

## SUMMARIES OF STATE AID JUDGMENTS AT NATIONAL LEVEL

### JUDGMENTS SELECTED FROM THE 2009 STUDY ON THE ENFORCEMENT OF STATE AID LAW AT NATIONAL LEVEL

#### I- Information on the judgment

Voivodship Administrative Court in Warsaw ("Wojewódzki Sąd Administracyjny w Warszawie"), 06.10.2006, III Sa/Wa 1410/06, City of Warsaw v Director of Tax Chamber

#### II- Brief description of the facts and legal issues

The Voivodship Administrative Court ruled that the word "undertaking" in Article 87 (1) EC, should be understood widely, including all categories of entities conducting business activity, regardless of its legal form or means of financing. If the local government entity leases municipal premises for commercial purposes it shall be treated as undertaking

#### *Parties:*

The claimant: City of Warsaw;

The defendant: the Polish Tax Authority (Director of the Tax Chamber).

#### *Factual background:*

The main subject matter of this case is an application for tax relief.

The State aid issues were only of minor significance and arose merely as a prerequisite for deciding on the existence of any obligation to provide the tax authorities with information and documents regarding the amount of State aid already received and its purpose. Whether or not the beneficiary had fulfilled this obligation was a key issue in relation to deciding upon the tax relief. Although the case was settled in accordance with procedural rules, both parties raised several arguments in relation to the *de minimis* rules as well as definition of an undertaking appeared.

The claimant applied to the Tax Office in Warsaw, as a first instance authority, for cancellation of interests resulting from tax arrears, for a period of four years, which exceeded PLN 5,7 million (ca. EUR 1,38 million). The tax arrears resulted from a failure to pay accrued VAT tax on the lease taken out by the claimant on his business premises. Following an application by City of Warsaw, the Tax Office requested information pertaining to the type and the purpose of the aid for which the City of Warsaw had applied, as well as information on any State aid already granted, in particular the relevant date, legal basis, form and purpose. Taking into account that the City of Warsaw did not provide the requested information and documents within the specified time, the Tax Office decided not to consider the application. The Tax Office justified this action by pointing out that the City Of Warsaw had failed to submit its declaration in accordance with Article 37 of the Polish Act on procedural issues concerning public aid of 30 April 2004. Pursuant to Article 37, an undertaking applying for *de minimis* aid is obliged to provide the relevant authority with a respective motion as

well as documents confirming *de minimis* aid received in the relevant year and in the two preceding years, including a declaration of the amount and the purpose of any State aid received concerning the category of expenses which are qualified to be recovered by the State aid and for which it should be granted.

The Tax Office also highlighted the fact that the City of Warsaw is a local municipality (town) and if such local municipality performs its own activity, it must be qualified as an entity which conducts a business activity. In the Tax Office's opinion, support for such activity shall be qualified as a State aid, if all of the conditions set out in Article 87(1) EC are met. The Tax Office, as first instance authority, referred to its own analysis of the market for leasing business establishments in Warsaw, and stated that the given market is of an open and competitive nature. In such circumstances, granting aid to the City of Warsaw would put it at an advantage in respect of its competitors and therefore affect competition on the market. As a result, the Tax Office was of the opinion that all the conditions set out in Article 87(1) EC had been fulfilled.

In the appeal to the Director of Tax Chamber, the City of Warsaw claimed it is not subject to the State aid rules on procedures. In the applicant's opinion, although this particular activity resembles a business activity, such activity is strictly regulated by binding legal provisions and as a result there were no grounds to define the local government unit as "*an entity engaged in business activity*". The City of Warsaw therefore put forward that there was no evidence to show that its activities constituted business operations. As a result, in the applicant's view, provisions of the Polish Act on procedural issues concerning public aid on State aid did not apply. The Director of Tax Chamber rejected the City of Warsaw's claim in its entirety. As the Director of Tax Chamber stated, a situation when an entity is not formally qualified as an undertaking does not affect the assessment of a support measure granted to it by means of tax relief.

The decisive factor in such an assessment is the purpose of the support. Whether or not the entity appears in the respective register of business undertakings is not relevant. It merely means that support granted to such an entity might be of both State aid, and non-State aid nature - the final assessment depends on the particular support measure and its purpose. The Director of Tax Chamber also pointed out that neither EC nor Polish law exclude the possibility that a local government entity can run a business activity.

The City of Warsaw did not agree with the Director of Tax Chamber's interpretation and lodged an appeal to the Voivodship Administrative Court in Warsaw. The main issues on appeal were based on the procedural grounds which had led to the conclusion that both tax authorities had not heard the case in its entirety. In the appeal, the City of Warsaw underlined once again that provisions of the Polish Act on procedural issues concerning public aid on State aid do not apply to it. The nature of local government entities' activity is of special character due to the fact that they must comply with strict binding legal provisions. Income, if any, gained as a result of such public activities, must be allotted for social purposes. Therefore, the collection of rent from municipal real estates does not lead to the presumption that the City of Warsaw runs a business, and as a consequence, the City of Warsaw should not be treated as a beneficiary of State aid.

In addition the City of Warsaw took the view that the amount of support granted should not have a decisive influence on qualifying the applicant as a beneficiary of State aid. The City of Warsaw argued that the tax relief in question would by no means distort competition on a European level and neither would it cause any harm to the common market. Such an opinion resulted from the fact that

the City of Warsaw's leasing of municipal possessions was of a local nature, and as such constituted a support granted to the City of Warsaw from public funds which would not negatively affect trade between Member States.

In addition, the City of Warsaw claimed that there were no procedural issues giving the tax offices the right to request information and documents concerning a public support measure and its purpose. In its response, the Director of Tax Chamber stated that State aid is a specific legal institution regulated not only by Polish law, but moreover, considering Poland's accession to European Union, by the legal system of the European Community. It also agreed that according to both European and Polish law provisions it is possible to grant support which will not be subject to State aid rules, however, it underlined that both in the domestic and European legal systems there are no explicit legal provisions according to which support received from the local government is always exempt from State aid rules.

### **III- Summary of the Court's findings**

#### *Legal issues:*

In its judgment the court agreed with the tax authorities, supported by the legal opinions of Ministry of Finance and the Office of Competition and Consumer Protection, that according to State aid rules the definition of undertaking is very broad, encompassing all kinds of entities which run business activities, regardless of their legal form and means of financing.

The court placed great emphasis on the OCCP opinion, in which the Office stated, on the basis of Polish law provisions as well as settled case law (notably ECJ's judgments) that a local government authority which leases municipal possessions for commercial reasons shall be treated as a public undertaking which may benefit from public support. When considering whether a public entity can assume a business activity, the court referred to the judgment of the Supreme Court. According to that judgment there is no doubt that the activities of the municipality as a public law entity may also include business activity. The activity should be assessed according to the facts of the specific case and its own legal context.

On these grounds, the court rejected the City of Warsaw's arguments according to which a district or a city, as a local government entity, cannot run a business and may not therefore benefit from State aid. In the court's opinion these issues depend on the scope of the activity conducted by the local authority entities and must be examined on a case by case basis. In some circumstances it may also be necessary to prepare detailed analyses. The court also shared the opinion of the Director of Tax Chamber, according to which not every support measure granted for the benefit of a local government entity constitutes a State aid. Nevertheless it cannot be excluded that in certain circumstances such support will be qualified as State aid.

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