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In brief

News in brief, April 2020

Editorial

“Just don’t write about the weather, we get that all the time!” my marketing colleagues advised. Well, it is hard not to, especially as one starts writing the editorial on the day when the weather is not very good and is really looking forward to the weekend when it should finally be getting better (and it did!). There is indeed a parallel to the current situation, which is also caused by something one does not really want to write about - and perhaps I will not. Business confidence is at freezing point too, while everybody is hoping it will get better.

The current situation is a new experience for all of us. And it puts the business trends of the past years or decades into an entirely new perspective. Some of them will be turned around completely: for instance, centralised production of a key component at a single location, remote but perhaps cheap at the time, will be replaced by the localisation of production close to manufacturing plants next in the chain. In administration, finance, accounting, and tax, the role of technologies will undoubtedly grow as they enable collaboration among individuals or teams at different locations, while ensuring smooth functioning if one of the links – technological or human – becomes unavailable.

The ability to keep a company, division, or even a single process going under unexpected circumstances is something many companies did not consider during times of seemingly never-ending growth. This makes it all the more important to start addressing these issues now, as functionalities have to be tested under live operations. Sometimes, a situation necessitates a temporary or emergency solution, and we have helped our clients implement many of them over the past weeks. However, an increasing number of companies are now looking into the future and planning long-term solutions.

It is not yet clear how long we will have to wait for clearer skies. In the meantime, we have the opportunity to prepare for functioning well in times of growth – so that our growth then is not hindered by our past debts.

For all of us, I am wishing for a good forecast – of both the weather and business confidence!



Jan Linhart
Partner

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Taxes

Amendment to Income Tax Act for 2021 - new taxation of bonds and monetary contribution for meals

The Ministry of Finance has submitted for external comments an amendment concerning income tax. From 2021, the amendment should change the taxation of bonds, reduce the administrative burden associated with the reporting of tax-exempt income paid to abroad, introduce monetary contributions for meals, and substantially extend the time test for exempting income from the sale of real property from tax.



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We summarise the major changes as follows:

- The amendment should cancel the exemption of Czech non-residents' interest income from bonds issued by Czech companies or the Czech Republic (i.e. Eurobonds). The cancellation of the exemption should not apply to bonds issued before the amendment's effective date.
- For discounted bonds, the difference between the bond's nominal (face) value and its issue price will no longer be taxed. Under the new amendment, the actual income from bonds determined as the difference between the bond's nominal value and its acquisition cost should be taxed. The taxation method should change as well: whereas until now withholding tax has been used, from now on proceeds from bonds (in form of the difference between the bond's nominal value redeemed and its acquisition cost) should be taxed by individuals within their income tax returns, as part of a separate income tax base – income from capital. For foreign investors, the redemption of bonds will be subject to the tax securement of up to 1% of the nominal value if other criteria are met as well.
- The ministry proposes to introduce contributions for meal allowances in monetary form: on the employee's part, the monetary contribution would be treated as a tax-exempt income up to 70% of the meal allowance amount; on the employer's part, as a tax-deductible expense with no limitation. The ministry thus intends to help employees as well as small entrepreneurs without their own foodservice facilities and excessively administratively burdened by meal vouchers.
- The five-year time test for exempting income from the sale of real property should be extended to fifteen years. Exemption could also be claimed before these fifteen years but only if the funds acquired are used to satisfy one's own housing needs. According to the proposed transitional provisions, the extended time test should not apply to real property acquired before the amendment's effective date.
- The monthly administrative burden associated with the reporting of income paid to abroad that is not subject to tax or is tax-exempt should be reduced to one summary report prepared for the entire calendar year. The monthly limit of CZK 100,000 for the reporting of tax-exempt income paid to abroad should increase to CZK 300,000. The reporting of income paid to abroad that is taxed using withholding tax on a monthly basis remains unchanged.
- The proposed cancellation of a 35% withholding tax for residents of countries outside the European Economic Area with which the Czech Republic has not concluded double taxation treaties or tax information

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exchange agreements (see the February issue of Tax and Legal Update) has been omitted from the amendment.
- The amendment will define a list of non-cooperative jurisdictions in the tax area, referring to the EU list of such jurisdictions. Any income of controlled entities included in the list of non-cooperative jurisdictions will automatically be included in the Czech controlling company's tax base.

