was also noted that Poland had not introduced the mechanism referred to in the judgment in *Halifax* case into the national regulations. In this regard, provisions of the directive were not implemented to the Polish legal order. Polish regulations on VAT did not (and do not) provide for the so-called tax law evasion clause. Therefore, the directive may not be an independent source of obligations for an entity and may not be invoked as such. This arises expressly from the ECJ case-law. Hence, in the Appellant’s opinion, tax authorities of the Member States may not invoke directly any provisions of the directive imposing any obligations on taxable persons, if such provisions have not been implemented to the national legal order. Since Poland has not implemented the provisions of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ of 13 June 1977 L.1977.145.1, as amended, hereinafter “the Sixth Directive”), interpreted in line with the judg-

ment in *Halifax* case – and did not introduce in the Polish Act the mechanism (admissible in accordance with the judgment referred to above) allowing deduction of VAT in a situation where such deductions would not lead to any infringement of the neutrality principle. Although the legislative nature of the ECJ judgments is not contested, such judgments do not serve as any autonomous source of law independent of the Community directives or regulations, but, as a legal interpretation of these acts, they in some way “supplement” the normative part thereof.

In his pleading of 2 March 2011, Director of the Tax Chamber in Wrocław did not find any analogy of the case at issue with the judgment in the *Weald Leasing* case. [...] It serves to protect the purpose of all statutory provisions. Hence tax authorities should follow that principle.

At the hearing, the Appellant stated that at present it leased approx. 12 real properties to 27 clients.

The Voivodship Administrative Court in Wrocław ruled as follows:

The appeal is justified.

Pursuant to Article 1 paragraph 2 of the Act of 25 July 2002 – Law on the system of administrative courts (*Journal of Laws* No. 153, item 1269), competence of administrative courts includes review of administrative decisions and other decisions based on the criterion of their compliance with the law. An act appealed against is revoked by the court if there occurred any material defects in the proceedings conducted or as a result of any infringement of the provisions of substantive law which could have (or have) a material bearing on the outcome of the case - Article 145 paragraph 1 of the Act of 30 August 2002 – Law on Proceedings before Administrative Courts (*Journal of Laws* No. 153, item 1270, as amended, hereinafter “Law on Proceedings before Administrative Courts”). Pursuant to Article 134 paragraph 1 of the Law on Proceedings before Administrative Courts, the court shall rule within the constraints of a given case, however not being bound by the allegations or requests presented in the appeal or by the legal basis invoked.

While analysing the tax decision appealed against, the Court found that it infringes the procedural law to such a considerable extent that it affects the outcome of the case, and also infringes the substantive law thus necessitating elimination thereof from legal transactions.

The essence of the dispute between the parties is whether, on grounds of the facts that occurred in the present case, one may speak of any abuse of the law by the Appellant. In the opinion of the tax authorities, in the case at issue we indisputably have to do with an abuse of the law, which resulted in the Appellant being deprived of its right to deduct VAT based on the principle of that right as defined by the ECJ. The Appellant is of an opinion to the contrary, arguing that the business activity conducted by it does not fall within the scope of the notion of abuse of the law and thus provides no grounds for depriving it of the right to deduct VAT. At the same time, the party contests the mere possibility to rely on the notion of abuse of the law since it is not reflected in the national law.

In the case at issue, in order to be able to evaluate the tax proceedings conducted, the Court has to, in the first place, respond to the Appellant's claim that tax authorities may not invoke the so-called tax law evasion clause.

It should be reminded that each legal culture assumes that in the system of statutory law not only norms explicitly laid down in legal regulations, but also norms inferred from the former in accordance with certain rules of reasoning apply (D. Simon, *Le système juridique communautaire*, Paris 1997, p. 234). The Community law provides for general principles which constitute unwritten sources of the law defined by the ECJ. The general principles have the same meaning as the primary law on condition that other Community norms are subordinate to them. The ECJ does not hesitate to deduce general principles from the nature of the Community itself or from its legal system (for further discussion cf. Perkowski, M. (ed.): *Wymiar sprawiedliwości Unii Europejskiej. Wybrane zagadnienia*, Wydawnictwo Prawnicze LexisNexis, Warsaw 2003, p. 64). Among such principles the ECJ listed the principle prohibiting abuse of the Community law. Any legal order which aspires to achieve a minimum level of enforcement must provide for self-protection measures to ensure that the rights conferred are not exercised in a manner which is abusive, excessive or distorted. Such a requirement is not at all alien to the Community law (opinion of Advocate General Tesouro of 4 February 1998, paragraph 24 in Case C-367/96 *Kefalas*). The system of Community law is not immune to the risk, inherent in every legal system, that actions may be taken which, despite formally complying with a legal provision, distort application thereof (D. Simon, A. Rigaux, *La technique de consécration d'un nouveau principe: l'exemple de l'abus de droit, Mélanges en hommage à Guy Isaac, Cinquante ans de droit communautaire*, Toulouse, Presses de l'Université des Sciences sociales, 2004, p. 568). Therefore, the ECJ noted that the Community law cannot be relied on for abusive or fraudulent ends (judgments of the ECJ: of 23 March 2000 C-373/97 *Diamantis*, paragraph 33; of 12 May 1998

C-367/96 *Kefalas*, paragraph 20; of 2 May 1996 C-206/94 *Paletta*, paragraph 24; of 5 October 1994 C-23/93 *TV10*, paragraph 21; of 3 March 1993, C-8/92 *General Milk Products*, paragraph 21; of 21 June 1988 39/86 *Lair*, paragraph 43; of 10 January 1985 229/83 *Leclerc*, paragraph 27; of 3 December 1974 33/74 *Van Binsbergen*, paragraph 13). Accordingly, abusive exercise takes place in such a context where the provisions of the Community law are abused in order to obtain on their basis any advantages in a manner running counter to their objectives. However, the general principle referred to above, due to the fact that it is defined in a very broad manner, is not in itself a useful tool for assessment of whether a right arising from the particular provision of the Community law is exercised abusively. In order for it to be operable, a more detailed doctrine or test is necessary to determine when abusive exercise takes place (cf. the aforementioned judgment of the ECJ in *Kefalas* case, paragraph 21). Indeed, in its case-law the ECJ has established a consistent pattern on the notion of abuse (not always referred to as an abuse of rights) whereby the assessment of the abuse is based on whether the right claimed is consonant with the purposes of the rules that formally give rise to it. The person claiming to have the right is barred from invoking it only to the extent to which he/she relies on a provision of the Community law formally conferring said right in order to achieve “an improper advantage, manifestly contrary to the objective of that provision”. Conversely, when the exercise of the right takes place within the limits imposed by the aims pursued by the Community law provision at issue, there is no abuse but merely a legitimate exercise of the right (cf. opinion of Advocate General Maduro of 7 April 2005 in Case C-255/02 *Halifax*, paragraph 68; opinion of Advocate General Alber of 16 May 2000 in Case C-110/99 *Emstald Stärke*, judgment of the ECJ of 14 December 2000 in *Emstald Stärke* case, paragraph 52; opinion of Advocate General Tizzano of 18 May 2004 in Case C-200/02 *Zhu and Chen*, paragraph 114 and 115; judgment of the ECJ in *Diamantis* case, paragraph 33, judgment of the ECJ of 12 March 1996 in Case C-441/93 *Pafitis*, paragraph 68; judgment of the ECJ in *Kefalas* case, paragraph 22; judgment of the ECJ of 9 March 1999 in Case C-212/97 *Centros*, paragraph 27; and judgment of the ECJ of 10 June 1985 in Case C-79/85 *Segers*, paragraph 16). What appears to be a decisive factor in affirming the existence of an abuse is the teleological scope of the Community rules invoked, which must be defined in order to establish whether the right claimed is, in effect, conferred by such provisions, to the extent to which it does not manifestly fall outside their scope (opinion of Advocate General Maduro of 7 April 2005 in *Halifax* case, paragraph 69). The rule worded above is also applicable to the value added tax. The foregoing conclusion may be inferred from the analysis of the following judgments of the ECJ: of 21 February 2006 in Case C-255/02 *Halifax and Others* along with the opinion of Advocate General Maduro of 7 April 2005; of 21 February 2008 in Case C-

425/06 *Part Service*; of 22 May 2008 in Case C-162/07 *Ampliscientifica and Amplifin*; and of 22 December 2010 in Case C-103/09 *Weald Lesing*. Therefore, the common system of VAT is not resistant to the risk of taking actions that, despite them being formally compliant with the provision of the law, lead to an abuse of the opportunities created by that provision contrary to the purposes it serves. Hence there is no reason why such a general principle of Community law should have to depend, in this area, on an express statement by the legislature that the provisions of VAT directives also do not escape the rule, consistently upheld by the Court, that no provision of Community law can be formally relied upon to secure advantages manifestly contrary to its purposes. Such a rule, conceived as a principle of interpretation, constitutes an indispensable safety valve for protecting the aims of all provisions of Community law against a formalistic application of them based solely on their plain meaning (opinion of Advocate General Maduro of 7 April 2005 in *Halifax* case, paragraph 74; judgment of the ECJ of 29 April 2004 in Joined Cases C-487/01 and C-7/02 *Gemeente leusden and Others*, paragraph 76; and opinion of Advocate General Tizzano of 3 June 2003 to the judgment referred to above, paragraphs 98 and 99). To the extent to which that principle is conceived as a general principle of interpretation it does not require express legislative recognition by the Community legislature to render it applicable to the provisions of the Sixth Directive (at present Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax – OJ EU of 11 December 2006 L 347 p. 1, as amended, hereinafter “Directive 2006/112/EC”). From the mere absence of a provision in the Sixth Directive (Directive 2006/112/EC) expressly setting out a principle of interpretation whereby abuses are proscribed – and the same could apply, for example, to the principles of legal certainty or the protection of legitimate expectations – we cannot therefore draw the conclusion that the Community legislature intended to exclude that principle from the Sixth Directive (Directive 2006/112/EC). Conversely, even if there were a provision in the Sixth Directive (Directive 2006/112/EC) expressly stating that principle, it could be regarded as a mere declaration or codification of an existing general principle (opinion of Advocate General Alber of 16 May 2000 in *Emstald* case). For precisely the same reasons one cannot agree with the suggestion put forward by the Appellant that the application of a general principle prohibiting abuse in the context of the Sixth Directive (Directive 2006/112/EC) must depend on the adoption by each Member State of appropriate national anti-avoidance provisions. In the present case these would be national provisions adopted in accordance with the procedure under Article 395 of Directive 2006/112/EC (formerly under Article 27 of the Sixth Directive). The provision referred to above does not prohibit adoption of the abuse doctrine for the interpretation of the common VAT rules. It is true that the Court has consistently held that Member States are bound

to observe all the provisions of the Sixth Directive and may not rely, as against a taxable person, on a provision derogating from the scheme of the directive in so far as a derogation has not been established in accordance with Article 27 of the Sixth Directive (judgment of the ECJ of 13 February 1985 in Case 5/84 *Direct Cosmetics*). Therefore, the need to prevent tax evasion or avoidance cannot justify the adoption of national measures derogating from the directive otherwise than under the procedure which is provided for in Article 27 of the Sixth Directive (judgments of the ECJ: of 21 September 1988 in Case C-50/87 *Commission v France*, paragraph 22; of 11 July 1991 in Case C-97/90 *Lennartz*, paragraph 35; judgment of 20 January 2005 in Case C-412/03 *Hotel Skandic Gĺsab ck AB*, paragraph 26). Moreover, only derogations that are proportionate and necessary to achieve the aims expressly mentioned in Article 27 of the Sixth Directive are authorised (judgment of 10 April 1984 in Case 324/82 *Commission of the European Communities v Kingdom of Belgium*, paragraphs 31 and 32, opinion of Advocate General Maduro of 7 April 2005 in *Halifax* case, paragraph 77). However, as the prohibition of abuse of Community law is seen as a principle of interpretation, it does not give rise to derogations from the provisions of the Sixth Directive (Directive 2006/112/EC). The result of its application is that the legal provision interpreted cannot be regarded as conferring the right at issue because the right claimed is manifestly beyond the aims and objectives pursued by the provision abusively relied upon. In this regard, and most importantly, the operation of this principle of interpretation does not entail the result that the economic activities carried on ought to be disregarded for VAT purposes or left outside the scope of the Sixth Directive (Directive 2006/112/EC). An interpretation of the Sixth Directive (Directive 2006/112/EC) according to this principle does not have the most obvious consequence to be expected in the context of legal interpretation: that the right is not in fact conferred, contrary to the literal meaning of the legal provision. If this interpretation entails any kind of derogation, it will be only from the text of the rule, not from the rule itself, which comprises more than its literal element. Moreover, the application of this Community principle of interpretation fully respects the objective of uniform application of VAT rules in all Member States that underlies the procedural conditions and limits on the adoption of national measures designed to prevent certain types of tax evasion or avoidance imposed by Article 27 of the Sixth Directive (Article 395 of Directive 2006/112/EC). There is, consequently, no conflict between the application of the Community law principle of interpretation prohibiting abuse in the VAT common system, and the procedure provided for by Article 27 of the Sixth Directive (Article 395 of Directive 2006/112/EC) for the introduction by Member States of special measures derogating from the Sixth Directive in order to prevent certain types of evasion or avoidance (Maduro's opinion of 7 April 2005 in *Halifax* case, paragraphs 79 and 80).

Therefore, it should be concluded that the common system of VAT is not a legal domain where virtually any opportunistic behaviour by taxable persons relying on the literal meaning of its provisions to improperly gain tax advantages against the tax authorities would have to be tolerated. The concept that the notion of abuse is equally applicable in the area of VAT, is entirely consistent with the stance taken by the ECJ (e.g. in its Judgment in *Gemeente Leusden* case, paragraph 76, judgment of 6 July 2006 in Joined Cases C-439/04 and C-440/04 *Kittel and Recolta Recycling SPRL*, paragraph 54), whereby “preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive”. Hence the ECJ has expressly stressed that the Community legislation cannot be extended to cover abusive practices by economic operators, that is to say transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by the Union’s law, and that the principle of prohibiting abusive practices also applies to the sphere of VAT (see judgments of the ECJ: *Halifax and Others*, paragraphs 69 and 70; *Ampliscientifica and Amplifin*, paragraph 27; *Weald Leasing*, paragraph 26).

However, the criteria for applying the aforementioned principle have been established in the light of the specific characteristics and principles of this harmonised system of VAT. The objective analysis of the prohibition of abuse has to be balanced against the principles of legal certainty and protection of legitimate expectations that also form part of the Community legal system, and in the light of which the provisions of the Sixth Directive (Directive 2006/112/EC) should be interpreted. From these principles it follows that taxpayers must be entitled to know in advance what their tax position will be and, for that purpose, rely on the plain meaning of the words of the VAT legislation (judgments of the ECJ: in *Gemeente Leusden* case, paragraphs 57, 58, 65 and 69; of 4 July 2000 in Case C-381/97 *Belgocodex*, paragraph 26; judgment of 8 June 2000, Case C-396/98 *Schloßstraße*, paragraph 44; of 11 July 2002, Case C-62/00 *Marks & Spencer*, paragraph 44; of 22 February 1989 in Joined Cases 92/87 and 93/87 *Commission v France and the United Kingdom*, paragraph 22).

In view of the above, the ECJ has defined, for the purposes of establishing the existence of an abuse in the area of VAT, a test comprising two elements (cf. judgments of the ECJ in *Halifax* case, *Ampliscientifica and Amplifin* case, *Weald Leasing* case, and *Part Service* case, along with the respective opinions of Advocates General).

For an abuse to be found existent, the following conditions must be met:

- first, the transactions at issue, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive (at present Directive 2006/112/EC) and of national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of these provisions;

- second, it must be apparent from the entirety of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage.

Both these elements must be present cumulatively to allow conclusion that an abuse of a right has taken place in the VAT system.

As regards the first condition, it shows explicitly that the purpose of the Community rules allegedly being abused are compared with the purpose and results achieved by the activity at issue. This element is important not only because it provides the standard upon which the purpose and results of the activity in question are to be assessed. It also provides a safeguard for those instances where the sole purpose of the activity might be to diminish tax liability but where that purpose is actually a result of a choice between different tax regimes (legal options) that the Community legislature intended to leave open. Therefore, where there is no contradiction between recognition of the claim made by the taxable person and the aims and results pursued by the legal provision invoked, no abuse can be asserted. It should be noted that the scope of the Community law interpretative principle prohibiting abuse of the VAT rules is defined in such a way so as not to affect legitimate trade. Such potential negative impact is, however, prevented if the prohibition of abuse is construed as meaning that the right claimed by a taxable person is excluded only when the relevant economic activity carried out has no other objective explanation than to create that claim against the tax authorities and recognition of the right would conflict with the purposes and results envisaged by the relevant provisions of the common system of VAT. Economic activity of that kind, even if not unlawful, deserves no protection from the Community law principles of legal certainty and protection of legitimate expectations because its only likely purpose is that of subverting the aims of the legal system itself.

Furthermore, an entrepreneur's choice between exempt transactions and taxable transactions may be based on a range of factors, including in particular tax considerations relating to the VAT system. Where a taxpayer has a choice between two transactions, the Sixth Directive (Directive 2006/112/EC) does not impose on him any obligation to choose the transaction which entails payment of the higher amount of VAT. Conversely, the taxpayers may choose to structure their business

so as to limit their tax liability. The prohibition of abuse, as a principle of interpretation, is no longer relevant where the economic activity carried out may have some explanation other than the mere attainment of tax advantages against tax authorities. In such circumstances, to interpret a legal provision as not conferring such an advantage on the basis of an unwritten general principle would grant an excessively broad discretion to tax authorities in deciding which of the purposes of a given transaction ought to be considered predominant. It would introduce a high degree of uncertainty regarding legitimate choices made by economic operators and would affect economic activities which clearly deserve protection, provided that they are, at least to some extent, accounted for by ordinary business aims.

As to the second element, the element of autonomy should be stressed. In fact, when applying it, the national authorities must determine whether the activity at issue has some autonomous basis which, if tax considerations are left aside, is capable of endowing it with some economic justification in the circumstances of the case. That purpose – which must not be confused with the subjective intention of the participants in those activities – is to be objectively determined on the basis of the absence of any other economic justification for the activity than that of creating a tax advantage. Hence what is meant is not to assess an intangible subjective intention of a party but to determine the artificial nature of a transaction on the basis of a set of objective circumstances.

It should be remembered that in the assessment of the taxable person's activity it is important to recall that VAT applies to economic activity the notion of which is wide and objective in nature. Therefore, in order to ascertain whether the activity at issue is an economic activity within the meaning of the VAT system, such activity must be considered *per se* and without regard to its purpose or results (judgments of the ECJ: of 14 February 1985, Case 268/83 *Rompelman*, paragraph 19; in *Kittel* case, paragraph 41; of 12 January 2006 in Joined Cases C-354/03, C-355/03 and C-484/03 *Optigen*, paragraphs 43 and 44).

To recapitulate the foregoing, it should be concluded that the principle prohibiting abuse of the Community law is applicable to the system of VAT and does not require any special national provisions. It should be emphasised, however, that it may be applied in exceptional cases where the abuse is evident and all legal measures must be employed sparingly and limited in their scope to the abuse at issue. The existence of the principle referred to above does not mean that a tax authority interferes excessively with a taxable person's activity. The tax authority is under an obligation to examine an activity objectively and *per se* to identify its characteristic features in order to decide whether or not its nature is that

of an economic activity. The foregoing is based on the requirement that the system of VAT should be neutral and on the principle of legal certainty, which requires that the application of Community legislation must be foreseeable by those subject to it. The requirement of legal certainty must be observed even more strictly in the case of rules entailing financial consequences, so that those concerned may know precisely the extent of their rights and obligations.

