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# Deloitte Poland Tax News for Financial Institutions | February 2021

## General tax ruling on VAT charged on fuel cards

On 15 February 2021 the Polish Minister of Finance issued a general tax ruling (no. PT9.8101.3.2020) regarding VAT on fleet fuel cards. The ruling elaborates whether the provision of fuel cards should be treated as a supply of a service (as a rule a financial service, VAT exempted with no right to VAT deduction) or a supply of goods (subject to 23% VAT and giving rise to the right to deduct input VAT).

The Court of Justice of the European Union (CJEU) in its judgement of 15 May 2019 (case C-235/18, Vega International) stated that the provision of fuel cards enabling refueling may be classified as a credit granting service, which is exempt from VAT. A similar judgement was made in a previous case regarding Auto Lease Holland (C-185/01, CJEU's judgement of 6 February 2003).

In terms of the Polish tax practice, both Polish taxpayers and tax authorities have not followed those judgements. To date, transactions with the use of fuel cards in Poland have mostly been set up and carried out in the form of chain transactions. Petrol stations issue fuel invoices to fuel card issuers (e.g. lease companies) who in turn invoice taxable supplies to companies whose fleet uses the fuel cards (e.g. a lessee). All parties (lessors and lessees) deduct input VAT. Polish tax authorities issued many individual tax rulings confirming that practice. According to them, issuers of fuel cards/lessors were actively engaged in the purchase and subsequent sale of fuel (which differs from the background of the CJEU-reviewed cases), and thus the supply of goods (not a service) occurs.

The problem came up again on 1 January 2021, when Article 7.8 of the Polish VAT Act (regarding chain transactions) was revoked (for reasons unrelated to fuel cards). That regulation constituted a legal basis for many individual rulings regarding VAT taxation of fuel cards. So once the legal basis has been revoked, those tax rulings become null and void.

To fill the gap, the Minister of Finance, Development Funds and Regional Policy issued a general tax ruling. According to the ruling, providing fuel cards should be treated as a VAT service provided that the following three conditions are jointly met:

1. a card owner buys fuel directly from a fuel provider, and
2. only a card owner decides how and when fuel is bought and how it is used, and
3. a card owner incurs all costs related to purchase, and
4. an intermediary's function is limited to issuing a card.

If any of those conditions is not met, then providing fuel cards should be treated as a supply of goods, not as a service.

The general tax ruling may require taxpayers to analyze fuel card schemes they use to assess how they will be affected by the new interpretation.

### VAT taxation of a funded sub-participation

VAT taxation of risk participation arrangements is subject to tax controversies. The key issue is whether such services should benefit from VAT exemption (as financing) or should they be charged with standard 23% output VAT.

In funded risk participation a participant provides a certain amount of principal to a grantor, thus assumes the risk associated with the funding granted by the grantor to its client. When a client repays the amount borrowed along with interest/fees, the grantor promptly transfers an appropriate part of the repaid funds to the participant, in line with the risk participation share expressed in percent. Thus, the participant bears the economic risk of default (i.e. shares the risk).

The VAT Act provides for a number of exemptions from VAT, in particular regarding the supply of financial services, such as granting credit facilities and loans, or intermediation in the supply of services that involve granting credit facilities or loans. Therefore, the exemption may include risk participation agreements as intermediation in the granting of credit facilities and loans or as services related to debts.

But the availability of the VAT exemption in case of sub-participation services is ambiguous and no uniform approach has been adopted. On the one hand, administrative courts confirm the right to VAT exemption, but on the other hand, latest tax rulings and court verdicts deny such right. To resolve those doubts the Polish Supreme Administrative Court referred preliminary questions to the CJEU.

Depending on the CJEU's judgement, Polish grantors (service recipients responsible for self-charging VAT using the reverse charge mechanism/import of services) may face a material tax risk. Thus, we recommend analyzing risk participation agreements.

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