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GFD on VAT rates from May 2020

VAT rates applicable to selected products and services will change in connection with an amendment to the Act on the Electronic Reporting of Sales. Most changes, such as the inclusion of water and sewer services or hairdresser's and barber's services into a group of services subject to the second reduced rate (10%), are relatively clear. But how to correctly evaluate meal services? And what does drinking water really mean in this context? Answers to these questions and many other topics are discussed in the General Financial Directorate's new information.



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The major part of GFD's information deals with the VAT rate on meal and beverage services under classification code CZ-CPA 56. These involve services that are defined in more detail by the case law of the Court of Justice of the EU, according to which meal services are involved if the consumption of food and drinks is complemented by other services that enhance the benefit of consumption. These include for instance serving at table, providing premises specifically intended for consumption, washable dishware and silverware, toilets and cloakrooms. It is not necessary that all these complementary services are provided simultaneously, but the extent to which they are provided must be considered.

Importantly, from a VAT viewpoint, the CZ-CPA 56 classification includes both the provision of meal and beverage services and the delivery of goods. When evaluating the nature of supplies, it is thus necessary to consider not only the classification under this code, but also the criteria specified in the description section of Appendix No. 2 to the VAT Act. If uncertain, the ERS website may provide clarification, as it shows selected model examples of how to distinguish between a meal service and a supply of goods. Please be aware that the CZ-NACE classification is used for ERS purposes, which may result in minor differences.

The GFD's information also pays close attention to exceptions from meal, catering and beverage services. Here the widely-discussed reduced VAT rate on draft beer is also discussed. Draft beer is subject to a 10% VAT rate only if the serving of such beer meets the criteria for the provision of restaurant services.

The GFD also deals with a VAT rate on the supply of drinking water under Code 2201 of the customs tariff, which is understood to be water delivered via a pipeline. Drinking water delivered in another manner (i.e. in bottles) remains subject to a 15% rate. The second reduced rate (i.e. 10%) shall also apply to the supply of hot water produced from drinking water. Another novelty is the reduced VAT rate on electronically provided books, brochures, leaflets and other printed materials, intended both for downloading or on-line reading, but only if such printed matters are specified in the appendix to the VAT Act and if their content does not contain more than 50% advertising.

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OPEIC: Last wave of calls includes large entities

The Ministry of Industry and Trade (MIT) has published an updated schedule of calls to participate in the Enterprise and Innovations for Competitiveness Operational Programme (OPEIC) for 2020. These will be the last calls within the current programme period, and a wide selection of subsidy programmes can be expected. The calls also aim at large businesses, and the most interesting ones among them are the Potential, Application, Innovation, Low-Carbon Technology and Energy Savings Programmes.



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Research, development and innovation in production

The call to participate in the Potential Programme supporting the foundation or development of research and development centres should be announced on 21 August 2020, with total funds for allocation of CZK 1 billion. Applications will be accepted from 4 September to 23 November 2020.

The Application Programme supports operating expenses incurred for industrial research and experimental development solutions. The call to participate in the programme is expected to be announced on 1 September 2020 and should allocate CZK 2.5 billion. Applications will be accepted from 14 September to 15 December 2020.

The Innovation Programme targeting innovation activities in production following a completed research and development project offers CZK 2.5 billion for allocation, and the call will be announced on 29 September 2020. Applications will be accepted from 15 October 2020 to 29 January 2021.

Large businesses intending to participate in the OPEIC programmes must again meet the following intervention code criteria:

- Intervention Code 065 – projects must have a significant positive effect on the environment, focusing on low-carbon economy and resilience against climate change.
- Intervention Code 063 – large businesses must directly cooperate with small and medium-size businesses on specific research and development projects.

To apply for support from the Potential Programme, large businesses must fulfil at least one of the above criteria. With respect to the Innovation Programme, large businesses cannot choose among the criteria but must meet Intervention Code 065. Contrariwise, within the Application Programme, so far it has been possible to file an application without having to prove that the intervention code criteria have been met (claiming a lower maximum subsidy per project) and the current schedule meanwhile confirms the same.

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On 29 April 2020 and in addition to support for research and development under the Enterprise and Innovations for Competitiveness Operational Programme, a call to participate in the TREND Programme (sub-programme 1 – Technological Leaders) will be announced by the Czech Technology Agency, targeting industrial research and experimental development, in particular operating expenses (personnel expenses, rent, energy, etc.).