To put it more vividly, application of the principle of neutrality of VAT as a general principle of the VAT system allows itself to sanction abusive behaviour in respect of VAT with no need to invoke the notion of abuse of the law. Where the principle of prohibition of abuse of the law and the principle of neutrality of VAT serve the same purposes, application of the former does not appear necessary. In a situation where the purposes are incompatible, one should rely on the principle of prohibition of abuse of the law (M. Ridsdale, *Abuse of rights, fiscal neutrality and VAT*, EC Tax Review, 2005, No. 2, p. 78 *et seq.*).

For that reason, as the ECJ has held on numerous occasions, ascertainment of the existence of an abuse may not lead to a penalty for which a clear and unambiguous legal basis would be necessary, but to an obligation to repay as simply the consequence of that finding resulting in deductions of input VAT becoming in full or in part undue (see judgment of the ECJ in the *Emsland Stärke* case, paragraph 56). It stems from the foregoing that transactions involved in an abusive practice should be re-defined so as to re-establish the situation that would have existed if the transactions constituting that abusive practice were not entered into. Such a re-definition should not fall beyond what is necessary to ensure proper collection of VAT and prevention of fraud. In this respect, tax administration authorities are entitled to demand, with retroactive effect, repayment of amounts deducted in relation to each transaction whenever they find that the right to deduct has been exercised abusively (judgment of the ECJ of 3 March 2005 Case C- 32/03 *Fini H*, paragraph 33). However, the tax administration authorities should also subtract therefrom any tax charged on an output transaction for which the taxable person was artificially liable under a scheme and, if appropriate, they should reimburse any excess in full. Similarly, they must allow a taxable person who, in the absence of transactions constituting an abusive practice, would have been the recipient of the service under the transaction not constituting such an abuse, to deduct, under the deduction rules of the Sixth Directive, input VAT on that transaction.

Taking into consideration the foregoing with respect to the present case, it should be concluded that the party's allegations as to the tax authorities being disallowed to resort to the principle of prohibition of abuse of the Community

law are unfounded. In its judgments the European Court of Justice has explicitly manifested the principle prohibiting abuse of the Community law and obliged a national judge to abide by same though bearing in mind that the principle is very limited in nature.

As it has already been mentioned, in the present case we have to do with a specific situation where the legal analysis carried out by the Court hereinabove, pointing to the scope of the principle prohibiting abuse of the Community law, determines the manner in which tax proceedings are to be evaluated. The right that, in the opinion of the tax authorities, was exercised abusively was the right to deduct VAT. That right has been conferred by the Sixth Directive (Directive 2006/112/EC). It is a right derived from the Community law, which has as its legal basis Article 17 of the Sixth Directive (Articles 167 and 168 of Directive 2006/112/EC), the content of which leaves Member States with no discretion as to the transposition thereof. If such Community law provisions serve to attain certain purposes and results, national provisions transposing them have to be interpreted and applied by national authorities in accordance with these purposes. Accordingly, if such a manner of interpretation of the Community law is intended to ensure that the objectives of the Community law, in particular of the provisions of the Sixth Directive conferring the right to deduct input tax, are not distorted, such an interpretation must also be binding for the national authorities while applying national provisions regarding deduction of input tax (judgment of the ECJ in the *Marks & Spencer* case, paragraph 27, and opinion of Advocate General Geelhoed to the judgment referred to above, paragraph 42; judgment in the *Gemeente Leusden* case, paragraph 78).

Therefore, having regard to the foregoing while analysing the present case, it should be noted that it is an undisputed fact in the case at issue that “A” sp. z o.o., providing medical services, established a subsidiary “B” (“D”) to implement construction projects and carry out repairs of facilities, including *inter alia* to build new segments of the hospital at ul. L. [...] in La. The subsidiary was intended to conduct taxable activity consisting in rental and lease of the newly-built or acquired real properties. To this end it received, *inter alia*, as a contribution in kind, plot of land from its parent company and also repurchased advertising media from it in order to lease same.

The tax authority infers abuse of a right from the mere fact that “A” sp. z o.o., a company conducting activity consisting in a provision of medical services exempt from VAT and, as a consequence, having no right to deduct VAT, established a subsidiary, “B” sp. z o.o. (“D” sp. z o.o.), to construct an outpatient clinic, and to

enjoy the right to deduct on account of the purchases made. It was concluded that the principal purpose for which the subsidiary had been established was to recover input tax related to the investment planned, to which “A” sp. z o.o. had no right. The central argument aiming to demonstrate that the appellant took actions in order to obtain a tax advantage was to refer to the scheme of operation employed previously between “A” Sp. z o.o. and “C” Sp. z o.o. (in the years 2001-2007) as it was noticed that in the previous scheme “C” sp. z o.o. also initially intended to conduct taxable activity. Meanwhile, following completion and recovery of input tax, when it turned out that “C” had a tax liability payable to the tax office’s bank account, the companies were merged. It was more advantageous for the company to make adjustment of the input tax pursuant to Article 91 paragraph 2 of the VAT Act by the acquiring company rather than to pay the tax due on further lease. What is more, the appellate authority pointed that in a situation when the intended purpose of a building were changed, for example, after a lapse of 10 years, the taxpayer would avoid the obligation to make the relevant adjustment and a possible adjustment would be spread over time. Accordingly, no credence was given to the statement of the President of the Company, whereby the only objective behind establishment of the company was to organise tasks and establish a new distribution of competencies [...] The appellate authority took the view that distribution of competencies in a company could be effected in a different manner, e.g. by means of establishing separate divisions to handle different tasks. Based on an analysis of the scheme previously employed, the argument raised by the Appellant that given the fact that the Appellant would provide services in the area of real property lease and the rent would be set at the market price level, one could not speak of any abuse of the law, was rejected. At the same time, based on the evidence material collected, in particular the “Investment Plan”, the appellate authority assumed that in the future the companies would be merged. As a consequence, the Appellant has been deprived of input tax.

The arguments raised by the Appellant basically focus on the assertion that the company was established for a particular economic purpose, namely to manage real properties and make investment in the form of construction and re-construction of buildings to be leased for non-residential purposes. Some part of the buildings was intended to be leased to the parent company for the purposes of medical activity exempt from VAT, and in this regard that company would have no right to deduct input VAT. However, the prevailing part was (and is) intended to be leased to third parties. The right to deduct tax on the investment purchases made is linked to the taxable activity, i.e. lease of real properties. Even assuming that merger of the companies (not planned by the company) would take place, the provision of Article 91 of the VAT Act stipulates an obligation to adjust input tax accordingly.

It should be noted that since the principle prohibiting abuse of the law is exceptional in nature and contingent upon fulfilment of strictly defined conditions, findings as to the evidence should also be made within that scope. Therefore, proving of whether in a given case any abuse of the law has taken place should be based on objective circumstances established in accordance with the rules of proceedings to take evidence as provided for in the Tax Law. Pursuant to Article 122 of the Tax Law, in the course of the proceedings tax authorities shall take any and all actions necessary to thoroughly examine the facts and settle the case in tax proceedings. That rule imposes on the authority an obligation to “exhaustively examine any and all facts related to a given case so as to create in this way the true picture thereof and provide a basis for correct application of the relevant provision of the law”. Pursuant to Article 187 paragraph 1 of the Tax Law, a tax authority shall be under an obligation to collect and exhaustively examine all evidence material. Such an obligation is not unlimited, however, in a case when a taxpayer invokes specific facts which the tax authority conducting the proceedings can verify and such facts are relevant for the settlement of the case, failure to take any actions in this regard means that the tax authority did not perform the obligation incumbent on it to admit any and all evidence serving the purpose of establishing the objective truth. And it is only based on the entire evidence material collected that the tax authority shall determine whether a given fact was proven to have taken place. However, account should be taken of both the facts that are favourable and unfavourable for the party. Moreover, pursuant to Article 199a of the Tax Law, while establishing the content of a legal transaction, a tax authority shall take into consideration mutual intentions of the parties and the purpose of the transaction rather than a mere literal wording of declarations of will made by the parties to such transactions.

Therefore, if the assessment of whether we have to do with an artificial scheme of operation resulting in the finding that the Community law has been abused should be based on objective facts, then it may not be made based either on the taxpayer’s subjective intention which, in the present case, is only presumed by the tax authority, or on an arbitrary assumption by the tax authorities that such an abuse has existed.

In the first place it should be noted that tax authorities tend to infer most arguments to prove alleged abuse of the law not from the existing facts established while evaluating the Appellant’s activity, but based on a scheme that took place previously, i.e. between “A” sp. z o.o. and “C” sp. z o.o. in the years from 2001 until 2007. Thus, based on past facts they attempt to prove the existing facts and also to deduce facts that might (but not must) occur in the future. What is meant here is the probable – in the opinion of the tax authorities – merger

of “A” sp. z o.o. and “B” sp. z o.o. (“C” sp. z o.o.). In this regard the authorities indeed try to enter into polemics with the Appellant. For the foregoing reasons they evaluate certain facts in a markedly biased manner rather than objectively and tend to draw conclusions departed from the reality. Determination of whether we have to do with an artificial structure created solely for the purposes of obtaining a tax advantage should be based on the existent facts. It is only based on such facts that certain conclusions can be arrived at. At the initial stage of his economic activity a taxpayer may not be accused of having an intention of conducting such an activity solely for the purpose of committing any abuse if the taxpayer’s actions lead to entirely different conclusions. At this point, it should be noted that in accordance with the case-law of the ECJ any person who has the intention, confirmed by objective evidence, to commence independently an economic activity within the meaning of Article 4 of the Sixth Directive and who incurs the first expenditure for those purposes must be regarded as a taxable person. Acting in that capacity, he has therefore, in accordance with Article 17 of the Sixth Directive (at present, *inter alia*, Article 167 and Article 168 of Directive 2006/112/EC) the right immediately to deduct the VAT payable or paid on the investment expenditure incurred for the purposes of the transactions which he intends to carry out and which give rise to the right to deduct, without having to wait for the actual exploitation of his business to begin (judgments of the ECJ: of 8 June 2000 Case C-400/98 *Breitsohl*, paragraph 34; of 15 January 1998 Case C-37/95 *Ghent Coal Terminal*; of 21 March 2000 Joined Cases C-110/98-C-147/98 *Gabalfrisa and Others*). It is clear from the above that any attempts to contest any economic activity planned and then conducted by a taxpayer can be made based on the evaluation of all the facts related to the said activity, also on evaluation made from a time perspective.

Moreover, in their arguments the tax authorities focused only on their findings with respect to the relationship between “A” sp. z o.o. and “B” sp. z o.o. (“D” sp. z o.o.), and this was also analysed at random as they contested the Appellant’s right to deduct claiming that the mere fact of establishment of a subsidiary constituted abuse of the right because the parent company had no right to deduct due to the fact that it conducted activity exempt from VAT. In addition, while not contesting the taxable activity conducted by the Appellant in the area of lease for non-residential purposes, they disregarded that fact in the context of the right to deduct the taxpayer was entitled to. It should be noted that the Appellant leased to “A” sp. z o.o. only 38% of the Hospital space, it also leased another facility to “E” sp. z o.o., and intended to lease space to other entities (this being confirmed by preliminary agreements and letters of intent). At the trial it was argued that the Appellant had already leased 12 real properties to 27 clients. The foregoing not only confirms the economic purpose of establishing a subsidiary, as claimed by

the Appellant, namely management of real properties, but also making investment consisting in a construction and re-construction of buildings to be leased for non-residential purposes, and hence confirms the Appellant's right to deduct VAT.

It should be noted, however, that establishment and use of a subsidiary which is an independent VAT payer, with a view to obtaining any VAT advantage consisting in a postponed payment of that tax is not an abuse *per se*. And this has been concluded in a judgment of the ECJ in the *Weald Leasing* case, whereby a tax advantage accruing from an undertaking's recourse to asset leasing transactions, such as those under dispute in a case brought before the national court (through the use of a subsidiary and a third-party entity), instead of the outright purchase of those assets, does not constitute a tax advantage the grant of which would be contrary to the purpose of the relevant provisions of the Sixth Directive and of the national legislation transposing it, provided that the contractual terms of those transactions, particularly those concerned with setting the level of rentals, correspond to arm's length terms and that the involvement of an intermediate third party company in those transactions is not such as to preclude the application of those provisions, a matter which it is for the national court to determine.

In addition, lease of real properties for non-residential purposes falls within the scope of application of the Sixth Directive (Directive 2006/112/EC) and the VAT Act, and any tax advantage that might possibly accrue from such transactions is not in itself an advantage the grant of which would be contrary to the purpose of the relevant provisions of that directive and of the national legislation transposing it.

If the Appellant could deduct VAT paid on the goods purchased, such a right was conferred on him because the company did not in fact conduct any activity in the area of medical services, but an activity consisting in a lease of real properties for non-residential purposes, which is a taxable activity not exempt from VAT pursuant to Article 5 paragraph 1 subparagraph 1, Article 15 paragraphs 1 and 2, and Article 41 paragraph 1 of the VAT Act. Further, the Appellant is right in arguing that lease to "A" sp. z o.o. not only entails the necessity of paying the tax due but also provides no possibility of deducting VAT by "A" sp. z o.o.

Moreover, the tax authority has no right to take any economic decisions for taxpayers. Its role is to evaluate decisions made by them in terms of the legal and fiscal consequences thereof. Therefore, it is unacceptable to argue that the parent company, instead of incorporating its subsidiary, should establish separate divisions to handle different tasks. It should be also recalled that a taxpayer has the right to freely structure his activity, within the limits of the applicable law, in such

a manner so as to reduce its tax liability. In this context it is incomprehensible to challenge the taxpayer's intention to make use of legal opportunities provided for by the VAT Act, namely to make an adjustment of input tax, stipulated in Article 91 of the VAT Act, due to a change in the original intended purpose of the goods or services (to which the input tax is related). Since the legislator has provided for a 10-year period for the adjustment of input tax related to real properties, it should be assumed that the legislator's intention was to introduce exactly such a solution, hence the taxpayer may not be blamed for his intention to make use of such a legal opportunity, especially as in the case at issue the provision can inure to the benefit of the State Treasury.

It should be pointed that such circumstances as: registration of a change of the scope of the Appellant's economic activity in the National Court Register, lease agreement of 5 November 2008, entered into by the Appellant with "A" sp. z o.o., concerning the space of [...] square meters in the hospital at L. [...] street (total area of [...] square meters), preliminary lease agreements with other third parties, as well as letters of intent concerning lease agreements ("F", "G", "H"), lease of advertising media by the Appellant to third parties ("I" sp. z o.o. in La., "J", "K" sp. z o.o.) have been considered by the tax authority as substantiating the claim of abuse of the law. In the decision at issue there are, however, no conclusions as to whether the tax authority contests all the transactions referred to, claiming, for example, that what we have to do with is acting on other than arm's length terms. At the same time, no reference was made in the decision to possible consequences for third parties' rights (in terms of their right to deduct VAT) that would arise as a result of the finding that the Appellant had allegedly abused the law. Moreover, it follows from the content of the decision that the Appellant purchased a real property in J., on which a hospital building as well as a laboratory and office building are situated, and it leases them to "E" sp. z o.o. There is no assessment of that fact in the context of the Appellant's right to deduct either. It should be also noted that the VAT-7 statements as well as the decision of the tax authority of first instance show that in October and November 2008 the taxpayer declared output tax, yet the appellate authority failed to address that fact.

Having regard to the foregoing, it should be concluded that in the present case a material breach of the provisions of Article 122, Article 187 paragraph 1, Article 191 and Article 210 paragraph 1 subparagraph 6 of the Tax Law has occurred. Defective and selective analysis of the evidence material may not serve as a basis for the Appellant being deprived of his right to deduct VAT, conferred by Articles 167 and 168 of Directive 2006/112/EC (formerly Article 17 of the Sixth Directive) and by Article 86 paragraph 1 of the VAT Act in accordance with the principle prohi-

biting abuse of the Community law, which principle the authorities attempted to apply to the present case while at the same time disregarding other key guidelines contained in the ECJ judgments, rendering that principle an exceptional instrument. Since the said principle is exceptional in nature, it should be applied with much caution so as not to contravene the rules of the VAT system, including the principle of VAT neutrality.

The appellate authority shall be obliged to carry out, in tax proceedings conducted anew, an analysis of the Appellant's entire economic activity in terms of a possible establishment of an artificial structure with a view to obtaining a tax advantage contrary to the purpose of the provision of the Community law providing for the right to deduct, i.e. Articles 167 and 168 of Directive 2006/112/EC – Article 86 paragraph 1 of the VAT Act, taking account of the interpretation of the above principle, as contained in this judgment, as well as the Court's guidelines described hereinabove and relating to the present case. Such an analysis should be made based on facts rather than presumptions, and on the entire evidence material collected. Should the tax authority be in doubt as to the economic activity conducted by the Appellant, it may prove useful to look at that activity from the perspective of successive fiscal years. There are no obstacles to the tax authority making any findings concerning completion of the hospital investment project implemented, other investments made as well as the economic activity actually conducted by the Appellant, in addition to basing its findings on the agreements entered into by the party or documents drafted. Especially as such a mode of proceeding is not unfamiliar to the tax authority, in particular in tax cases in which we have to do with an initial stage of the conduct of a given type of activity by the taxpayer. The analysis carried out along with possible findings should be reflected in the grounds for the decision of the tax authority. It should be recalled that pursuant to Article 210 paragraph 4 of the Tax Law, read in conjunction with Article 235 of the Tax Law, factual grounds for a decision shall include, in particular, description of the facts the authority has found proven, pieces of evidence it has given credence to, and reasons for which it has refused to consider other pieces of evidence credible, whereas legal grounds shall contain explanation of the legal basis for the decision with reference to the relevant provisions of the law.

Having regard to the foregoing, the Court revoked the decision pursuant to Article 145 paragraph 1 subparagraph 1 letters a) and c) of the Law on Proceedings before Administrative Courts. The ruling on the stay of enforcement of the decision was based on Article 152 of the Law on Proceedings before Administrative Courts. Decision on the costs was made pursuant to Article 200 of the Law on Proceedings before Administrative Courts.

JUDGMENT
of
THE SUPREME ADMINISTRATIVE COURT

of 27 September 2011
(I GSK 482/10)

Presiding Judge: NSA judge Janusz Trzeciński (rapporteur)

Judges: NSA judge Zofia Przegalińska, WSA judge Jacek Czaja (delegated)

The Supreme Administrative Court (*Naczelny Sąd Administracyjny*, having examined, at a hearing on 27 September 2011, in its Financial Chamber, the appeal in cassation filed by B. S.A. in S., Branch E. in T., against the judgment of the Voivodship Administrative Court (*Wojewódzki Sąd Administracyjny*) in Gdańsk of 25 March 2010, File No. III SA/Gd 493/09, concerning the complaint of B. S.A. in S., Branch E. in T., against the Decision of the Director of the Customs Chamber (*Dyrektor Izby Celnej*) in G. of [...] August 2009 No. [...] concerning repayment of customs duties, hereby 1. revokes the judgment appealed against and orders that the case be re-examined by the Voivodship Administrative Court in Gdańsk; 2. decides that the sum of PLN 13,676 (in words: thirteen thousand six hundred and seventy six Polish zlotys) be paid by the Director of the Customs Chamber in G. to B. S.A. in S., Branch E. in T., as reimbursement of the costs of the cassation proceedings.

FOUNDATIONS

I

1. By virtue of the Decision of [...] May 2009 the Head of the Customs Office (*Naczelnik Urzędu Celnego*) in G. refused to repay to the Appellant (B. Spółka Akcyjna in S., Branch E. in T.) import duties paid for the goods subject to the procedure for release for circulation in accordance with the customs declarations specified in the decision, due to the latter's failure to meet the deadline for the submission of the application. The legal basis for the decision was Article 73 paragraph 1 of the Act of 19 March 2004 – the Customs Law (*Journal of Laws* No. 68, item 622, as amended) read in conjunction with Article 236 of Council Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ EC L 302 of 19 October 1992, as amended) and Article 878

of Commission Regulation (EEC) No. 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation No. 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ EC L 253 of 11 October 1993, as amended).

The authority held that due to the failure to meet the 3-year deadline for the submission of an application for repayment of customs duties, it was obliged under Article 236 of the Community Customs Code to refuse repayment of the same.

Following the examination of a complaint filed by the Appellant, the Director of the Customs Chamber in G., by virtue of the Decision of [...] August 2009, upheld the decision complained about.

2. In its appeal against the foregoing, lodged with the Voivodship Administrative Court in Gdańsk, the Appellant requested that the decisions of the authorities of both instances be revoked on the grounds of alleged infringement of the provisions of the substantive law (i.e. Article 2 and Article 7 of the Constitution of the Republic of Poland, Article 236 paragraphs 1 and 2 of the Community Customs Code, Article 72 paragraph 1 read in conjunction with Article 1 paragraphs 1 and 3 of the Tax Law) and infringement of procedural provisions affecting the outcome of the case (i.e. Article 120; Article 121 paragraphs 1 and 2; Article 122; Article 124; and Article 187 paragraph 1 of the Tax Law), as well as the erroneous establishment of facts.

One of the reasons for the appeal was the fact that the Community provisions pursuant to which the Appellant submitted its customs declaration were published in Polish as late as on 1 October 2004, hence at the moment the declaration was filed they were unavailable in the Polish version of the *Official Journal of the European Union*.

3. By virtue of its judgment of 25 March 2010, File No. III SA/Gd 493/09, the WSA in Gdańsk dismissed the appeal.

In the grounds for its judgment, the WSA in Gdańsk held that pursuant to Article 2 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, constituting an integral part of the Accession Treaty of 16 April 2003 r. (*Journal of Laws* of 2004 No. 90,

item 864), from the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in the Act concerning the conditions of accession. The WSA in Gdańsk takes the view that the provisions of the acts referred to above do not render application of the Community regulations on the territory of Poland contingent upon publication thereof in the Polish language in the *Official Journal of European Union* since, in principle, the new Member States adopt the entire EC *acquis* as of the accession date, subject to exceptions explicitly defined in the accession acts.

In the grounds for its judgment, the WSA in Gdańsk referred to the case-law of the European Court of Justice relating to the issue of Community acts unpublished in the language of a given Member State. In particular, the WSA in Gdańsk extensively invoked the judgment of the ECJ of 11 December 2007 in Case C-161/06 *Skoma-Lux v Celni reditelstvi Olomouc*. In that judgment, the ECJ concluded that Article 58 of the Act concerning the conditions of accession precludes the obligations contained in Community legislation which has not been published in the *Official Journal of the European Union* in the language of a new Member State, where that language is an official language of the Union, from being imposed on individuals in that State, even though those persons could have learned of that legislation by other means.

The WSA in Gdańsk has stressed the fact that in paragraphs 70–73 of the ECJ judgment referred to the above a time limit was defined stating when it is acceptable to apply the interpretation of the Community law as contained in that judgment to cases finally settled. As the WSA in Gdańsk has noted, it follows from the aforementioned ECJ judgment that calling into question the final decisions or rulings issued on the basis of an unpublished legal act would be possible only in exceptional cases. In the opinion of the WSA in Gdańsk, in the case brought by the Appellant we do not have to deal with it as an exceptional case. The importer paid the customs duty on a voluntary basis (making a so-called self-assessment) rather than under an administrative decision. According to the WSA in Gdańsk, which relied in this respect on the ECJ judgment in the *Skoma-Lux* case, it would be otherwise only in cases where based on unpublished provisions any administrative measures were adopted or judicial decisions issued, in particular of a coercive nature, which would compromise fundamental rights.

The WSA in Gdańsk has held that it would be contrary to the requirements of legal certainty to assume that in matters covered by the Community regulation

in the period from the accession to the official publication of the Community acts in the Polish language, there existed a legal void. The WSA in Gdańsk is of the opinion that the importance of the ECJ judgment in the *Skoma-Lux* case for legal relationships established prior to the issuance thereof, consists in the creation of an exceptional solution enabling avoidance by the party of adverse consequences due to the absence of a translation of a Community act into the language of a Member State.

As it has been emphasized by the WSA in Gdańsk, this does not, however, apply to situations where there are no doubts or discrepancies in the understanding of a provision and the importer, acting voluntarily without being made liable for any customs duties under any administrative decision (self-assessment), abides by the obligation ensuing from that provision.

The WSA takes the view that if in the period preceding publication of the acts of the Community customs law in the Polish language, the importer filed a customs declaration and paid certain amounts, these constitute, undoubtedly, customs duties and taxes on account of the procedure for the release of goods for circulation.

Furthermore, the WSA has pointed that since no administrative penalties or measures compromising fundamental rights were applied to the Appellant, the ECJ judgment referred to above could hardly be considered to serve as the basis for any revoking or change of a decision of the authority assessing the customs duties payable. If the ECJ has held that final decisions may be called into question in such a situation only in exceptional cases, then – in the opinion of the WSA in Gdańsk – the situation where the importer, being one of thousands operating in Poland, files a customs declaration and pays the relevant amount, is not one of such cases.

In response to the alleged infringement of Article 236 of the Community Customs Code, the WSA in Gdańsk has taken the view that even if it were found that the period referred to in paragraph 2 of that provision, should be extended, the appellate authority should still be deemed right in claiming that there have occurred no preconditions listed therein, justifying the repayment of the customs duties paid by the Appellant. The WSA in Gdańsk is of the opinion that while submitting a declaration of goods for customs clearance, the Appellant relied on the provisions of the Community Customs Code applicable on the territory of the EC, thus considering it to be the source of law of general application. Moreover, such an action was also based on Article 2 of the Customs Law.

While explaining reasons for which the alleged infringement of Article 72 paragraph 1, read in conjunction with Article 1 paragraphs 1 and 3 of the Tax Law, was found unjustified, the WSA in Gdańsk has claimed that in that respect Article 73 paragraph 1 of the Customs Law had to be invoked, whereunder proceedings in customs cases shall be governed by the respective provisions of Article 12 and Section IV of the Tax Law. Article 72 of the Tax Law, invoked by the Appellant, is not included in Section IV of the said Law, hence it cannot be applied in customs cases.

II

1. The judgment of the WSA in Gdańsk of 25 March 2010, File No. III SA/Gd 493/09, was appealed against under an appeal in cassation filed by B. Spółka Akcyjna in S., Branch E. in T.

The Appellant claimed that the said judgment:

a) infringed substantive law by the wrong application thereof, namely:

- Article 87 paragraph 1 of the Constitution as well as Article 2 and Article 7 of the Constitution in that it was erroneously assumed that these provisions were not applicable to the case at issue;

- Article 2 and Article 7 of the Constitution in that the principle of non-retroactivity of the law was infringed and the payments claimed by the Appellant were classified as customs duties or import duties;

- Article 32 of the Constitution in that the funds paid by the Appellant based on provisions that had not been published in accordance with the law, hence having no binding force, were deemed legally owed;

- Article 236 of the Community Customs Code in that it was improperly applied, i.e. it was held that the said provision was directly applicable to the case at issue in breach of the principle of non-retroactivity of the law, and it was held that funds unduly paid by the Appellant were customs duties;

- Article 72 paragraph 1, read in conjunction with Article 1 paragraphs 1 and 3, and further in conjunction with Article 2 paragraph 1 subparagraph 1 of the Tax Law in that it was held that the said provision could not apply to an unduly made payment even in a situation where there was a legal gap with regard to the regulation of a return of any overcharged duty;

b) infringed procedural provisions having a material bearing on the outcome of the case, namely:

- Article 145 paragraph 1 subparagraph 1, read in conjunction with Article 3 paragraph 2 subparagraph 1 of the Law on Proceedings before Administrative Courts, further read in conjunction with Article 1 paragraphs 1 and 2 of the Act of 25 July 2002 – Law on the System of Administrative Courts (*Journal of Laws* No. 153, item 1269, as amended), in that an improper review of the operation of public administration was carried out resulting from the unfounded assumption that the decision appealed against did not infringe the law;

- Article 135 and Article 145 paragraph 1 subparagraph 1 of the Law on Proceedings before Administrative Courts, read in conjunction with Article 233 paragraph 1 of the Tax Law, in that the decisions issued by the customs authorities of both instances were deemed compliant with the law, whereas these were to be revoked as thereunder the return of payments not legally owed was refused;

- Article 141 paragraph 4 of the Law on Proceedings before Administrative Courts, in that in the grounds for the judgment appealed against not all the allegations submitted in the appeal were addressed;

- Article 145 paragraph 1 subparagraph 1 letter c of the Law on Proceedings before Administrative Courts, read in conjunction with Article 127 and Article 233 paragraph 1 subparagraphs 1 and 2, further read in conjunction with Article 210 and Article 222 of the Tax Law, and Article 107 paragraphs 1 and 3 of the Code of Administrative Proceedings, in that an unfounded assumption was made to the effect that the customs authorities of first and second instance had conducted the proceedings in a correct manner and that this had been reflected in correct grounds for the decision;

- Article 145 paragraph 1 subparagraph 1 letter c of the Law on Proceedings before Administrative Courts, read in conjunction with Article 120, Article 121 paragraphs 1 and 2, Article 122, Article 124, read in conjunction with Article 187 paragraph 1 of the Tax Law, in that it was unfoundedly concluded that while issuing the decision of appeals against the authority had taken into consideration all the facts of the case, explained its stance in an exhaustive and convincing manner, and, in particular, that it had responded to all the allegations raised by the Appellant.

Referring to the failures listed above, the Appellant requested that the judgment appealed against be revoked and the case be ordered to be re-examined by the court of first instance, and that the reimbursement of the costs of the proceedings, including the costs incurred in connection with legal representation, be ordered to the benefit of the Appellant in accordance with the applicable rules.

Or, should the NSA find that only the infringement of the substantive law had taken place, the Appellant requested that the judgment appealed against be revoked in its entirety and the appeal in cassation be examined pursuant to Article 188 of the Law on Proceedings before Administrative Courts, and, further, that reimbursement of the costs of the proceedings, including the costs incurred in connection with legal representation, be ordered to the benefit of the Appellant in accordance with the applicable rules.

2. While explaining reasons for the appeal in cassation, the Appellant has held that in the period from 1 May 2004 to 1 October 2004, namely in the period covered by the application for the return of payments made on account of an import of goods into the customs territory of the European Community, no regulations were applicable on the territory of Poland to allow the collection of the payments referred to above by a fiscal authority. As the Appellant maintains, the obligations stipulated in the Community legislation which has not been published in the *Official Journal of the European Union* in the language of a new Member State, may not be enforced against individuals in the state concerned, even if these individuals could have learned of that legislation by other means. In this context, the Appellant relied on the relevant paragraphs of the ECJ judgment in the *Skoma-Lux* case as well as on the case-law of administrative courts.

The Appellant held that the Community Customs Code and Council Regulation (EEC) No. 1315/88 of 3 May 1988 amending Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, and Regulation (EEC) No. 918/83 setting up a Community system of reliefs from customs duty were published on 1 October 2004 (Chapter 2 Volume 4 of the *Polish Special Edition of the Official Journal of the European Union*), whereas Commission Regulation (EEC) No. 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No. 2913/92 establishing the Community Customs Code was published on 7 August 2004 (Chapter 2 Volume 6 of the *Polish Special Edition of the Official Journal of the European Union*).

Accordingly, in the Appellant's opinion, in the period from 1 May 2004 to 1 October 2004 there were no bases for the collection of the payments specified by the Appellant. It means that in that period the administration authorities and courts had no legal bases to take decisions under provisions not yet published in the Polish language. The Appellant takes the view that in the said period there existed no provisions to serve as a basis for the performance of certain obligations, including for the calculation of payments due and the amount on which these were to be assessed. As a consequence, in the Appellant's opinion, the authority enforced provisions that were not applicable, which means that it unduly collected payments that were not customs duties.

Further, the Appellant is of the opinion that the payments made by it were legally classified as customs duties in breach of the principle of non-retroactivity of the law, as the classification was made based on the rules of the Community law which were not yet applicable at the moment the payments were collected. The Appellant maintains that it is the legislation in force on the date the payments were made by the Appellant that should provide the basis for the evaluation of the said payments.

In the statement of reasons for the appeal in cassation it has been held that Article 236 of the Community Customs Code does not apply to the funds paid by the Appellant as the provision at issue came into effect after the payment had been made. The Appellant has also stressed the fact that the court of first instance erroneously assumed that since the Appellant had voluntarily declared goods for customs clearance, it had complied with the law it deemed applicable.

Moreover, the Appellant claimed that there was a legal gap which, in its opinion, justified the application of Article 72 paragraph 1 of the Tax Law to the case at issue.

While explaining reasons for the alleged infringement of Article 141 paragraph 4 of the Law on Proceedings before Administrative Courts by the court of first instance, the Appellant pointed to numerous allegations which, in its opinion, were not taken into consideration by that court. What was meant here was the alleged infringement of Article 120, Article 121 paragraphs 1 and 2, Article 122 and Article 124 of the Tax Law, as well as allegations relating to the establishment of facts on which the decisions appealed against were based.

3. In response to the appeal in cassation the Director of the Customs Chamber in G. requested dismissal thereof and the reimbursement of the costs incurred in connection with legal representation.

III

The Supreme Administrative Court considered the following:

1. The appeal in cassation should be allowed. The Supreme Administrative Court believes that the case of the appealing company needs to be re-examined by the Voivodship Administrative Court.

2. In order for the present case to be settled, it is necessary to establish the legal status of the Community law acts that were issued prior to Poland's accession to the European Union (i.e. prior to 1 May 2004), yet for a certain period of time following the accession they remained unpublished in the Polish version of the *Official Journal of the European Union*.

2.1. As on the date of Poland's accession to the European Union, at the Community level Article 254 of the Treaty establishing the European Community (EC Treaty) was in force. The said provision read as follows: "1. Regulations, directives and decisions adopted in accordance with the procedure referred to in Article 251 shall be signed by the President of the European Parliament and by the President of the Council and published in the *Official Journal of the European Union*. They shall enter into force on the date specified in them or, in the absence thereof, on the 20th day following that of their publication. 2. Regulations of the Council and of the Commission, as well as directives of those institutions which are addressed to all Member States, shall be published in the *Official Journal of the European Union*. They shall enter into force on the date specified in them or, in the absence thereof, on the 20th day following that of their publication." At present, the matter is governed by Article 297 of the Treaty on the functioning of the European Union (TFEU).

Pursuant to Article 5 of Council Regulation No. 1 of 15 April 1958 determining the languages to be used by the European Economic Community (OJ EC L 17 of 16 October 1998, as amended), the *Official Journal of the European Union* shall be published in all the official languages of the European Union. As a result of Poland's accession to the EU, the Polish language became one of the official languages of the Union (see Article 1 of the regulation referred to above).

Article 2 of the Act concerning the conditions of accession of, *inter alia*, the Republic of Poland to the European Union stipulates that “From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act”. In turn, Article 58 of that Act provides as follows: “The texts of the acts of the institutions, and of the European Central Bank, adopted before accession and drawn up by the Council, the Commission or the European Central Bank in the Czech, Estonian, Hungarian, Latvian, Lithuanian, Maltese, Polish, Slovak and Slovenian languages shall, from the date of accession, be authentic under the same conditions as the texts drawn up in the present eleven languages. They shall be published in the *Official Journal of the European Union* if the texts in the present languages were so published”.

2.2. The interpretation of the European regulations quoted above requires that account be taken of the case-law of the European Court of Justice.

The issue of legal force and of the possibility of enforcing the acts of the Community law which, on the date of accession of a new Member State, were not published in any of the official languages, was at first the subject of divergent decisions of judicial authorities in those Member States which acceded the European Union in 2004. There were both judgments to the effect that any acts not published in the language of a given state could not serve as a source of obligations of individuals, and judgments whereby such acts were enforced (cf. Bobek M., *The Binding Force of Babel: The Enforcement of EC Law Unpublished in the Languages of the New Member States*, “Cambridge Yearbook of European Legal Studies” 2007, pp. 45–46).

Ultimately, however, doubts in this regard have been resolved by the ECJ in its judgment of 11 December 2007 in Case C-161/06 *Skoma-Lux sro v Celni reditelstvi Olomouc*.

In the grounds for the aforementioned judgment, the ECJ has held that it follows from Article 2 of the above-quoted Act concerning the conditions of accession that the Community acts issued prior to the accession date bind the new Member States and that, as a rule, such acts should be applied in the Member States as of that date (paragraph 32 of the grounds). On the other hand, however, the ECJ has emphasised the fact that a Community act (e.g. regulation) cannot be enforced against individuals prior to its proper publication in the *Official Journal of the European Union* (paragraphs 37 to 38 of the grounds). Furthermore, as the

ECJ has noted, it follows from Article 58 of the Act concerning the conditions of accession, and also from the provisions of the Council Regulation of 15 April 1958, referred to above, that with regard to the citizens of a Member State, the proper publication of an act means publication thereof in the language of that State in the *Official Journal of the European Union* (paragraph 34 of the grounds).

In its judgment in the *Skoma-Lux* case the ECJ stressed that the enforcement of obligations from individuals, arising from acts not published in the relevant language in the name of the principle of effectiveness of the Community law, would result in the individuals bearing the adverse effects of a failure by the Union's administration to comply with its obligation to make available, on the date of accession, the entire *acquis communautaire* in the official languages of all the states acceding the European Union (paragraph 42 of the grounds).

In its statement of grounds for the judgment in *Skoma-Lux* case, the ECJ has explicitly concluded that the fact that the applicant is a professional undertaking conducting activity in the sector of international trade and acquainted with the customs requirements, is not sufficient to make the provisions of an unpublished legal act enforceable against it (paragraphs 45 to 46 of the grounds). Furthermore, in the opinion of the ECJ, making such an act available in a particular language version in an unofficial form (in particular on the internet) does not equate to a valid publication in the *Official Journal of the European Union* (paragraph 48 of the grounds). The ECJ has emphasised the fact that the only version of a Community regulation which is authentic is that which is published in the *Official Journal of the European Union*, such that an electronic version predating that publication, even if it is subsequently seen to be consistent with the published version, cannot be enforced against individuals (paragraph 50 of the grounds).

It follows from the grounds for the ECJ judgment in *Skoma-Lux* case that a Community law regulation not published in the language of a Member State is not invalid for that reason (paragraph 58 of the grounds). The fact that such regulation is not enforceable against individuals has no bearing on the fact that it is part of the *acquis communautaire* and is binding on the Member State concerned as from its accession (paragraph 59 of the grounds).