Energy Savings and Low-Carbon Technology

Other calls within OPEIC should be announced during the course of 2020. These should focus on energy-saving measures and include calls under the Low-Carbon Technology Programme. The latter should be announced in September and target Electromobility, Energy Accumulation, and Secondary Raw Materials. Applications for support can be submitted from 11 (or 14) September to 25 November (or 21 December) 2020.

Another interesting programme under OPEIC also available for large businesses is the Energy Savings Programme focusing on the reduction of energy consumption in companies (e.g. through building insulation, lighting replacement, energy measurement and regulation systems, etc.). Applications for this type of support can currently be submitted until 29 May 2020. However, another call with funds for allocation of CZK 2 billion might also be announced, depending on the amount of unallocated funds.

More detailed information about applicable criterial for individual calls will be available once the calls are announced.

The MIT is currently assessing the effects of the coronavirus pandemic on the current schedule of calls and is considering the setting of further criteria, postponing the deadlines and potentially reallocating some funds from the European operational programmes. Therefore, it cannot be excluded that the above criteria and other parameters will change.

In addition to funds from subsidy programmes, the government also offers other forms of support for businesses. We are closely monitoring the situation. Should you have any questions, please do not hesitate to contact us.

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Legal

Different permit validities for family members of foreign employees

Like many other countries, the Czech Republic enables the relocation of employees together with their close family members, most often their spouses and children. Foreign nationals have been using this option very often, as they do not want to be parted from their immediate family. This necessitates the filing of an application for long-term residence permits; it is not possible for employees employed seasonally or under short-term work assignments.



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The relocation of family members together with the main applicant is conditional upon obtaining a family visa. The application can be filed with the Czech embassy in the relevant state. A family visa is valid for one year. The visa itself is a mere stamp in a passport; if family members want to prolong their stay in the Czech Republic, they must apply for a long-term residence permit for the purpose of a family reunification. Once the application is approved, the applicant receives a residence card similar to the Czech identification card (občanský průkaz), always linked to the main applicant's permit. The card cannot be issued separately. Card holders enjoy many benefits, especially free access to the Czech labour market. Cards are valid for up to two years, usually copying the validity of the permit of the main applicant (e.g. employee card holder).

Recently, we have seen some changes in the approach to granting long-term residence permits, e.g. breaking the connection between the validity of a family member's permit and the main applicant's permit, which have caused certain complications. Previously, long-term residence permits of family members were issued so as to unify the permits' validity for all family members even if this meant issuing the first permit of a family member for a period shorter than one year. It was then easy to arrange for the subsequent renewals of residence permits, as the entire family only had to bear in mind one deadline, and one visit to the Ministry of Interior was sufficient. Now, the ministry mostly grants long-term residence permits with a minimum one-year validity, resulting in differences in the validity term of individual family members' permits.

This change is in line with the basic principle of a long-term residence, i.e. the minimum validity of one-year. This longer validity may constitute an advantage, but where families with a higher number of members are involved, this means many more visits to the authorities, and a risk of failure to apply for extending the permit validity in a timely manner. Consequently, it is always necessary to check the validity of each individual permit separately.

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Legal

Exit tax – new criterion for cross-border restructuring

Effective from the taxable period started 1 January 2020, an amendment to the Income Tax Act introduced a tax on the relocation of assets without a change of ownership, i.e. exit tax. What cross-border transactions are subject to the exit taxation?



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Council Directive (EU) 2016/1164, laying down rules against tax avoidance practices that directly affect the functioning of the internal market, imposed the obligation on member states to implement in their national legislations certain rules aiming to prevent the tax base erosion within the internal market and shifting of profits outside the member states in which profits have been generated. One of the measures aiming to do so is the exit tax. Consequently, a new provision regulating the taxation upon the relocation of assets without a change of ownership was added to the Income Tax Act in the form of Section 23(g).

This provision aims to prevent tax avoidance through the transfer of assets from the Czech Republic to states with a lower tax burden. The amendment specifies transactions that will be subject to exit tax as transactions in which assets are relocated from the Czech Republic abroad without a change of ownership whereby the Czech Republic loses the right to tax the proceeds from the future sale of these assets. This means that, for income tax purposes, such transactions shall be deemed to be a transfer for consideration of assets to oneself at a price that would have been agreed between independent parties within regular business relationships under the same or similar conditions.