It should be added that while ruling in the *Skoma-Lux* case, the ECJ also decided on the temporal effects of its judgment. In particular, the ECJ has held that Member States are not, under Community law, obliged to call into question the administrative or judicial decisions taken on the basis of rules not published in the languages of these states, where those decisions have become definitive under

the applicable national rules (paragraph 72 of the grounds). The ECJ takes the view that it is only in “exceptional circumstances” where, on the basis of such rules, there have been administrative measures or judicial decisions, in particular of a coercive nature, which would compromise fundamental rights, that the above principle could be departed from (paragraph 73 of the grounds).

The issue addressed in the appeal in cassation under analysis in these proceedings, has also been the subject of the judgment of the ECJ of 4 June 2009 in Case C-560/07 *Balbiino AS vs. Pollumajandusminister, Maksu- ja Tolliameti Pohla maksu- ja tollikeskus*.

In the grounds for that judgment, the ECJ has confirmed that an act of a Community institution cannot be enforced against natural and legal persons in a Member State before they have the opportunity to make themselves acquainted with it by its proper publication in the *Official Journal of the European Union* (paragraph 29 of the grounds). However, a different situation takes place when some rules of a Community regulation have been repeated in a national legislation, for example in an act. Then, the Community law does not preclude enforcement of the provisions of such an act against individuals (paragraph 31 of the grounds). Accordingly, the task of the national court is to ascertain whether a particular regulation imposing an obligation on an individual resulted solely from an unpublished Community act or from the provision of a national act, which reiterated the content of the Community regulation (paragraph 32 of the grounds).

The ECJ also took the same stance in its judgment of 29 October 2009 in Case C-140/08 *Rakvere Lihakombinaat AS v Pollumajandusministeerium, Maksu- ja Tolliamenti Ida maksu- ja tollikeskus*.

It should be emphasised that in contrast to its judgment in the *Skoma-Lux* case, in the judgments of the *Balbiino* and *Rakvere* cases the ECJ has not limited the temporal effects of its decision.

2.3. In addition to the EU standards discussed above, the decision in the present case should also comply with the applicable norms laid down in the Constitution of the Republic of Poland.

Pursuant to Article 27, the first sentence of the Constitution of the Republic of Poland, “Polish shall be the official language in the Republic of Poland”. Exception to that rule arises from the second sentence of the said provision of the Constitution of the Republic of Poland, whereby “This provision shall not infringe

upon national minority rights resulting from ratified international agreements?”. That does not, however, apply to the matter analysed in the present case.

The norm whereby Polish is the official language in the Republic of Poland means that public government authorities in the Republic of Poland are required to use the Polish language, both in the relations among these authorities and towards citizens (see Resolution of the Constitutional Tribunal of 14 May 1997, File No. W 7/96). Certain exceptions to that requirement may be deemed admissible – in addition to the one referred to in Article 27, the second sentence, of the Constitution of the Republic of Poland – with respect to private legal transactions, among non-public entities where none of the parties to a legal transaction is in a superior position (position of an authority) towards the other parties (cf. judgment of the Constitutional Tribunal of 13 September 2005, File No. K 38/04). Any derogation from the said requirement may also be dictated by the need to protect the right to a fair trial or the right to good administration, if these rights are exercised on the territory of Poland by persons who do not speak the official language.

As regards government authorities, they are under an obligation to use the Polish language in their relations with the citizens of the Republic of Poland (cf. Trzeciński, J.: *Język urzędowy – art. 27 Konstytucji* [in:] *Konstytucja, ustroj, system finansowy państwa. Księga pamiątkowa ku czci prof. Natalii Gajl* (Dębowska-Romanowska, T., Jankiewicz, A. [eds.]), Warsaw 1999, pp. 49–50). That thesis is corroborated by the content of Article 4 of the Act of 7 October 1999 on the Polish language (*Journal of Laws* No. 90, item 999, as amended), whereby Polish is the official language, *inter alia*, of the constitutional state authorities, local self-government authorities, local public administration authorities or any other entities carrying out public tasks. Further, in accordance with Article 5 paragraph 1 of the said Act, entities carrying out public tasks on the territory of the Republic of Poland in principle make any official acts in Polish.

It follows from Article 27 of the Constitution, further elaborated by the provisions of the Act on the Polish language, that any and all authorities or institutions which carry out public tasks on the territory of the Republic of Poland, affecting through their position of authority the scope of freedom, rights or obligations of the citizens of the Republic of Poland, should use the Polish language in their relations with citizens. Such a requirement applies not only to the Polish State authorities but also to other entities which have been authorised under international commitments of the Republic of Poland to regulate, in a binding manner, the status of Polish citizens, including to the European Union authorities. This is because there are no grounds to conclude that the normative content of Article

27 of the Constitution has been limited as a result of Poland's accession to the European Union. In particular, no such grounds have been provided by Article 90 of the Constitution of the Republic of Poland.

It should be added that pursuant to Article 83 of the Constitution, everyone is under an obligation to observe the law applicable on the territory of the Republic of Poland. Moreover, the principle of *ignorantia iuris nocet*, well-established in European legal culture, is an expression of an assumption that each citizen should be familiar with legal norms addressed to him/her. On the other hand, however, it follows from the general principle of a democratic state, enunciated in Article 2 of the Constitution of the Republic of Poland, that any requirements and prohibitions applied to citizens by government authorities should be formulated in a manner comprehensible for those citizens. In any situation to the contrary, one cannot expect in a democratic state that the law would be complied with by its addressees. Therefore, legal norms should arise from the acts the content of which is familiar to citizens and comprehensible to citizens. The principal condition enabling comprehension by the addressees of legal norms of the content of the obligations applied to them is to express the norms in the language the addressees can be expected to speak. The provisions of the Constitution of the Republic of Poland and, in particular, of Article 27 thereof do not provide any grounds to conclude that the Polish citizens could be required to speak any languages other than Polish.

It is a rule in a democratic state that legal acts are issued and made available to individuals in appropriate forms. A commonly acceptable form is one of an official journal, usually published in a traditional paper version, although in some states, including since recently in Poland, an official journal published in the form of an electronic document has become the rule (see the Act of 4 March 2011 on an amendment to the Act on the publication of normative acts and certain other legal acts, as well as certain other Acts; *Journal of Laws* No. 117, item 676). Notwithstanding the foregoing, in no event may an individual in a democratic state be required to know the provisions the content of which is available in a form other than as stipulated in the relevant laws (e.g. in unofficial internet publications). And any special characteristics of the legal norms' addressees, such as their involvement in professional or international trade, are of no relevance here.

For the foregoing reasons the NSA takes the view that any normative acts which stipulate legal norms addressed to Polish citizens and Polish organisational units may be enforced by the authorities of the public government of the Republic

of Poland only when they have been written in Polish and published in the relevant official journal. This applies not only to sources of the law issued by the national legislative authorities, but also to any and all normative acts in force on the territory of the Republic of Poland, including to the acts of the so-called secondary Community (EU) law. Such acts are subject to publication in the Polish language in the *Official Journal of the European Union*, published by the Office for Official Publications of the European Commission, referred to in Article 29a of the Act of 20 July 2000 on a publication of normative acts and certain other legal acts (*Journal of Laws* of 2007 No. 68, item 449, as amended). Any other form of publication cannot result in any obligations being imposed on individuals.

2.4. The consequence of the arguments put forward above, taking account of both the European and the constitutional standard, is the need to conclude that any act of the Community (European) law which has not been published in the Polish edition of the *Official Journal of the European Union* may not serve as a legal basis for any obligations for Polish citizens or Polish organisational units.

The foregoing thesis does not, however, mean that such an act should be deemed inapplicable until its publication since it is the norms of the EU law, including Article 254 of the EC Treaty (currently: Article 297 of the TFEU) that decide on the applicability of an act of European law. The fact that an act has not been published in the official language of a given Member State only precludes the courts and other public government authorities (including administration authorities) from the possibility of inferring from such an act any obligations of the citizens of that Member State. Nevertheless, it does not preclude possible obligations incumbent on the public government authorities, for example ones ensuing from the requirement to enforce or implement such an act.

2.5. The Supreme Administrative Court is also of the opinion that the prohibition to infer any obligations of an individual from an act that has not been published in Polish is not subject to any exceptions in a situation where the conduct of the individual concerned might be in the circumstances of a given case considered to satisfy the disposition of the norm expressed in such an act. In particular, performance by an individual of the obligation under a legal provision not published in Polish can result from the individual's error or cautiousness for fear of suffering certain legal consequences (e.g. administrative penalties). Behaviour or intentions of a particular individual being the addressee of the obligation arising from a legal act not published in Polish do not in any manner lift the prohibition on enforcement of such a legal act.

Accordingly, if an individual has made a certain payment to a public authority (e.g. a customs duty), despite the fact that the obligation to make such a payment arose from an act not published in Polish, such a circumstance does not automatically preclude the admissibility of recourse to such legal measures that would enable recovery of the payments transferred without any legal basis. This is because irrespective of the actual intentions of the payer, a public charge paid under an act that could not be applied due to the fact that it had not been published in Polish, had no legal justification.

3. For the foregoing reasons, the arguments put forward by the Voivodship Administrative Court based on which the appeal was dismissed, shall not be approved.

The appealing company paid the customs duty pursuant to provisions which had not been published in Polish, hence these were not applicable to that company. And it is of no relevance that, as the customs authorities as well as the WSA in Gdańsk maintain, the said duty was paid “voluntarily”, in the form of the so-called self-assessment. That fact does not, in any manner, remedy the defectiveness of the legal basis for the customs duty liability.

4. In the judgment appealed against also the ECJ standpoint, presented in the grounds for the ruling in the *Skoma-Lux* case, was invoked whereby a Member State which following 1 May 2004 enforced against its citizens any rules of the European law which had not been published in the official language of that state, is not, under the Community law, obliged to call into question the administrative or judicial decisions taken on the basis of such rules where those decisions have become definitive under the applicable national rules (paragraph 72 of the grounds of the said judgment of the ECJ). In the opinion of the ECJ, “it would be otherwise only in exceptional circumstances”, namely where on the basis of such rules „there have been administrative measures or judicial decisions, in particular of a coercive nature, which would compromise fundamental rights: it is for the competent national authorities to ascertain this within those limits” (paragraph 73 of the grounds of the said judgment of the ECJ).

The WSA in Gdańsk is convinced that in the case under analysis we do not have to do with such an “exceptional circumstance” and, in addition to that, no administrative decision has been issued with respect to the company as the customs duty was paid in the form of a self-assessment.

The Supreme Administrative Court is of the opinion that the WSA in Gdańsk has erroneously read the theses put forward by the ECJ and contained in paragraphs 70 to 73 of the judgment of the ECJ in the *Skoma-Lux* case, and for this reason it has wrongly applied the EU law for the purposes of evaluation of the present case.

First, the ECJ has held that the Member States “are not, under Community law, obliged” to call into question the decisions or rulings issued on the basis of rules not published in the official language. The sentence of the grounds for the ECJ judgment, quoted above, means only that the obligation to call into question decisions or rulings does not arise from the Community law. This leads to the conclusion that the ECJ has not precluded the possibility of national authorities of public government contesting individual decisions, in particular where it would be justified on grounds of national rules, for example statutory or constitutional ones.

Second, the above-quoted thesis raised by the ECJ refers solely to the calling into question of administrative or judicial decisions. Yet, as it was noted by the WSA in Gdańsk, the appealing company made a self-assessment without having been made liable for any customs duties under any administrative decision.

While re-examining the case, the Court of first instance should take account of the foregoing circumstances.

Furthermore, the Court of first instance should also, in the course of re-examination of the case, regard the fact that in the judgment of the ECJ in *Balbiino* and *Rakvere* cases, referred to above, no reservation analogous to that contained in the above-quoted fragments of the *Skoma-Lux* judgment were made.

5. The Supreme Administrative Court takes the view that in the Appellant’s case any rules of the Community law which were not published in Polish in the *Official Journal of the European Union* at the time when the customs declaration was made are not applicable. In particular, this pertains to Article 236 of the Community Customs Code which, *inter alia*, sets forth the rules to govern the repayment of customs duties which were not legally owed, including the period for the submission of an application for the repayment of such duties. Therefore, the legal classification of the Appellant’s application for a repayment of the duties cannot be made based on that provision of EU law.

In consequence, when re-examining the case, the Court of first instance should establish, following the *tempus regit actum* principle, which legal provisions should apply to the Appellant's case, both as regards the obligation to pay the customs duty, the amount of such duty, and the procedure allowing the possible recovery of the duty.

While establishing the content of the legal norms which should be applied to the Appellant's case, it should be assumed as a starting point that, as it has already been held hereinabove, the Community Customs Code or any other provisions of the EU law which, on the date of payment of the customs duty, were not published in the Polish edition of the *Official Journal of the European Union*, are not applicable to the present case. Therefore, the legal basis for the customs liability and for any possible claim for a return of the customs duty that was not legally owed should be established based on the provisions of Polish law.

On 1 May 2004, the Act of 19 March 2004 – the Customs Law – entered into force pursuant to Article 1 read in conjunction with Article 39 of the Act of 19 March 2004 – Provisions implementing the Act – the Customs Law (*Journal of Laws* No. 68, item 623, as amended). On that date, in accordance with Article 25 of the implementing Act referred to above, the then-applicable Act of 9 January 1997 – the Customs Code (*Journal of Laws* of 2001 No. 75, item 802, as amended) lost its binding force.

In accordance with the inter-temporal norm ensuing from Article 26 of the Provisions implementing the Customs Law, “to matters related to customs debt, where such customs debt was incurred prior to the date of the Republic of Poland becoming a Member State of the European Union” the existing regulations should apply, hence, in the first place, those contained in the repealed Customs Code of 1997. The provision quoted introduced an inter-temporal principle of the so-called continuing application of the former law with respect to customs duties deemed payable prior to the date of Poland becoming a Member State of the EU, which took place on 1 May 2004.

It should be noted, however, that the above-quoted inter-temporal provision, as well as the entire implementing Act of 19 March 2004, was drafted and adopted on the assumption that as of 1 May 2004 in Poland the norms of the Community customs law, contained in directly effective legal acts, would be applicable (cf. grounds for the government's draft Act – Provisions implementing the Act – the Customs Law, along with draft implementing acts of 23 February 2004; Form No. 2556/IV term of office, pp. 1–2). Such an assumption, however, did not

prove to be true since also following Poland's accession to the EU some acts of the Community law could not, for a certain period of time, be enforced against Polish citizens due to an absence of proper publication thereof in the Polish language. Such a circumstance cannot be disregarded in the process of interpretation of the inter-temporal provisions contained in the implementing Act of 19 March 2004. Interpretation of the law, including of inter-temporal provisions, may not lead to an effect manifestly contrary to the legislator's intention, the purpose for which the regulation at issue was introduced, and also the function of the particular legal institution.

Any literal reading of the norms expressed in the provisions implementing the Customs Law and, in particular, in Article 26 of that Act, could lead to the conclusion that for a few months following Poland's accession to the EU there was a "legal void" in the area of customs law and the territory of Poland was a peculiar "duty-free area". The adoption of such an interpretation would certainly contravene the intention of the legislator and, what is more, could result in legal chaos and bring about legal consequences difficult to define, both in the area of national and international law. Therefore, while interpreting the law, the Supreme Administrative Court is obliged to employ such interpretative methods so as to minimise the risk of occurrence of such consequences.

In consequence, the Supreme Administrative Court is of the opinion that for the purposes of deciding of the present case the norm stipulated in Article 26 of the implementing provisions should be read using the teleological and functional interpretation, that is as a norm that requires the application of the existing law, namely the law in force prior to 1 May 2004 (including of the Customs Code of 1997), to determine customs debts incurred prior to the date on which the provisions of the Community customs law could be enforced against Polish citizens, namely prior to the date of proper publication thereof in Polish in the *Official Journal of the European Union*.

Having regard to the foregoing, the Supreme Administrative Court, acting pursuant to Article 185 paragraph 1 and Article 203 paragraph 1, read in conjunction with Article 207 paragraph 2 of the Law on Proceedings before Administrative Courts, ruled as in the operative part of the judgment.



JUDGMENT
of
THE SUPREME ADMINISTRATIVE COURT

of 28 September 2011
(II OSK 1909/10)

Presiding Judge: NSA judge Włodzimierz Ryms.

Judges: NSA judge Jacek Chlebny (rapporteur), NSA judge Janusz Furmanek.

On 28 September 2011, the Supreme Administrative Court (*Naczelny Sąd Administracyjny*), after hearing on 28 September 2011 in its General Administrative Chamber the appeal in cassation filed by S. G. against judgment of the Voivodship Administrative Court in Warsaw (*Wojewódzki Sąd Administracyjny w Warszawie*) of 24 May 2010, File No. V SA/Wa 1862/09, concerning the complaint of S. G. against Decision of the Head of the Office for Foreigners (*Szef Urzędu do Spraw Cudzoziemców*) of 31 August 2009 No. [...] concerning the expulsion of a foreigner 1. repeals the contested judgment, 2. repeals Decision of the Head of the Foreigner Office of 31 August 2009, 3. awards S. G. an amount of PLN 447 (say four hundred forty seven zlotys) from the Head of the Office for Foreigners as reimbursement of the costs of the cassation proceedings.

Grounds

By the contested judgment of 24 May 2010, the Voivodship Administrative Court in Warsaw repealed the complaint of S. G. against Decision of the Head of the Office for Foreigners of 31 August 2009 upholding Decision of the Governor of the Mazowieckie Province (*Wojewoda Mazowiecki*) of 31 March 2009 concerning the expulsion of a foreigner from the territory of Poland.

The judgment was delivered in the following factual and legal situation.

By Decision of 31 March 2009, pursuant to Article 88 paragraph 1 subparagraphs 1 and 2, Article 90 paragraph 1 subparagraph 1 1 and Article 92 subparagraph 1 1 of the Act of 13 June 2003 on Foreigners (*Journal of Laws* of 2006 No. 234, Item 1694, as amended), and Article 23 of the Act of 24 October 2008 amending the Act on Foreigners and certain other acts (*Journal of Laws* No. 216 Item 1367), the Governor of the Mazowieckie Voivodship decided on the expulsion

of the appellant from the territory of Poland. At the same time, the Governor did not establish any grounds for awarding the appellant a tolerated residence permit under the Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland (*Journal of Laws* of 2006 No. 234 Item 1695, as amended), hereinafter Act on granting protection to foreigners. In the grounds of the decision the authority indicated that the appellant, a citizen of A., came to Poland with her family (parents and two siblings) in December 1993. The latest residence permit held by the appellant expired on [...] October 2005, and by [...] January 2006, the appellant was staying in Poland under a temporary visa, issued in connection with the procedure for a temporary residence permit initiated by her mother. According to the authority, the expulsion decision was justified by the appellant's irregular stay in Poland, and moreover, by her engagement in illegal work. It was established in the course of the procedure that during holiday time the appellant undertook occasional work, not having the required permit.

In addition, on the same day, i.e. 31 March 2008, the Governor of the Mazowieckie Voivodship issued a decision on the expulsion of the appellant's parents and adult brother and sister.

By Decision of 31 August 2009, the Head of the Office for Foreigners upheld the decision of the authority of first instance. The review authority held that, since [...] January 2006, the appellant had stayed in Poland illegally, and moreover she had worked illegally, which exhausts the grounds for expulsion specified in Article 88 paragraph 1 subparagraphs 1 and 2 of the Act on Foreigners. When examining the possible reasons for granting a tolerated residence permit under Article 97 paragraph 1 subparagraph 1 1a of the Act on granting protection to foreigners, the authority concluded that Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, drafted in Rome on 4 November 1950 (*Journal of Laws* of 1993, No. 61, Item 284, as amended), hereinafter the Convention, allows public authorities to interfere with private and family life in the event of the negative circumstances specified in the Act on Foreigners or Act on granting protection to foreigners. The Head of the Office stressed that the expulsion procedures were initiated with respect to all the appellant's family members, and the resultant expulsion decisions were issued both with respect to the appellant's parents and her adult siblings. According to the authority, in view of the circumstance, the decision to expel the appellant does not breach Article 97 paragraph 1 subparagraph 1 1a of the Act on granting protection to foreigners, and thus it does not breach Article 8 of the Convention, as in the situation it cannot be claimed that the family will not be separated. When referring to the current situation in the appellant's country of origin, the authority concluded that

at the time actions were taken to accelerate the peace process to end the ongoing conflict, which does not necessitate granting the party a tolerated permit in view of the wording of Article 97 paragraph 1 subparagraph 1 1 of the latter Act.

In the grounds of the judgment repealing the complaint submitted by S. G. against the decision of the Head of the Office for Foreigners, the Voivodship Administrative Court in Warsaw concluded that the administrative authorities concerned were right to conclude that the foreigner's irregular stay in Poland justified the expulsion decision. According to the Court, in the case, there was also no breach of Article 97 paragraph 1 subparagraph 1 1 and 1a of the Act on granting protection to foreigners and Article 8 of the Convention. The expulsion of the appellant will not constitute an interference with her family life, as the fact that the appellant's parents and adult siblings are residing in Poland cannot be invoked to assume that she has the right of lawful residence in Poland. It is not only the duration of the appellant's stay in Poland that is a relevant circumstance in the case, but also the nature of the stay. The appellant and her family members legalised their residence in Poland on a periodic basis only, and after the expiry of the last permit, the appellant stayed in Poland illegally. Invoking the case law of the European Court of Human Rights (judgment of ECHR of 31 January 2006 *Rodrigues da Silva and Hoogkamer v. Holland*), the Court concluded that Article 8 of the Convention does not establish a general obligation to respect the choice of the country of settlement made by immigrants. In the grounds of the contested judgment, the court stressed that the appellant cannot invoke the views expressed by the European Court of Human Rights in cases *Keles v. the Federal Republic of Germany* and cases *Abdulaziz, Cabales and Balkandali v. United Kingdom*, because the judgments in those cases were issued in different factual circumstances. In the former case, the person with respect to which the judgment was issued had legally stayed within the territory of Germany for 27 years, among others, under a permanent residence permit, which, according to the Court constituted one of the most important facts which justified concluding that there was a breach of Article 8 of the Convention. Also the latter case concerned persons legally and permanently residing in the host country who were denied reunification with their family. In the case under review, the problem of potential family separation does not occur, as the administrative authorities issued decisions on expulsion from the territory of Poland also with respect to the appellant's family members.

According to the court, in the present case, there was no breach of Article 97 paragraph 1 subparagraph 1 of the Act on granting protection to foreigners, as the current situation in A. does not pose any threats to the values protected by the Convention invoked by the relevant provision of the Polish Act.

In her appeal against the judgment of the Court of first instance to the Supreme Administrative Court, the appellant submitted the following claims:

1) a breach of procedural provisions:

- Article 77 § 1 of the Code of administrative procedure, due to non-exhaustive examination of evidence;

- Article 80 of the Code of administrative procedure, due to a breach of the principle of free examination of evidence as a result of partial examination of the evidence; the appellant also claimed that there was an error in the factual findings, because it was assumed the situation in A. is stable and does not raise any concerns, as a result of which the appellant's return to the country does not involve any danger.

Article 7 of the Code of administrative procedure, due to inaccurate establishment of the factual state and non-consideration of the party's interest.

2) a breach of substantive law provisions;

- Article 8 of the Convention, due to its erroneous interpretation and non-application, even though according to the party the provision justifies non-expulsion on grounds of the need to respect her family life,

- Article 97 paragraph 1 subparagraph 1 1a of the Act on granting protection to foreigners, due to the refusal to apply it on concluding that the appellant's right to the respect for her family life is not under threat and there are no grounds for awarding protection to the appellant,

- Article 88 paragraph 1 of the Act on Foreigners, due to the fact that the decision to expel the appellant was ungrounded.

In the light of the foregoing, the party requested the Supreme Administrative Court to uphold the appeal in cassation by repealing the decision on expulsion and lifting the obligation to leave Poland, and possibly to repeal the judgment of the Voivodship Administrative Court in Warsaw in full and refer the case to the same court for retrial.

In the grounds of the appeal in cassation, the appellant held that the decision to expel her contradicts the principle of proportionality, as the sanction imposed

is disproportionately high compared with the breaches of the provisions of the Act on Foreigners as established by the authorities. The party stressed that for a number of years her family life had concentrated in Poland, where the appellant had started and continued her education. Her closest relatives are residing in Poland. The appellant is actively involved in her town's community life, which proves that she has assimilated into society, and Poland is her second home. Furthermore, there are no negative circumstances to justify such a far-reaching measure of interference with the appellant's family life as an expulsion decision. As regards the appellant's possible return to A., the appellant pointed that she does not use the A. language in writing, while her father is considered to be a deserter in his country of origin, which is punishable with death and can lead to the persecution of his family. According to the appellant, this aspect of the case was not duly addressed during the administrative procedure, while when formulating their conclusions in this respect, both the public administration authorities and the Voivodship Administrative Court in Warsaw disregarded the fact that A. is not a fully democratic state.

In response to the appeal in cassation, the Head of the Office for Foreigners requested it to be set aside.

The Supreme Administrative Court considered the following:

The appeal in cassation is based on justified grounds.

I. The Court considered the upholding of the appeals in cassation to be justified by the claimed breach of Article 8 of the European Convention of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In delivering the contested judgment, the Court of first instance disregarded the fact that Article 8 of the Convention does not only protect the family life but also the private life of foreigners staying in Poland. The expulsion of a foreigner residing in Poland may be non-allowable due to the protection following from Article 8 of the Convention.

A foreigner's private life may be interfered with subject to the conditions indicated in Article 8 (2) of the Convention. This is connected with the fact that addressing foreigners' legal and residence issues cannot be narrowed down to the application of the provisions of the Act on Foreigners, but requires considering the provisions of the Convention and ratified international agreements dealing with the protection of family rights. The Convention is a part of the Polish legal order and secures fundamental human rights for everybody within the jurisdiction

of the state (Article 1), as a result of which foreigners can exercise the rights protected under the Convention to the same extent as the citizens, unless the rights are constrained by the Convention itself. Article 8 of the Convention guarantees all foreigners the right to protect their private and family life, irrespective whether they stay in a given country legally or illegally. The Convention is a ratified international agreement, and being, pursuant to Article 91 (1) of the Constitution, part of the national legal order, it is directly applicable. Pursuant to Article 91 (2), read in conjunction with Article 241 (1) of the Constitution, the provisions of the Convention have precedence over national legislation, if the legislation cannot be reconciled with the provisions of the Convention. Private and family life is also protected under the Constitution of the Republic of Poland, which guarantees an individual, in Article 47, the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life. Also foreigners are entitled to protection of private and family life under Article 47 of the Constitution.

II. The appealing foreigner is an adult, unmarried, and runs a household with her parents and adult siblings, citizens of A. The appellant had arrived in Poland in the early 1990s (December 1993). The circumstance that the appellant had come to Poland as a 3-year-old child and on the initiation of the expulsion procedure, it had lived in Poland for 15 years, makes her eligible to be assigned to the group of so-called second-generation immigrants, whose right to reside in the host state, as concluded by the European Court of Human Rights (see judgment of the European Court of Human Rights/ Grand Chamber of 9 October 2003 *Slivenko v. Latvia*) must be viewed in the context of the right to private life, protected irrespective of the right to family life, as required by Article 8 of the Convention. Therefore, although the Court of first instance was right to claim that Article 8 of the Convention does not impose on the state a general obligation to respect the choice made by foreigners as to the country they wish to reside in, it must be concluded that the possibility of expelling a foreigner should be analysed in view of the right to respect family life. This follows from the fact that Article 8 of the Convention protects the rights (understood as the possibility of developing relations with other people and with the external world) also of those of citizens who do not have “a family life” (judgment of the European Court of Human Rights/ Grand Chamber of 23 September 2008 *Maslov v. Austria*). It appears from the case law of the European Court of Human Rights that private life within the meaning of Article 8 comprises all relationships between immigrants and the community they live in and may involve aspects related to the individual’s social identity. The situation of persons who have spent most of their lives in the country where they were raised and educated and from which they are to be expelled, should be given special

consideration (see judgments of the European Court of Human Rights in cases *Maslov v. Austria*, § 74; *Üner v. Holland*, § 58). The Court's criteria that can be helpful in determining a breach of the state's duties under Article 8 of the Convention in cases concerning expulsion of young persons who have not started their own families include, among others, the duration of the period of residence in the country from which the foreigner is to be expelled and the closeness of the social, cultural and family bonds with the host country and with the country to which the individual is to be expelled.

Therefore the possible expulsion of the appellant was to be analysed in terms of the need to respect such relationships, in view of a whole range of factual findings linked to the the party's life made during the administrative procedure, and not just in the light of the appellant's irregular stay in Poland in the years directly preceding the initiation of the expulsion and irregular stay procedures. When establishing the state's scope of duties ensuing from its commitment to respect the principles of the Convention, account must be taken of the case-specific facts. This is because the scope of the state's duties related to hosting immigrants within their territory varies depending on the circumstances of the individuals concerned and the public interest, which is subject to evaluation on a case-by-case basis.

III. The authorities argue that, once coming of age, the appellant failed to legalise her residence within the territory of Poland. The appellant's irregular stay within the territory of Poland dates back to [...] January 2006. Most of the appellant's residence in Poland was legal, spanning her childhood and early youth. At the time the expulsion procedure was initiated (1 December 2008), the appellant had resided in Poland for nearly 3 years (i.e. between [...] January 2006 and [...] December 2008). According to the Supreme Administrative Court, in view of the circumstances and given the scope of the right to private and family life, it was necessary to establish whether the measure applied qualifies as a necessary interference measure, i.e. whether, despite being allowable as a measure provided by law and justified by one of the grounds laid down in Article 8 (2) of the Convention, it is consistent with the proportionality principle. This is because the appellant's irregular stay within the territory of Poland may not be treated as a conclusive factor justifying the expulsion decision, considering that there are reasons for protecting the party under Article 8 of the Convention in view of the right to family life protection established in the provision. In evaluating the possibility of applying Article 8 of the Convention, insufficient consideration was given to the bonds that the appellant has with Poland and the difficulties the appellant could encounter in the event of a forced expulsion to her country of origin. The appellant came to Poland as a 3-year-old child, and thus she has spent here most

of her life. The appellant explained that she has no home or family in A., she is not linked in any way with the country of citizenship. In the event of expulsion, the appellant's inability to write in the A. language would undoubtedly be another difficulty in adapting to the new conditions, and as is noticed by the appellant, it could narrow down her life opportunities in A. In analysing the proportionality principle of the measure of interference with the appellant's private life, one must take into account the relatively short period of irregular stay, and the fact that the appellant lived in Poland as a child (i.e. she was not the one to decide about it but the persons who exercised their custody rights over her), and the resultant multi-annual and multi-layered integration into Polish society (linguistic, cultural and even religious), undisturbed by any incident that could throw doubt on the closeness of the bonds links between the appellant and the country of residence. In view of the facts linked to the party's life revealed during the administrative procedure, the appellant – as a potential beneficiary of protection granted by the Polish state – must be seen in a broader context than a foreigner staying illegally in Poland. The request sent by the residents of P. to the Minister of Internal Affairs and Administration to legalise the residence of the appellant and her family in Poland proves that the party and her closest relatives enjoy the trust of the local community. The support they receive from the residents of P. is a clear proof of close links with the nearest surroundings, strong links with the Polish culture and a high level of social integration. All these circumstances were disregarded both by the Head of the Office for Foreigners and the Court of first instance. Undoubtedly, the margin of freedom left to the authorities in cases concerning the expulsion of foreigners staying illegally within the territory of their state is broader than in cases concerning legal immigrants, yet it does not release the authority from the obligation to maintain a fair balance between the appellant's individual interest and the public interest.

IV. The judgments of the European Court of Human Rights cited in the grounds of the contested judgment (judgments in cases *Rodrigues da Silva and Hoogkamer v. Holland*, *Keles v. Germany*, *Abdulaziz, Cabales and Balkandali v. UK*), in which the Court indicated the duties of the state concerning the respect of the right to family life of settled immigrants, cannot be adopted as the right point of reference in the appellant's case, which should be seen the light of the protection of private life. The case *Rodrigues da Silva and Hoogkamer* concerned the obligations of the illegal immigrant's country of residence that consist in enabling the foreigner to remain in the country to pursue family life. The conclusions presented by the Court in cases *Keles and Abdulaziz, Cabales and Balkandali* also focused on the interpretation and correct application of Article 8 of the Convention in terms

of the right to family life established by the provision, except that in case *Abdulaziz, Cabales and Balkandali* the Court dealt with the specific problem of family reunification in the context of the admissibility of refusing a spouse the right to enter the country of residence of the other spouse.

V. Responding further to the claimed breach of Article 97 paragraph 1 subparagraph 1 1a of the Act on granting protection to citizens on account of denying the appellant a tolerated residence permit, it must be recalled that according to the legal state as at the date of the contested decision, the provision allowed a tolerated permit to be granted to a foreigner if expelling the foreigner would breach his/her right to family life within the meaning of the Convention or would breach the children's rights specified in the Convention on the Rights of the Child, adopted by the the United Nations General Assembly of 20 November 1989 (*Journal of Laws* of 1991 No 120, Item 526 and of 2000 No 2, Item 11) to an extent significantly threatening the child's psychological and physical development. The above regulation does not imply the right to legalise the residence of a foreigner on account of his/her private life in Poland, and thus granting a tolerated residence permit in view of the need to protect a foreigner's private life would be *contra legem* and would be an illegitimate violation of the statutory reasons for granting such a permit. Thus, the scope of statutory protection is narrower than that of conventional protection, which covers both the protection of private and family life.

VI. Another aspect should also be addressed when examining the claimed breach of Article 97 paragraph 1 subparagraph 1 1a of the Act on granting protection to foreigners. It must be recalled that the authorities explained that there was no interference with the appellant's family life because expulsion decisions were issued with respect to all members of the G. family. In her appeal in cassation the appellant held that in such a situation an expulsion decision issued with respect to one family member unacceptably anticipates the outcome of the procedures concerning the other family members. The appellant held that the same authority – the Head of the Office for Foreigners – in each of the five expulsion decisions concerning the appellant's family members argued that, in view of the fact, his decision will not result in family separation, and thus, it will not breach Article 97 paragraph 1 subparagraph 1 1a of the Act on granting protection to foreigners. Thus the appellant claimed that the authority did not treat the cases concerning her family members individually, but as if dealt with them jointly.

When responding to the argument, consideration must be given to the wording of Article 62 of the Code of administrative procedure, pursuant to which, in cases

where rights and duties result from the same factual state and from the same legal basis and where the same administrative authority is competent, a single procedure may be instigated and conducted with respect to more than one party. In the light of Article 7 paragraph 1 of the Act on Foreigners, procedures in cases not regulated by law are governed by the provisions of the Code of administrative procedure, unless otherwise provided by the law. The views presented in the legal doctrine on the nature of Article 62 of the Code of administrative procedure differ, but the prevailing opinion is that combining cases with the aim of dealing with them jointly does not mean that the cases lose their independent character (see A. Skóra, *Współuczestnictwo w postępowaniu administracyjnym*, Oficyna 2009, p. 297). A decision in an administrative case does not affect the legal situation of a party to a separate administrative case, formally dealt with together (B. Adamiak [in] B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego, Komentarz*, Warszawa 2009, p. 289). The Supreme Administrative Court concurs with the view, concluding that joint hearing of the cases of foreign family members may be justified, if the facts and reasons for expulsion are identical, which does not infringe the principle of separate evaluation of the situation of the foreigner to be expelled.

There are no reasons to conclude that the introduction by the legislator of the provision of Article 62 of the Code of administrative procedure was motivated by other intention than joint examination of separate cases and that it was intended to create a single case with multiple subjects. The linguistic and systemic interpretation of Article 62 of the Code of administrative procedure justifies the view that the provision, seen in the context of the provisions concerning the initial phase of administrative procedure, enables the authority to combine into a single procedure several cases which seem to be of the same type, i.e. cases in which the parties' rights and obligations ensue from the same factual situation and the same legal basis. This is because the application of Article 62 of the Code of administrative procedure does not depend on the multitude of parties, which is mentioned towards the end of the provision, but on the multitude of administrative cases, which is referred to in its initial part (A. Wróbel [in] M. Jaśkowska, A. Wróbel, *Kodeks postępowania administracyjnego, Komentarz*, Warszawa 2009, p. 358). However, it cannot be excluded that findings made during such a procedure may lead to a conclusion that the situation of its subjects is diversified, e.g. the procedure may reveal the circumstances set out in Article 89 paragraph 1 of the Act on Foreigners with respect to one or more subjects of the expulsion procedure that justify non-expulsion. On the other hand, the right granted to the subject (subjects) may require taking a positive decision also with respect to the other parties of the joint procedure, in view of the very need to respect the principle of respect for family

life, which may be interrupted as a result of negative decisions. For example, granting a tolerated residence permit to a spouse (parent) may result in the need to grant such a permit to the other spouse (child), if the denial of the permit would infringe the right to family life.

VII. The absence of a directive as to how the procedure carried out in accordance with Article 62 of the Code of civil procedure is to be finalised leads to divergent interpretation of the provision, also in terms of the views on the possibility of determining the legal situation of the parties to such a procedure by way of a single decision or multiple decisions. The regulation of the issue under the Code does not provide expressly that cases heard jointly can also be decided jointly. The combination of cases for joint hearing or for joint determination is also known in procedural regulations, for instance, the Law on procedure before administrative courts (Article 111 of the Act of 30 August 2002 Law on procedure before administrative courts / *Journal of Laws* No. 153, Item 1270, as amended/, hereinafter: Law on procedure before administrative courts). The divergent views among the representatives of the doctrine as to whether combining several separate administrative cases for joint examination in a single procedure should lead to the finalisation of such a procedure by a single administrative decision or rather by separate decisions for each of the cases, indicate difficulties as to providing a conclusive answer to such a question. The former solution is advocated by W. Chróścielewski and J.P. Tarno, who argue that concluding a case with a single decision ensures equal treatment of the parties to the procedure (W. Chróścielewski, J.P.Tarno, *Postępowanie administracyjne i przed sądami administracyjnymi*, Warsaw 2004, pp.121-122, cited by A. Skóra, op. cit., p. 298). The opposite view is advocated by B. Adamiak (B. Adamiak [in] B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego, Komentarz*, Warsaw 2009, p. 289) and Kmiecik (comments to judgment of the Supreme Administrative Court of 14 January 1993, SA/Wr 1408/92, published OPS 1994, z 12, Item 233, p. 561), who argue that several administrative cases combined into a single procedure should be concluded by separate decisions - in line with the "one case, one decision" principle. With respect to the above considerations, the author of the above publication dealing with the problem of co-participation in administrative procedures - A. Skóra - concludes that if the legislator has not specified that a joint administrative procedure should end with a single decision, addressed to all the co-participants, then the choice of the method of concluding the case, i.e. issuing a single decision addressed to all the co-participants or delivering separate decisions concerning their legal status, is left to the administrative authority. This should be assessed individually for each specific administrative procedure and considering the specificities of the jointly heard administrative cases.