The transactions include transfers of assets from headquarters in the CR to a permanent establishment abroad, or transfers of tax residence to a foreign country. An explanatory report to this amendment clarifies that company transformations or contributions of assets into corporations involving a change of ownership should not be subject to exit tax.

According to the explanatory report, property and assets subject to the regime defined in Section 23(g) shall be any resources a business uses for its activity; consequently, relocations of any assets, both non-current and current, shall be subject to this tax.

The practical application of Section 23(g) causes much uncertainty. It is therefore strongly advisable to perform a thorough analysis of the relevant tax aspects when planning cross-border restructuring or other transactions.

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Case law

Transfer of tax residency within EU does not have to be tax neutral

The Supreme Administrative Court (SAC) has referred to the Court of Justice of the EU (CJEU) a prejudicial question whether Czech legislation disallowing to claim tax losses upon a change in the place of effective management within the EU is contrary to EU legislation. The CJEU held that while a cross-border transfer of the place of effective management into another member state is covered by the freedom of establishment ensuing from the Treaty on the Functioning of the EU, the transfer does not have to be tax neutral.



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AURES Holdings a.s. was incorporated under the laws of the Netherlands and originally had its registered office and place of effective management in the Netherlands. Subsequently, it transferred its place of effective management to the Czech Republic, becoming a Czech tax resident. After the transfer, the company in its Czech tax return claimed losses that had been incurred before the change of the tax residency. The tax administrator did not accept this approach: in their opinion, the Income Tax Act allows assuming tax losses solely within defined cross-border transactions governed by the transposed EU directive on the common system of taxation applicable to mergers.

Confirming its previous decisions, the CJEU stated that while the transfer of the place of effective management within the EU is covered by EU law, protecting the freedom of establishment, EU law does not guarantee that a transfer of a place of effective management from one member state to another will be tax neutral. According to the CJEU, the freedom of establishment cannot be understood as meaning that a member state is required to draw up its tax rules on the basis of those of another member state. The CJEU thus held that Czech legislation is not contrary to the freedom of establishment and EU law.

Following the CJEU answers, the SAC ruled that neither national nor EU legislation allows entities from another member state to claim tax losses incurred in another member state solely upon the relocation of the place of their effective management. Under the conditions stipulated by the Income Tax Act, tax losses incurred in another member state may only be claimed in cases covered by the implemented EU directive on the common taxation applicable to mergers. This means that in cases involving only the transfer of the place of effective management into the CR, taxpayers cannot claim tax losses incurred in another member state.

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Case law

Medical telephone consultations VAT exempt

In German case No. C48/19, the Court of Justice of the EU (CJEU) answered whether medical services provided in a form of a telephone consultation are exempt from VAT.



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After being appointed by public health insurance companies, the taxpayer provided telephone consultations to patients suffering from chronical and long-term illnesses. The consultations were provided by nurses, medical assistants, and in some cases also a physician.

The taxpayer treated this activity as the provision of medical services, and as such exempt from VAT. However, the tax authority objected and stated that the services were subject to tax. A prejudicial question was therefore referred to the CJEU.

The CJEU had previously adjudicated that medical services may be provided almost anywhere. In this case, the court confirmed its previous conclusions and further elaborated on them. The CJEU is of the opinion that tax exemption may be applicable also to health and illness advisory services, subject to meeting two conditions:

First, the consultations must pursue a therapeutic purpose, such as explaining a patient's medical condition, suggesting changes to therapy or medication. They cannot just involve general information on illnesses and treatments. The second condition concerns the professional and quality level of the staff providing the telephone services; it must be equal to that of other medical service providers.

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Case law

Another Czech case before CJEU: is there entitlement to VAT deduction if the supply provider is unknown?

The Supreme Administrative Court (SAC) referred two prejudicial questions to the Court of Justice of the EU (CJEU) concerning entitlements to VAT deductions. In the case in question, the taxable supply recipient failed to support who had provided them with advertising services on which they subsequently deducted VAT. On these grounds, the SAC refused to acknowledge the taxpayer's entitlement to deduct VAT.



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In a tax inspection of the taxable periods of 2010 and 2011, the tax administrator challenged the VAT deduction on advertising services received. The service provider given in the tax document stated that they were not aware of having rendered the services; the provision of the services itself, however, was not challenged. On these grounds, the tax administrator assessed additional tax for each of the periods, including sanctions.