Joint hearing of cases concerning members of the same family is undoubtedly justified by procedural expediency and economics. Such a type of procedure allows the authority to assess in a better way the relations between the different family members in terms of the reasons for granting a temporary residence permit listed in Article 97 paragraph 1 subparagraph 1a of the Act on granting protection to foreigners, and assume common findings as to the situation in the country to which the expulsion is to take place relevant in view of the reasons for granting a tolerated residence permit listed in Article 97 paragraph 1 subparagraph 1a of the Act on granting protection to foreigners, which also require examination within the framework of the expulsion procedure as a result of the wording of Article 89 paragraph 1 subparagraph 1 of the Act on Foreigners. Thus, by applying a joint procedure the relevant authority has better means of evaluating the family relations that potentially exist between the co-participants of the joint procedure. An assessment of the existence and nature of the bond between foreign family members with respect to whom the authority initiated an expulsion procedure to determine the existence of a bond that can be defined as family life within the meaning of the Convention, cannot disregard the factual and legal situation of the individual family members. The nature of the premise ensuing from Article 97 paragraph 1 subparagraph 1a of the Act on granting protection to foreigners (breach of the right to family life) determines the fact that the situation of an individual foreigner must be seen in relation to the situation of the other members of his/her family. In such circumstance, the authority is clearly authorised, in formal terms, to consider the legal situation of each participant in the procedure in relation to the situation of the parties to the cases heard in parallel under the same proceedings. The Supreme Administrative Court holds that the procedural situation analysed here justifies the issuance of decisions addressed separately to each party of the expulsion procedure conducted pursuant to Article 62 of the Code of administrative procedure. In other words, cases concerning the expulsion of foreigners who are in the same factual and legal situation may be heard in a single procedure (Article 62 of the Code of administrative procedure) to be concluded by separate decisions with respect to each individual foreigner. This conclusion is justified by the “single case, single decision” principle, but also by the fact that when separate decisions are issued with respect to the co-participants in a procedure conducted under Article 62 of the Code of administrative procedure, requesting a review by one of the parties of such a procedure may lead to the decisions issued in relation to the other co-participants of the procedure becoming final. In such a case, contesting a negative decision does not affect any positive decisions that may be delivered, which is not insignificant considering that in expulsion procedures a positive decision is that on granting a tolerated residence permit, i.e. a decision legalising the foreigner’s stay in Poland. Thus, the pro-

cedural independence of jointly heard administrative cases which are ended with separate decisions protects and stabilises the legal situation of the co-participant (or co-participants) for whom the procedure ends positively. Given the optional nature of the application of Article 62 of the Code of administrative procedure, adopting the procedure respects the principle expressed in Article 7 of the Code of administrative procedure, which requires considering the party's interest.

VIII. The claims of the appeal in cassation concerning non-complete establishment of the facts by selective assessment of the situation in A. should be considered incorrect. The appellant's arguments that she can be persecuted in the country of origin due to her father being a deserter are unconvincing. The picture of A. emerging from the documents attached to the case file does not indicate that such concerns are well founded. However, there is no doubt that due to the ongoing conflict the situation in the party's country of origin is not fully stable, yet it is hard to conclude on the basis of the material gathered in the case that there is a real threat of war in A. Therefore it was rightly concluded in the present case that the situation in the appellant's country of citizenship is not such as to warrant her fears of personal safety, which would constitute a basis for granting the party a tolerated permit under Article 97 paragraph 1 subparagraph 1 of the Act on granting protection to foreigners.

IX. Given that in the present case, both the challenged judgment setting aside the complaint and the contested decision were issued in breach of Article 8 of the Convention, the Supreme Administrative Court repealed the contested judgment and heard the appeal pursuant to Article 188 of the Law on procedure before administrative courts. The breach by the Head of the Office for Foreigners of Article 8 of the Convention was sufficient to uphold the appeal and set aside the contested decision pursuant to Article 145 § 1 subparagraph 1 letter a) of the Law on procedure before administrative courts. As the case is re-heard, it must be considered whether it is purposeful to hear the appellant's case jointly with the case of her family members, and assess within the framework of the procedure whether the nature of the bonds that link the appellant with Poland and with A. justify waiver of the expulsion decision in view of the need to protect the appellant's private life pursuant to Article 8 of the Convention.

The Supreme Administrative Court has ruled on the costs pursuant to Article 2003 of the Law on procedure before administrative courts.

In the light of all the foregoing, the Supreme Administrative Court ruled as in the operative part of the judgment.



JUDGMENT
of
THE SUPREME ADMINISTRATIVE COURT

of 29 May 2012
(II OSK 444/11)

Presiding Judge: NSA judge Alicja Plucińska-Filipowicz.

Judges: NSA judge Jerzy Stelmasiak (rapporteur), WSA judge Czesława Nowak-Kolczyńska.

The Supreme Administrative Court (*Naczelny Sąd Administracyjny*), after hearing in its General Administrative Chamber, on 29 May 2012, the appeal in cassation filed by Stowarzyszenie Ekologiczne “Światowid” (*Światowid Environmental Association*) with registered head office in Warsaw against judgment of the Voivodship Administrative Court in Warsaw (*Wojewódzki Sąd Administracyjny w Warszawie*) of 5 November 2010, File No. IV SA/Wa 1582/10, on the complaint of Stowarzyszenie Ekologiczne “Światowid” with registered head office in Warsaw against Decision of the Self-Regulatory Review Board in Warsaw (*Samorządowe Kolegium Odwoławcze w Warszawie*) of 22 June 2010, No. KOC/2235/Oś/09, on the inadmissibility of review 1. repeals the contested judgment and refers the case back to the Voivodship Administrative Court in Warsaw for retrial, 2. decides that the costs of the cassation proceedings will not be reimbursed.

Grounds

By its judgment of 5 November 2010, the Voivodship Administrative Court in Warsaw repealed the complaint of Stowarzyszenie Ekologiczne “Światowid” with registered head office in Warsaw against the decision of the Self-Regulatory Review Board in Warsaw of 22 June 2010 on the inadmissibility of review.

In the grounds of the judgment, the Court of first instance noted that in the contested decision of 22 June 2010 the Self-Regulatory Review Board in Warsaw decided on the inadmissibility of review as requested by Stowarzyszenie Ekologiczne “Światowid” with registered head office in Warsaw with respect to Decision of the Mayor of Warsaw of 26 March 2009 establishing the environmental requirements for authorising a project involving the construction of underground garages for more than 300 passenger vehicles in the framework of the construc-

tion of the office and services compound [...] at the intersection of [...] streets in the District of Włochy in Warsaw.

The procedure in the case was initiated on 10 April 2008, i.e. before the entry into force of the Act of 3 October 2008 on public access to information about the environment and environmental protection, public participation in environmental protection and environmental impact assessments (*Journal of Laws* No. 199, item 1227, as amended), hereinafter Act of 3 October 2008. Pursuant to Self-Regulatory Review Board in Warsaw of the Act, the proceedings in the present case is regulated by the provisions of the Act of 27 April 2001 Environmental Protection Law (*Journal of Laws* of 2008 No. 25, item 150), hereinafter Environmental Protection Law. – including the provisions concerning the participation of environmental organisation in proceedings conducted with public participation.

As was pointed by the Self-Regulatory Review Board in Warsaw, the authority competent for issuing decisions on environmental requirements is obliged to enable the public to participate in any proceedings requiring the preparation of an impact assessment report. Once the requirement of the preparation of an environmental impact report was imposed, the proceedings before the authority of first instance was open to the participation of environmental organisations and other social organisations (Article 33 paragraphs 1 and 1a of the Environmental Protection Law). Environmental organisations which volunteer to participate in a specific administrative procedure that requires public participation – justifying their participation by the territorial scope of their operation – and submit their comments or requests in the framework of the procedure, act as parties to such a procedure. The request to participate should be submitted by the environmental organisation at the time of the submission of comments or requests.

The Self-Regulatory Review Board in Warsaw pointed that the complaining Association did not participate in the proceeding in the first instance, i.e. it did not volunteer to participate in the proceedings and failed to submit any comments or requests as required in such a situation. Thus, it could not request an effective review, as a consequence of which such review was inadmissible.

The complaint against the above decision was filed by the complaining Association.

On repealing the complaint, The Court of first instance concluded that in the current case it was crucial to interpret Article 153 paragraphs 1 and 2 of the Act of 3 October 2008. The Court of first instance stressed that the procedure concer-

ning the issuance of a decision on environmental requirements is initiated upon the request of the entity undertaking a given project. The entity is not the sole participant of the proceedings concerning the issuance of such a decision, as under the Environmental Protection Law also other entities may take part in it.

The participation of environmental organisations in a procedure concerning the issuance of decisions on environmental requirements is determined by Article 53 of the Environmental Protection Law, which provides that the authority competent for issuing decisions on environmental requirements is obliged to enable the public to participate in a procedure that requires an impact assessment report to be drafted. At the same time, the Court of first instance stressed that in order to be admitted to such proceedings, the Association was required to fulfil the other requirements specified in Article 33 of the Environmental Protection Law.

According to the above provision of the Environmental Protection Law, the participation of an environmental organisation, i.e. its being admitted to the procedure, requires the organisation to demonstrate that the category of the case requires public participation and that the territorial scope of its activity allows it to participate and that the organisation has volunteered to participate by submitting comments and requests. At the same time, an environmental organisation willing to participate in administrative proceedings in the capacity of a party must fulfil the formal requirement of volunteering to participate in the proceedings and, at the same time, submitting comments and requests. Thus, the organisation was required to comply jointly with the above requirements, which, according to the Court, was explicitly indicated by the cited provision.

The Court of first instance stressed that, despite fulfilling the first two requirements, the complaining Association failed to volunteer to participate in the case and submit comments or requests. Consequently, the Court of first instance concluded that the complaining Association did not participate in the procedure that ended with the decision of the Mayor of Warsaw of 26 March 2009, hence it lacked legitimacy allowing it to request the review.

According to the Court of first instance, it is irrelevant that under the currently applicable Act of 3 October 2008 the rules for the participation of environmental organisations in procedures related to investment projects have been amended, allowing such organisation to request review, even if they did not participate in the first-instance procedure. The Court of first instance concluded that it is also unjustified for the Association to claim that the procedure was conducted in breach of the provisions of the Aarhus Convention of 25 June 1998 on Access to Infor-

mation, Public Participation in Decision-making and Access to Justice in Environmental Matters (*Journal of Laws* of 2003 No. 78, item 706), and that the claim concerning a breach of Article 10a of Directive 85/337/EC of 27 June 1985 cannot be sustained. The Court of first instance stressed that the Association failed to demonstrate how the provisions of the convention and directive were breached.

In the opinion of the Court of first instance, the Aarhus Convention is not an international convention that can be directly applied, without the need to revise the legal system of the ratifying state. This appears from the manner the provisions of the Convention are formulated. It is addressed to the Parties, i.e. states. The idea underlying the Convention is to enable the public to participate in environmental proceedings. The provisions of the Aarhus Convention oblige the ratifying states to take legislative action and adopt laws to implement its provisions, so that the public is capable of participating in environmental-related proceedings. The Polish legislator has created such legal framework.

At the same time, the Court of first instance underlined that, by establishing certain recommendations for the Parties, the provisions of the Convention accept certain cases of divergence resulting from the national law. This appears from Article 9 (2) of the Convention, in which the Convention makes the following reservation: “where so provided for under national law”. A similar text can be found in Article 9 (3). Furthermore, the Court of first instance highlighted that the above provision of the Convention states that: “The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.”

In the current case, such a requirement did exist under Polish law. In order to be able to have recourse to the review procedure, the environmental organisation was required, at the time, to submit a request to participate in the investment-related procedure in the first instance and, at the same time, submit comments or requests, which the complaining Association failed to do.

The Court of first instance responded with identical remarks to the claim of a breach of Article 10a of Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment. The provision also requires that the public be enabled to participate in such procedure, but at the same time, it does not preclude the possibility of imposing by the Mem-

ber State of a requirement to exhaust the preliminary review procedure before an administrative authority prior to recourse to judicial procedures.

The appeal in cassation against the above judgment was filed by the complaining Association.

It claimed breaches of substantive law:

Firstly, of Article 33 paragraphs 1 and 1a of the Environmental Protection Law as applicable before 15 November 2008, read in conjunction with Article 153 paragraphs 1 and 2 of the Act of 3 October 2008, due to their erroneous interpretation according to which the Association lacked active legitimacy to request the review, as it failed to participate in the case and it failed to submit comments or requests, while the Association was not obliged to fulfil these requirements.

Secondly, of Article 9 (1), (2), (3), (4) and (5) of the Aarhus Convention, read in conjunction with Article 91 paragraphs 1 and 2 of the Constitution of the Republic of Poland, due to their erroneous interpretation according to which the Convention is not an international agreement that can be applied directly, with no need for the legal system of the state which signed and ratified the Convention to be revised.

Thirdly, of Article 1 (2) and Article 10a of Council Directive 85/337/EEC of 27 June 1985 as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, by their non-application in a situation when, before 15 November 2008, there was an inconsistency between national and Community law.

Furthermore, the Association claimed a breach of procedural provisions - Article 145 § 1 subparagraph 1 letter c) of the Act of 30 August 2002 Law on Procedure before Administrative Courts (*Journal of Laws* No. 153, item 1270, as amended), read in conjunction with Article 134 of the Code of administrative procedure, which significantly affected the outcome of the case.

The Association requested the contested judgment to be repealed in full and the case to be referred back for retrial.

The Supreme Administrative Court considered the following:

In the light of Article 174 of the Act of 30 August 2002 Law on Procedure before Administrative Courts (*Journal of Laws* of 2012, item 270, as amended, hereinafter the Law on Procedure before Administrative Courts) – an appeal in cassation can be based on the following:

1) a breach of substantive law due to its erroneous interpretation or misapplication,

2) a breach of procedural provisions, if such misapplication could significantly affect the outcome of the case.

However, it must be stressed that the Supreme Administrative Court is bound by the fundamental rules governing an appeal in cassation, as pursuant to Article 183 § 1 of the Law on Procedure before Administrative Courts it hears cases within the limits of the appeal in cassation, addressing *ex officio* exclusively the nullity of procedure. If then there are no reasons for considering a procedure to be null, as specified in Article 183 § 2 of the Law on Procedure before Administrative Courts (and there are no such reasons in the case under review), the Court is bound by the limits of the appeal in cassation. This means that it is not authorised to reformulate the claims of an appeal in cassation to make them more specific, but instead it is authorised to examine the contested decision within the limits presented in the appeal in cassation filed.

In assessing, subject to the above limits, the justifiability of the appeal in cassation in the present case, it must be concluded that the following claims presented therein are well-founded.

Firstly, in the present case, it is considered right to claim that the Court of first instance breached Article 1 (2), in conjunction with Article 10a, of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ L 175, p. 40), as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ L 156) of 15 June 2003 due to the non-application of the article, despite the fact that before 15 November 2008 there was an inconsistency between national and Community law. This appears from the fact that the fundamental issue to be

resolved here consists in conducting a legal assessment to determine whether the provision of Article 33 paragraphs 1 and 1a of the Act Environmental Protection Law, which may be applicable in the current case, takes precedence over Article 10a of the above Directive. The latter provides that Member States shall ensure that, in accordance with the relevant national legal system, members of the public who: have legitimate interest or who possibly claim impairment of law, where administrative procedural law of a Member State requires this as a precondition, have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive. Moreover, it is for the Member States to determine at what stage the decisions, acts or omissions may be challenged. In turn, what constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To that end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1 (2) shall be deemed sufficient for the purpose of point (a) of this Article. Such organisations are also deemed to have rights capable of being impaired for the purpose of point (b) of this Article.

However, the provisions of the Article do not exclude the possibility of a preliminary review procedure before an administrative authority and do not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

In order to further the effectiveness of the provisions of this Article, Member States are obliged to ensure that practical information is made available to the public on access to administrative and judicial review procedures.

Moreover the directive was to be transposed into national law by 25 June 2005 at the latest. This was done by the Act of 18 May 2005 amending the Environmental Protection Law Act and certain other acts (*Journal of Laws* No. 113, item 954), which entered into force on 28 July 2005.

After the above revision, Article 32 paragraph 1 of the Environmental Protection Law provided that prior to the issuance of a decision requiring public participation, the competent administrative organ should announce the publication, in a generally available register, information about the request for the issuance of such a decision and about the possibility of submitting comments and requests, specifying, at the same time, the place and a 21-day deadline for the submission,

and in cases referred to in Article 60 paragraph 1 subparagraph 1, it should also inform the public of any pending proceedings with respect to cross-border environmental impact.

On the other hand, Article 33 paragraph 1 of the Environmental Protection Law Act clearly provided that it is only the environmental organisations which volunteer to participate in a specific administrative procedure requiring public participation - justifying their involvement by the territorial scope of their operation - and which have submitted their comments or requests in the framework of the proceedings that can act as parties to such proceedings (Article 31 § 4 of the Code of administrative procedure does not apply). This means that the participation in the proceedings is limited by a deadline, and in the case of an environmental organisation, also by its area of operation and by the requirement to submit comments and requests within prescribed time-frames.

Therefore the European Commission concluded that the term “public concerned” referred to in Article 1 (2) of Directive 85/337/EEC was transposed incorrectly, which led to substantial broadening of the scope of the rights of environmental organisations in administrative procedures with public participation and in procedures concerning environmental impact assessments (see the government’s Memorandum of Understanding for the draft Act on public access to information about the environment and environmental protection, participation of the public in environmental protection and environmental impact assessments). On the other hand, of course, the directive was fully transposed in Article 44 of the cited Act of 3 October 2008.

Thirdly, as is prescribed by the legal norm in Article 153 of the Act of 3 October 2008, also the provisions of the Environmental Protection Law Act should be applied, i.e. Article 33 paragraphs 1 and 1a of the Act, even though the Act of 18 May 2005 amending the Environmental Protection Law Act and certain other acts did not fully transpose Council Directive 85/337/EEC, as it introduced certain restrictions to the access of environmental organisations to the procedure.

It should also be recalled that the provisions of the directive are addressed to Member States and specify the objective to be achieved within a prescribed deadline. However, the choice of the method and manner of transposition is left to the Member States. Yet, if the provisions of the directive are not implemented into the national legal order, they can be invoked in a relationship between an entity and the state if they are precise, unconditional and the deadline for the transposition of the directive to national law has expired.

Furthermore, it appears from the European Court of Justice case-law that in such cases the applicable rule is that EU law takes precedence over national law. It also appears from the case law of the European Court of Justice that each entity may derive its rights vis-a-vis the state from the provisions of a given directive, if the provisions are clear and unconditional, the deadline for their implementation has expired, and the Member State concerned has failed to implement them or failed to implement them in full or correctly. In the current case, beyond any doubt, Directive 85/337/EEC amended by Directive 2003/35/EC of the European Parliament and of the Council, was not implemented in full by the revision of the Environmental Protection Law Act and certain other acts of 18 May 2005, because the full transposition was made only on 15 November 2008, i.e. on the day of entry into force of the Act of 3 October 2008, and as regards the participation of the environmental organisation in the administrative proceedings concerned, this was done under Article 44 of the Act. Meanwhile, the deadline for the transposition of the directive expired on 25 June 2005 (Article 6 of Directive 2003/35/WE of the European Parliament and of the Council of 26 May 2003 – OJ L 2003.156.17).

In turn, Article 153 of the Act of 3 October 2008 provides that cases instigated but not resolved with a final decision are governed by the provisions of the Environmental Protection Law Act, i.e. in the present case, by Article 33 paragraphs 1 and 1a of the Environmental Protection Law Act.

However, according to the panel of the Supreme Administrative Court, if, as in the current case, there is an inconsistency between Article 10a of the Directive and Article 33 paragraphs 1 and 1a of the Environmental Protection Law Act, precedence must be given to the application of EU law. In the case under examination, this means that the provisions of Article 33 paragraphs 1 and 1a of the Environmental Protection Law Act, as applicable as at 15 November 2008, in the light of Self-Regulatory Review Board in Warsaw of the Act of 3 October 2008, will not be applicable to the participation of the environmental organisation concerned in the administrative proceedings in the case, because it is the provision of Article 10a of Council Directive 85/337/EEC, in the wording as applicable after its revision by Directive 2003/35/WE of the European Parliament and of the Council (OJ L 2003.156.17) that takes precedence (compare judgment of the European Court of Justice of 15 October 2009 in Case C-263/08). This means that the Court of first instance breached the provisions of substantive law to an extent affecting the outcome of the case in view of the requirement of Article 145 § 1 subparagraph 1 letter a) of the Law on Procedure before Administrative Courts. On the other hand, the enforcement of the rights ensuing from Article 9 (1), (2), (3), (4) and (5) of the Aarhus Convention of 25 June 1998 concerns

public participation, i.e. participation of the ‘public concerned’. Consequently, this cannot be understood, in the Polish law, as tantamount to considering an entity as a party to a given administrative procedure in view of Articles 28 and 29 of the Code of Administrative Procedure or as the participation as a party in view of Article 31 § 3 of the Code of Administrative Procedure. In the present case, as considered above, the right of the environmental organisation within this substantive scope, must thus be derived from the rule ensuing from the provision of Article 10a of the cited Directive, and after 15 November 2008, also from Article 44 of the Act of 03 October 2008.

Fourthly, considering the above circumstances related to the non-application, in the current case, of Article 10a of Directive 85/337/EEC following its revision of 2003, the Court of first instance also breached Article 145 § 1 subparagraph 1 letter c) of the Law on Procedure before Administrative Courts, read in conjunction with Article 134 of the Code of Administrative Procedure, by ruling on the inadmissibility of review, as the law did not provide any reasons in this respect justifying the application of the provision.

In view of the above and pursuant to Article 185 § 1 of the Law on Procedure before Administrative Courts, the Supreme Administrative Court has ruled as in the operative part of the judgment. The Court order that the costs of the cassation procedure will not be awarded pursuant to Article 207 § 2 of the Law on Procedure before Administrative Courts, after concluding that in the present proceedings there is a well-founded case, as provided for in the provision.

RESOLUTION
of
THE SUPREME ADMINISTRATIVE COURT

of 30 May 2012
(II GPS 2/12)

President: President of the Commercial Chamber of the Supreme Administrative Court NSA judge Andrzej Kisielewicz (rapporteur)

NSA judges: Gabriela Jyż (co-rapporteur), Janusz Drachal, Maria Myślińska, Anna Robotowska, Krystyna Anna Stec, Janusz Zajda.

The Supreme Administrative Court, hearing the case brought by the appeals in cassation submitted by P. M. and Director M. of the Regional Branch Office of the Agency for Restructuring and Modernisation of Agriculture (*Agencja Restrukturyzacji i Modernizacji Rolnictwa*) in W. against the judgment of the Voivodship Administrative Court (*Wojewódzki Sąd Administracyjny*) in W. of 26 May 2010, File No. VIII SA/Wa 156/100, in the case brought by the appeal in cassation of “A. E. P.” Spółka z o.o. in B. and P. M. – partners of “P. A.” s.c. (civil law partnership) against Decision of Director M. of the Regional Branch Office of the Agency for Restructuring and Modernisation of Agriculture in W. of [...] January 2010, No. [...], on agricultural payments, after examining at an open session on 30 May 2012, with the participation of Prosecutor Lucjan Nowakowski of the Attorney General Office, of the following legal question submitted by the panel of judges of the Commercial Chamber of the Supreme Administrative Court by Decision of 10 January 2012, File No. II GSK 1290/10, pursuant to Article 187 § 1 of the Act of 30 August 2002 Law on procedure before Administrative Courts, (*Journal of Laws* of 14 March 2012 item 270), to the panel of seven judges of the Supreme Administrative Court: “In the case of a group of individuals bound by a civil law partnership agreement, is the status of an agricultural producer as defined in Article 3 subparagraph 3 of the Act of 18 December 2003 on the national system for keeping records of producers, records of farms and records of applications for the award of payments (*Journal of Laws* of 2004 No. 10, item 76, as amended) available to the civil law partnership, partners of the civil law partnership or a partner of the civil law partnership referred to in Article 12 paragraph 5 of the Act?”, has taken the following resolution: In the case of a group of individuals bound by a civil law partnership agreement, the status of an agricultural producer within the meaning of Article

3 subparagraph 3 of the Act of 18 December 2003 on the national system for keeping records of producers, records of farms and records of applications for the award of payments (*Journal of Laws* of 2004 No. 10, item 76, as amended) is available to the civil law partnership.

Grounds

The legal issue referred to the extended panel of the Supreme Administrative Court, which raises serious doubts expressed in the question asked in the operative part of the decision, was submitted in connection with the following facts:

In response to Application of [...] May 2008 filed by “P. A.” spółka cywilna (P.A. civil law partnership) with registered head office in B., signed by one of its two partners – P. M., the Head of the Powiat Branch Office (*Kierownik Biura Powiatowego*) of the Agency for Restructuring and Modernisation of Agriculture (ARiMR) in B., by Decision of [...] June 2009, granted the partners of the partnership – P. M. and A. E. P. Spółka z o.o. with registered head office in B., the agri-environmental payment for 2008. The payment was calculated in accordance with § 8, § 14 and Annex No. 4 of the Decree of the Minister of Agriculture and Rural Development of 28 February 2008 on specific conditions and procedure for granting financial assistance under the “Agri-environmental Programme”, which is covered by the Rural Development Programme for the years 2007–2013 (*Journal of Laws* No. 34, item 200), hereinafter Agri-environmental Decree.

Acting on behalf of P. A. spółka cywilna, P. M. filed an appeal against the decision, arguing that the amount of the payment was calculated erroneously. Subsequently, by letter of [...] August 2009, P. M. submitted a declaration on behalf of the civil law partnership that he withdraws the appeal.

However, Director M. of the Branch Office of ARiMR in W., by Decision of [...] January 2010, taken pursuant to Article 138 paragraph 1 subparagraph 2 of the Act of 14 June 1960 of the Code of Administrative Procedure (consolidated text: *Journal of Laws* of 2000 No. 98, item 1071, as amended, hereinafter: Code of Administrative Procedure), repealed the decision and discontinued the proceedings before the authority of first instance. In the ‘grounds’ of the decision, it concluded that there were no reasons for initiating and conducting administrative proceedings in the case, because a civil law partnership does not have legal personality, so it is not entitled to receive the payment requested in the application. The review authority held that it is the partners who are subject to the rights and obligations ensuing from the relationships inherent in a civil law partnership, but

the partners of spółka cywilna P. A. – P. M. and A. E. P. Sp. z o.o. – are registered in the records of agricultural producers maintained by ARiMR as independent agricultural producers (each of them being registered separately), as a result of which the authority cannot grant the payment to the partners. Consequently, the application submitted on behalf of the partnership cannot be considered an application of its partners.

The Voivodship Administrative Court in W. granted the appeal against the decision. In the ‘grounds’ of the judgment the Court stated, before all, that the contested decision was delivered in breach of Article 139 of the Code of Administrative Procedure (i.e. prohibition of *reformationis in peius*). According to the Court, another reason for concluding that the authority of second instance breached the prohibition of *reformationis in peius* is the fact that the partner of the civil law partnership withdrew the appeal.

According to the Court of first instance, there were also no reasons for considering the proceedings in the case devoid of purpose (and for discontinuing the proceedings pursuant to Article 138 § 1 subparagraph 2 of the Code of Administrative Procedure). The Court held that having legal personality under civil law is not required for an entity to be a party of administrative-law relationships. In the light of Article 29 of the Code of Administrative Procedure, organisational units with no legal personality, e.g. civil law partnerships, can be parties to administrative proceedings, if specific provisions grant them such status. According to the Court, the following provisions of substantive law allow a civil law partnership to apply for agri-environmental payments: Article 39 (2) of Council Regulation (EC) No. 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ L 277, 21.10.2005, p. 1, as amended), hereinafter Regulation No. 1698/2005, and Article 10 paragraph 1 subparagraph 1 of the Act of 7 March 2007 on supporting rural development with the participation of funds of the European Agricultural Fund for Rural Development (*Journal of Laws* No. 64, item 427), hereinafter: Act on supporting rural development; the assistance referred to in the Act also covers assistance in the framework of agri-environmental programmes and is granted upon applications of natural persons, legal persons or organisational units with no legal personality. Moreover, pursuant to § 2 paragraph 1 of the Agri-environmental Decree, agri-environmental payments are granted to a farmer as defined in Article 2 (a) of Council Regulation (EC) No. 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending regulations (...) (OJ L 270, 21.10.2003, p. 1 as amended; Polish Special Edition of 2004

Chapter 3, Title 44, p. 486, as amended), hereinafter: Regulation No. 1782/2003, among others, if the farmer has been assigned an identification number pursuant to the provisions on the national system for keeping records of producers, records of farms and records of applications for the award of payments. According to the latter provision, a “farmer” means a natural or legal person, or a group of natural or legal persons, whatever legal status is granted to the group and its members by national law, whose farm is situated within Community territory, as defined in Article 299 of the Treaty, and who exercise an agricultural activity. According to the Voivodship Administrative Court, a civil law partnership is an organisational unit with no legal personality, and thus it can be considered a group of natural or legal persons referred to in the provisions.

However, the Court of first instance shared the view of the authority of first instance that Article 12 paragraph 5 of the Act of 18 December 2003 on the national system for keeping records of producers, records of farms and records of applications for the award of payments (*Journal of Laws* of 2004 No. 10, item 76, as amended), hereinafter: Act on the national system for keeping records of producers, does not support the view that the civil law partnership in question has legal personality with respect to the agri-environmental payment claimed, because the provision merely regulates the question of assigning an identification number, among others, to agricultural producers operating in the form of a civil law partnership. Therefore, according to the Court the application for the award of an agri-environmental payment should have been submitted by one partner of the civil law partnership – the one who has been assigned an identification number, upon consent of the other partners. The very same partner is awarded the payment. Meanwhile, it does not appear from the case file – and the authority failed to clarify – who is registered in the records of agricultural producers under Identification No. [...] indicated in the civil law partnership’s application for payment. As a result, the Court ordered that, when re-examining the case, the authority of second instance should determine, first of all, who is the agricultural producer registered in the records under the identification number indicated in Application of [...] May 2008, and then it should deliver a substantive and not formal decision on granting or refusing to grant the appellants the agricultural payment for 2008.

Two appeals in cassation were filed against the judgment of the Court of first instance.

I. In his appeal in cassation, Director M. of the Regional Branch Office of the Agency for Restructuring and Modernisation of Agriculture in W. requested the contested judgment to be repealed in full and the case referred back for retrial

or the contested judgment to be repealed and the appeal set aside. He also requested the costs to be reimbursed as prescribed by the law.

Invoking Article 174 subparagraphs 1 and 2 of the Act of 30 August 2002 “Law on Procedure before Administrative Courts” (consolidated text: *Journal of Laws* of 14 March 2012, item 270) hereinafter: Law on Procedure before Administrative Courts, he argued that the judgment was delivered in breach of the following procedural provisions to an extent affecting the outcome of the case:

- Articles 29 and 30 of the Code of Administrative Procedure, due to its erroneous interpretation leading to a conclusion that a civil law partnership has legal personality and is a party to administrative proceedings; it appears from the provisions, as well as from the case law of the Supreme Administrative Court, that a civil law partnership, as “a legal person with no corporate status,” does not have legal personality and is not a party to administrative proceedings; nor does it acquire the attribute under the specific provisions pursuant to which the payments concerned are awarded,

- Article 33 and Article 1 of the Act of 23 April 1964 the Civil Code (*Journal of Laws* No. 16, item 93, as amended), hereinafter: the Civil Code, in conjunction with Article 30 of the Code of Administrative Procedure, due to their erroneous interpretation as a result of which the civil law partnership was granted legal personality, and thus also an administrative capacity, as a consequence of which it obtained the status of a party to the proceedings,

- Article 138 § 1 subparagraph 2 of the Code of Administrative Procedure, due to its defective application and conclusion that the appellant, i.e. the authority of second instance, did not have any legal basis to issue a decision repealing the decision of the Head of the Poviát Branch Office of the Agency for Restructuring and Modernisation of Agriculture in B., considering that the authority of first instance issued an incorrect, i.e. unlawful decision to grant the payment to the civil law partnership, which could not be an addressee of such a decision,

- Article 139 of the Code of Administrative Procedure, due to its incorrect application, because the decision in question was a formal and not substantive decision, so it could not be detrimental to the party,

- Article 105 § 1 of the Code of Administrative Procedure, due to its erroneous interpretation leading to a conclusion that the proceedings before the authority

of second instance did not become devoid of purpose given that the party to the proceedings conducted by the appellant was a civil law partnership,

- Article 145 § 1 of the Law on Procedure before Administrative Courts, due to its incorrect interpretation and application by concluding that the contested decision was in breach of procedural provisions to an extent affecting the outcome of the case, although the provision does not establish a basis for granting an appeal against the decision,

- Article 153 of the Law on Procedure before Administrative Courts, due to its misapplication, even though in its judgment VIII SA/Wa 564/08, the Voivodship Administrative Court in W. ruled that a civil law partnership does not have legal personality,

- Article 141 § 4 of the Law on Procedure before Administrative Courts, due to its misapplication by formulating such guidance to the authority that was to re-examine the case that the Court did actually take a position on the merits, because it ordered that the authority issue a substantive and not formal decision on awarding or denying the payment to the appellants.

In justifying the main claim of the appeal in cassation that a civil law partnership does not have a legal capacity, the appellant invoked the case law of the Supreme Court and of administrative courts. A civil law partnership does not have legal personality; only its partners can act on its behalf. However, in the present case the application for the award of payment was filed by a civil law partnership. Consequently, the review authority correctly applied Article 138 paragraph 1 subparagraph 2 of the Code of Administrative Procedure, as there was no legal basis for it to decide on the merits of the case. In addition, the above decision of the review authority could not be treated as delivered to the detriment of the party, because it was not a substantive decision, and only a substantive decision could potentially constitute a breach of Article 139 of the Code of Administrative Procedure.

The review authority also held that an entity that is a registered agricultural producer cannot file an application on behalf of another agricultural producer – a civil law partnership. He may only act on his own behalf.

II. P. M. based his appeal in cassation on Article 174 subparagraph 2 of the Law on procedure before Administrative Courts, and requested the judgment to be changed in so far as it contained erroneous legal evaluation and guidance

as to further procedure. He claimed that the judgment breached Article 141 § 4 of the Law on procedure before Administrative Courts, due to its erroneous legal assessment and erroneous guidance as to further procedure, which resulted from defective interpretation and application of Article 12 paragraph 5 of the Act on the national system for keeping records of producers.

When stating the grounds for the appeal in cassation the appellant held that in the case of a civil law partnership all its partners are eligible for payment as a group of natural or legal persons, i.e. a group falling within the scope of the definition of a farmer in Article 2 (a) of Regulation No. 1782/2003. Pursuant to Article 39 (2) of Regulation No. 1698/2005 agri-environmental payments are available to farmers. According to the appellant, it follows from the above regulations that natural and legal persons represent a separate category of entities entitled to the payments than groups of such people, even if the latter act independently, on their own behalf, as beneficiaries of agricultural payments. In the light of the above principles and national law, which treats civil law partnerships as contractual relationships, decisions on agricultural payments granted to civil law partnerships are issued with respect to all the partners, indicating the name of the partnership (such indication of the party will include both the group of persons concerned and all its individual members), and are served on the authorised partner, as registered in the records of producers, unless a special representative is appointed by way of a separate procedure.

According to the appellant, it is unjustified to claim that an application may only be effectively filed by the partner who was assigned an identification number linked to the partnership. Thus, it is unfounded to claim that the payment is to be granted to such a partner, who may not necessarily be a farmer within the meaning of the cited legal provisions.

The appellant submitted that assigning an identification number to a partner of a civil law partnership means that the records of agricultural producers have a separate entry, listing all significant events linked to the civil law partnership concerned, understood as a separate farmer, i.e. a separate agricultural producer within the meaning of Article 3 subparagraph 3 letter b) of the Act on the national system for keeping records of producers. A different interpretation of the fulfilment of the condition set out in § 2 paragraph 1 subparagraph 1 of the Agri-environmental Decree would mean limiting the availability of the payments for a specific category of farmers, i.e. groups of persons forming a civil law partnership.

When hearing the appeals in cassation, the Supreme Administrative Court expressed its doubt as to who should be considered an agricultural producer in the present case within the meaning of Article 3 paragraph 3 of the Act on the national system for keeping records of producers – the civil law partnership, its partners or the partner of the civil law partnership who was assigned an identification number upon consent of the other partners.

The case under review concerns so-called agri-environmental payments, which are granted to farmers. Therefore it must be answered who is the farmer entitled to such a payment in the case of agricultural activity carried out by a civil law partnership. The Court's question may be considered relevant to the present case, as clarifying who is the agricultural producer within the meaning of Article 3 subparagraph 3 of the above Act on the national system for keeping records of producers will make it possible, at the same time, to clarify who can be considered a farmer entitled to agri-environmental payments. Incidentally, the administrative authority of the second instance explained its view that the partnership's application for the award of the payment cannot be treated as an application filed by its partners, because both partners feature in the records as independent agricultural manufacturers. It held that a person registered in the records as an independent agricultural producer cannot obtain a payment as a partner of a civil law partnership. Thus, there is a direct relation between being registered in the records and being entitled to agri-environmental payments.

According to the panel of the Supreme Administrative Court that submitted the legal question, as a matter of fact, the question requires establishing whether a civil law partnership has a legal capacity, and thus also an administrative capacity. Consequently, after in-depth deliberations and based on literature and case law, the Court supports the view that a civil law partnership does not have legal personality. It does not have a legal capacity under separate legislation (Article 33 of the Civil Code). Consequently, it cannot assume rights and obligations as an independent entity. Thus, the Court seems to reject the first of three possibilities of granting a civil law partnership the status of an agricultural producer pursuant to Article 3 subparagraph 3 of the Act. However, it seems to support the view that each partner of a civil law partnership can be considered an agricultural producer within the meaning of Article 3 subparagraph 3. If a civil law partnership is just an agreement between the partners on conducting joint activity (in this case agricultural activity), then "an agreement" cannot be a holder of a farm and cannot conduct agricultural activity. Thus, in the present situation, a holding may be held or co-held by partners bound by a civil law partnership agreement, and consequently, such partners can be granted the status of an agricultural producer.

As a result, partners (natural persons and legal persons) bound by joint assets can be considered to be legal entities. According to the Court, the view that a civil law partnership is not, in the light of the above provisions, an organisational unit without legal personality is also evident from the regulations on requesting an entry into the records of producers. The provision of Article 12 paragraph 5 of the Act in question explicitly refers to agricultural producers acting through a civil law partnership. It appears from the very wording of the provision that according to the law, a civil law partnership is just a form under which agricultural producers, i.e. civil law partnership partners, carry out their activity. The use by the legislator of a plural form in the provision when defining agricultural producers seems to suggest that partners have the status of an agricultural producer in so far as they comply with the conditions laid down in Article 3 subparagraph 3 of the Act on the national system for keeping records of producers. The issue of assigning an identification number, which is governed by Article 12 paragraphs 5 and 6 of the Act, merely indicates that in the case of agricultural producers that are partners of a civil law partnership, an identification number assigned to one of them serves to identify the entities applying for a relevant agricultural payment, including groups of natural and legal persons acting under a civil law partnership agreement.

According to the Court, it can also be held that a partner of a civil law partnership, as referred to in Article 12 paragraph 5 of the Act on the national system for keeping records of producers, can be considered an agricultural producer within the meaning of Article 3 paragraph 3 of the Act. This follows from: § 2 paragraph 1 subparagraph 1 of the Agri-environmental Decree, according to which a farmer is entitled to a payment, if he was assigned an identification number. In the case of agricultural producers acting through a civil law partnership, it is the partner assigned an identification number pursuant to Article 12 paragraphs 5 and 6 of the Act that is such a farmer. Also Article 18 paragraphs 2 and 3 of the Act on supporting rural development provides that when land is held jointly, assistance is granted to the co-holder with respect to whom the other co-holders have expressed a written consent and who is registered in the records. The partner is the sole entity entitled to file the application referred to in Article 10 paragraph 1 subparagraph 1 of the Act on supporting rural development and to receive a payment. The fact that in such a case the partners of a civil law partnership are bound by its articles of association is only relevant in the context of their subsequent mutual settlements of the payment.

To support the view, the Court invoked the disparate and clear - in its opinion - wording of § 4 and § 6 subparagraph 3 of the Decree of the Minister of Agriculture and Rural Development of 17 October 2007 on specific conditions and pro-

cedure for granting financial assistance under the “Agri-environmental Programme” (*Journal of Laws* No. 193, item 1397), which explicitly states that partners of a civil law partnership can apply for assistance, if each of the partners meets the conditions for applying for assistance as set out in that legislative act, and that assistance is granted to partners of a civil law partnership, if the conditions laid down in § 4 are met, and if one of the partners, who obtained the consent of the other partners, has been assigned an identification number.

According to the Court, this view can also be supported in the light of Article 12 paragraphs 4 and 6 of the Act on the national system for keeping records of producers. Pursuant to these provisions, spouses and entities that co-hold a farm are assigned a single identification number, i.e. the number is assigned to one of the spouses or co-holders. Agricultural payments are available to the spouse or co-holder who was assigned an identification number in line with the above provisions. The settlement of such receivables between spouses and co-holders is not regulated by the decision on the award of a payment.

The Prosecutor General expressed his view on the matter, and requested, by letter of [...] May 2012, the following resolution to be adopted: “In the case of a group of individuals bound by a civil law partnership agreement, the status of an agricultural producer within the meaning of Article 3 subparagraph 3 of the Act on the national system for keeping records of producers is available to a civil law partnership”.

When presenting the grounds for his view, he explained that, considering the definition of a farmer in Article 2 (a) of Regulation No. 1782/2003, it can be concluded that a civil law partnership is an agricultural producer (a farmer) within the meaning of Article 3 subparagraph 3 of the Act on the national system for keeping records of producers, but only on condition that the partnership is considered an organisational unit with no legal personality, as defined in the above provision. The Prosecutor General did not have any doubts as to the fact that a civil law partnership does not have legal personality, although it is generally considered to be a corporation, i.e. an association of persons committed to the delivery of specific common goals. A civil law partnership is a specific organisation, i.e. an individualised and concrete organisational entity. The partnership’s assets are the partner’s joint assets, separate from their personal assets.

At a hearing held on 30 May 2012, the Prosecutor General changed his view and requested the following resolution to be adopted: “In the case of a group of individuals bound by a civil law partnership agreement, the status of an agricultural producer within the meaning of Article 3 subparagraph 3 of the Act on the national system for keeping records of producers is available to the partners of a civil law partnership”.

The panel of seven judges of the Supreme Administrative Court considered the following:

The legal question submitted for determination directly concerns the interpretation of Article 3 subparagraph 3 of the Act on the national system for keeping records of producers, which was neither used by the Court of first instance to rule on the legal issue submitted nor to interpret the other provisions examined by the Court. Despite it, the interpretation of Article 3 subparagraph 3 of the Act remains within the competence of the Supreme Administrative Court examining the appeal in cassation (Article 183 § 1 of the Law on Procedure before Administrative Courts,), since the answer to the question who is an agricultural producer (farmer) within the meaning of Article 3 subparagraph 3 of the Act on the national system for keeping records of producers will permit determining in the present case the entity entitled to agri-environmental payments (a civil law partnership or its partners). The Court submitting the legal question duly documented the differences in the treatment of civil law partnerships within existing civil law relationships. On that basis, it must be held that the requirements laid down in Article 187 § 1 of the Law on procedure before Administrative Courts, were fulfilled.

The panel of seven judges of the Supreme Administrative Court concludes that the question of the lack of legal personality on the part of a civil law partnership is unquestionable and thus it will be disregarded in later deliberations. Furthermore, the Court does not have any doubts as to the fact that a civil law partnership does not have a legal capacity. Thus, there are no grounds for placing an “abstract” civil law partnership among organisational units that are not legal persons but have a legal capacity under the law (Article 331 § 1 of the Civil Code).

Article 3 subparagraph 3 of the Act on the national system for keeping records of producers, which raised the doubts of the Court submitting the question, provides that an agricultural producer, as referred to in the Act, means:

a natural person, legal person or an organisational unit with no legal personality that is:

a) a farm holder or

b) a farmer within the meaning of Article 2 (a) of Council Regulation (EC) No. 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers, and amending regulations (EEC) No. 2019/93, (EC) No. 1452/2001, (EC) No. 1453/2001, (EC) No. 1454/2001, (EC) No. 1868/94, (EC) No. 1251/1999, (EC) No. 1254/1999, (EC) No. 1673/2000, (EEC) No. 2358/71 and (EC) No. 2529/2001, or

c) a keeper of an animal.

It must be stressed that the provision lays down the statutory (legal) definition of the term “agricultural producer”. Thus, the legislator defines its binding meaning by the Act discussed here. When mentioning an agricultural producer (farmer), the definition refers to the above mentioned Article 2 (a) of Regulation No. 1782/2003. In view of the wording of the latter, it must be concluded that an agricultural producer (farmer) means a natural or legal person, an organisational unit with no legal personality (according to Article 2 (a) of the Regulation, a group of natural or legal persons, whatever legal status is granted to the group and its members by national law) whose farm is situated within Community territory, as defined in Article 299 of the Treaty, and who exercise an agricultural activity.

The national system for keeping records of producers is used, among others, for the purpose of awarding and transferring payments (Article 1 paragraph 1 subparagraph 1 of the Act). The ordinary panel of the Court was right to conclude that the provision of Article 3 subparagraph 3 does not in itself establish the legal capacity of a civil law partnership in the context of payments. The term “agricultural producer” used in the Act merely indicates the entity that can apply and receive payments. The question as to who is entitled to specific payments is governed by the provisions of material law, regulating in detail the principles of awarding such payments. The provision of Article 39 paragraph 2 of Council Regulation (EC) No. 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) provides that agri-environmental payments are granted to farmers who voluntarily give agri-environmental commitments. Further to this, Article 10 paragraph 1 subparagraphs 1 and 2 of the Act on supporting rural development defines the farmer referred

to in Regulation 1698/2005 as a natural person, legal person or an organisational unit with no legal personality. Meanwhile, the implementing provision for the Act, i.e. § 2 paragraph 1 of the Decree of the Minister of Agriculture and Rural Development of 28 February 2008, defines in § 2 paragraph 1 the term ‘farmer’ by making reference to Article 2 (a) of Regulation No. 1782/2003.

The relevant national legal provisions, i.e. the Act on supporting rural development and the Act on the national system for keeping records, mention three categories of entities entitled to apply for and receive such payments: natural persons, legal persons and organisational units with no legal personality, providing, however, that a farmer can be a natural person, a legal person or a group of natural or legal persons. These two terms – a group of natural or legal persons and an organisational unit with no legal personality – should be considered convergent in content terms. Clearly, the notion of an organisational unit with no legal personality incorporates a group of (natural or legal) persons jointly running an agricultural holding. On the other hand, there is no doubt that the subdivision of agricultural producers into natural persons, legal persons and organisational units with no legal personality has clearly a differentiating purpose. The subdivision of farmers pursuant to Article 2 (a) of Regulation No. 1782/2003 should be seen in the same light. Therefore, a single natural person is distinguished from natural persons acting in a group (within an organisational unit with no legal personality). Incidentally, the latter provision does not refer to persons (a person) acting in a group, but to a group of (natural or legal) persons conducting agricultural activity.

Thus, as regards agri-environmental payments, Community and domestic law goes beyond the traditional division of legal entities into natural and legal persons, recognising that such payments can also be granted to groups of natural and legal persons (i.e. organisational units with no legal personality). It must be noted that EU law considers that a farmer can be a group of natural or legal persons, while disregarding the legal status of such groups and their members under national law (Article 2 (c) of Regulation No. 1782/2003). EU provisions treat a group as a farmer, irrespective of who has the legal capacity in such cases under national law – the group or its members.

This leads to the following definitive conclusion: the very fact that a civil law partnership does not have legal personality under national law and that it does not, as a rule, have a legal capacity as an entity seen separately from its partners, is not an obstacle to considering a civil law partnership to be entitled to the payment.

Thus, the entitlement of a civil law partnership to such payments cannot be seen in view of the general capacity to take legal actions (or more specifically, absence thereof), but in view of the requirements set out in the legal provisions discussed. A civil law partnership is entitled to such payments, if it is a farmer within the above meaning, i.e. if it can be considered an organisational unit with no legal personality (according to Regulation No. 1782/2003, a group of natural or legal persons conducting agricultural activity).

The capacity to assume rights and obligations (legal capacity) is a normative category, i.e. it is governed by relevant legal provisions. However, it has not been determined in normative terms how the legal capacity may be granted, in particular it is not required that the attribute be assigned in general and explicit terms to specific legal entities. Thus, the legal capacity e.g. of a civil law partnership within the area of its operation may depend on the legal provision directly assigning certain rights and obligations to the partnership (and not its partners). In the grounds of the decision in which the legal question was submitted, the Court invokes an argument from the case law of administrative courts that a civil law partnership, which, by its very nature, does not have legal personality, may be assigned certain rights or obligations pursuant to a legal provision and thus it can obtain a legal capacity with respect to such rights and obligations (e.g. Resolution of the Supreme Administrative Court of 15 October 2008, II GPS 5/08)

Beyond doubt, a civil law partnership is a group of individuals within the meaning of Article 2 (a) of Regulation 1782/2003. Thus, it cannot be denied the status of an organisational unit with no legal personality referred to in Article 3 subparagraph 3 letter b) of the Act on the national system for keeping records of producers and in Article 10 paragraph 1 subparagraph 1 of the Act on supporting rural development. Denying such status is unfounded for the simple reason that law does not define the notion and does not lay down its specific features, except that such an organisational entity does not have legal personality. Incidentally, it must be noted that identifying a civil law partnership with an organisational unit requires it to be treated in material terms, i.e. as being the result of a partnership agreement, and thus as being a certain type of “social arrangement” operating under the agreement, the substratum of which is formed, above all, by persons pursuing specific common objectives. In its decision to submit the legal question, the Court does not seem to notice the difference, stating that if it is assumed that a civil law partnership is merely a partners’ agreement on conducting joint activity, such “an agreement” cannot hold a farm and cannot conduct agricultural activity.

Thus, seen in material terms, a civil law partnership is undoubtedly an organisational unit, since joint delivery of a specific economic goal requires the cooperation between partners to be organised at least to a minimum extent. A civil law partnership as such has not been granted legal personality by law, and consequently is an organisational unit with no legal personality, which – as mentioned above – does not exclude its having a legal capacity pursuant to the law.

It appears from the above deliberations that partners of a civil law partnership cannot be considered to be agricultural producers (farmers) within the meaning of Article 3 subparagraph 3 of the Act on the national system for keeping records of producers, and at the same time, to be farmers within the meaning of the provisions concerning agri-environmental payments. The Court's panel of seven judges does not share the view that only the partner of a civil law partnership who meets the condition of having an identification number is an agricultural producer. This view seems to be derived from the provisions of Article 12 paragraph 5 of the Act on the national system for keeping records of producers, Article 18 paragraph 3 of the Act on supporting rural development, and § 2 paragraph 1 subparagraph 1 of the Agri-environmental Decree of the Minister of Agriculture and Rural Development. However, as mentioned above, it is the provisions laying down the relevant legal definitions (Article 3 subparagraph 3) that are conclusive and binding for understanding the notion of an agricultural producer. Unfortunately, the provisions of the Act that specify the rules for making entries in the records are not clearly and properly correlated with the former provisions (definitions). However, these discrepancies cannot be invoked to build an argument contradictory to the definitions. The provision of Article 12 paragraph 5 of the latter Act provides that agricultural producers, processors, entities running rendering undertakings or potential beneficiaries, acting on behalf of a civil law partnership, receive a single identification number. The identification number is assigned to the partner who obtained a written consent of the other partners. It does not follow from that provision or other provisions that it is only the very partner that is considered an agricultural producer (farmer). Incidentally, such a conclusion would be contradictory to Article 3 subparagraph 3, which provides, among others, that the category of an agricultural producer can include organisational units, and not merely the individual entered into the records of producers.

In the context of Article 12 paragraph 5 of the Act on the national system for keeping records of producers, certain doubts can arise from § 2 paragraph 1 subparagraph 1 of the Agri-environmental Decree. According to the provision, an agri-environmental payment is granted to a farmer (and thus, among others, to a group of persons who conduct agricultural activity, and according to domestic

law, to an organisational unit with no legal personality), if the farmer has been assigned an identification number. In the case of a group of individuals carrying out agricultural activity through a civil law partnership, an entry in the records may be obtained exclusively by one of its members, and not the group (partnership) as a whole. If it was to be concluded on that basis that it is only the single member of the group entered in the records that is an agricultural producer (a farmer), such a conclusion would naturally be inconsistent with Article 3 subparagraph 3 of the Act on the national system for keeping records of producers, and with Article 10 paragraph 1 subparagraph 1 of the Act on supporting rural development. The above legal provisions differentiate between three separate categories of entities falling within the category of an agricultural producer (a farmer). Reducing an agricultural producer – a group of individuals (an organisational unit, including a civil law partnership) – to the person entered into the records of producers would render this particular category of agricultural producers empty, devoid of designata. Such a person would be assignable to the category of ‘natural persons’ or ‘legal persons’.

Clearing up these differences and the resultant interpretative doubts is only possible by adopting the interpretation of the legal provisions concerning entries in the records of producers and the related receipt of payments according to which such entries only serve registration purposes and cannot determine the right to the payment (indeed, it is just a register). The Court can see this possibility of interpretation in the decision under which the legal question was submitted. The decision concludes that the question of assigning an identification number, which is governed by Article 12 paragraphs 5 and 6 of the Act, merely indicates that, in the case of agricultural producers who are partners of a civil law partnership, an identification number assigned to one of them serves to identify the entities applying for the agricultural payments concerned. Thus, awarding the payment to the person registered in the records is actually a technical action, i.e. transfer of the group’s payment to its representative who is entered in the records. This interpretation should also apply to the following wording of Article 18 paragraph 2 of the Act on supporting rural areas: “assistance is available to the co-holder with respect to whom the other co-holders expressed a consent”.

Furthermore, it must be observed that granting the status of an agricultural producer (farmer) exclusively to one member of a given group, i.e. the individual registered in the records of producers, and thus granting the right to the payment only to the individual, would mean that the other members of the group would not be entitled to the payment. The payment would exclusively be addressed to the individual concerned. The others would have no title to the benefit, i.e. they

would be unable to claim a share in the payment from the beneficiary. Therefore one cannot support the view that in such a case allocating the payment between the members of the group (partners of the partnership) would be a matter of their mutual settlements.

The claim that, in the case of a civil law partnership, it is only the partner who is registered in the records, upon consent of the other partners, that has the status of an entitled agricultural producer, is not reflected in the provisions of the Decree of the Ministry of Agriculture and Rural Development of 17 October 2007 on specific conditions and procedure for granting financial assistance under the “Agri-environmental Programme”, since the provisions define a different range of entities entitled to financial assistance. It does not include “a group” or “an organisational unit with no legal personality”, but it includes, however, a natural person, natural persons acting and applying jointly for assistance, and partners of civil law partnerships.

It can be concluded from the above that the most relevant of the variants of addressing the legal question submitted by the ordinary panel of the Court is the one which grants the status of an agricultural producer (a farmer) to civil law partnership, treated as organisational units with no legal personality, as referred to in Article 3 subparagraph 3 of the Act on the national system for keeping records of producers.

The fact of considering, pursuant to the Act, an organisational unit with no legal personality to be a separate entity (an agricultural producer) leads to the conclusion that the same category of entities (agricultural producers) includes spouses jointly conducting agricultural activity, and co-holders of agricultural holdings (Article 12 paragraph 4 of the Act on the national system for keeping records of producers), since it would be unjustified to hold that apart from the statutory inclusion – under the legal definition concerned – of three different categories of entities into the group of agricultural producers (Article 3 subparagraph 3), the same Act distinguishes, in Article 12 paragraphs 4 and 5, three other types of agricultural producers: a spouse, a co-holder and a partner of a civil law partnership. Such persons do not conduct agricultural activity independently (individually) and thus cannot be treated as agricultural producers (natural persons).

In addition, it must be stressed that a civil law partnership may be considered an agricultural producer (a farmer) by being assigned to the category of an organisational unit with no legal personality (a group of persons referred to in Article 2 (a) of Regulation No. 1782/2003). The provisions of the Act on the na-

tional system for keeping records of producers and the provisions of substantive law concerning agri-environmental payments (*inter alia* Article 10 paragraph 1 of the Act on supporting rural development) do not recognise civil law partnerships as agricultural producers (farmers). This has quite serious implications: persons forming a group of individuals (a farmer) within the meaning of Article 2 (a) of Regulation 1782/2003, bound by a civil law partnership agreement, must jointly (all of them) conduct agricultural activity within a (single) common holding. This means that the compliance by the group making up such a partnership with the requirements for obtaining the payment is to be assessed under the above rule of cooperation between partners, and not under the rules of cooperation (making contributions) established by domestic legal provisions on civil law partnerships.

Having regard to the foregoing, the Supreme Administrative Court, pursuant to Article 264 paragraph 1, read in conjunction with Article 15 paragraph 1 subparagraph 3 of the before Administrative Courts, Law on Procedure before Administrative Courts, , adopts the following resolution: In the case of a group of individuals bound by a civil law partnership agreement, the status of an agricultural producer within the meaning of Article 3 subparagraph 3 of the Act of 18 December 2003 on the national system for keeping records of producers, records of farms and records of applications for the award of payments (*Journal of Laws* of 2004 No. 10, item 76, as amended) is available to the civil law partnership.