CJEU case law implies that to claim entitlement to VAT deduction, the taxable supply recipient must be a taxable person that used the supply received within their business activity, while it is also necessary that the taxable supply was provided by another taxable person. If these conditions are met, it is virtually impossible to deny the entitlement to deduction. CJEU case law also implies that it is the taxpayer who must prove compliance with the conditions for VAT stipulated by the substantive law; the tax administrator, on the other hand, bears the burden of proof if involvement in tax fraud is suspected.

The SAC based its decision on previous CJEU judgements: although the condition of the supply recipient proving that the taxable supply had been rendered to them by a taxable person was not met, it still is appropriate to acknowledge their entitlement to deduct VAT, as the taxpayer's involvement in tax fraud was not proven. This, however, would lead to the conclusion that a taxpayer claiming VAT deduction does not have to prove compliance with one of the conditions for VAT deduction stipulated by substantive law. According to the SAC, such an approach would render tax fraud virtually unpunishable. The SAC also noted that to prove involvement in tax fraud, the tax administrator must have at least basic information about the chain; in a situation where it cannot be proven who had provided the taxable supply, the tax administrator has in effect no chance to prove tax fraud.

In this respect, the SAC's extended panel of judges referred the following prejudicial questions to the CJEU:

Is it compatible with the EU directive that claiming entitlement to VAT deduction is conditional upon the taxable person - supply recipient proving that the supply was provided to them by another taxable person?

If so, and if the taxable person fails to meet this condition, is it possible to deny them the entitlement to deduct input VAT without it being proven that the taxpayer knew, or could have known of their involvement in tax fraud?

The CJEU's answers to these questions may provide certain guidance on how to proceed with VAT deduction in

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similar cases in the future.

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Assessment of creditworthiness and its examination by courts according to CJEU

According to the judgement of the Court of Justice of the EU (CJEU), Czech laws imposing the obligation to invoke the nullity of a credit agreement on the grounds of an insufficient assessment of creditworthiness solely on the consumer are incompatible with EU law. National courts must examine the proper assessment of creditworthiness of their own motion and draw consequences from failures to comply with this duty.



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Case C-679/18 concerned a Czech non-banking consumer loan provider. The CJEU dealt with the prejudicial question referred by a Czech court on whether national legislation prescribing that the nullity of a credit agreement on the grounds of an insufficient creditworthiness assessment can only be invoked by the affected consumer is compatible with EU law.

In the original dispute before a national court, the creditor neither asserted nor proved that they had assessed the debtor's creditworthiness prior to providing them with the loan. The debtor did not raise an objection to this effect and did not invoke the nullity of the credit agreement on these grounds. According to the court, most defaulting creditors do not – probably also because they are rarely represented by an attorney. However, under Czech laws and the courts' decision-making practice, such an objection may only be raised or nullity be invoked by the affected person, i.e. the debtor/consumer, within a limitation period of three years.

As the area of consumer credits is fully harmonised, member states cannot derogate from EU rules. Hence, the CJEU referred to its previous judgments, for instance in case C-377/14, pointing out the national courts' obligation to examine, of their own motion, infringements of certain provisions of EU consumer-protection legislation, in view of consumers' unequal position and their effective protection. Under CJEU case law on the principles of sincere cooperation, equivalence and effectiveness, infringements of EU law must be penalised following the same substantive and procedural rules as breaches of national law of a similar nature and importance, while penalties must be effective, proportionate and dissuasive.

Considering the above principles, the Czech legislation requirement that the debtor must actively raise an objection/invoke nullity is incompatible with the objectives of the directive on credit agreements for consumers. National courts thus must of their own motion examine whether there has been a failure to comply with the creditor's obligation, and draw consequences. If creditworthiness has not been adequately assessed, it renders the contract null and the debtor shall be obliged to return to the creditor solely the principal amount, at a time reasonably possible for them. On the other hand, national courts must consider whether a debtor wishes to invoke the nullity of the credit agreement.

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SAC rules against double taxation upon assignment of contractual sanctions

Regarding the assignment of contractual sanctions, the Supreme Administrative Court (SAC) determined what amounts should increase the tax base. According to the SAC, the tax base shall only be increased by the actual income from the assigned contractual sanctions, not by their full amount. At the same time, any loss on the assignment of the receivables not covered by tax-deductible adjustments is not tax-deductible. The SAC refused an interpretation of the law that would, in effect, lead to double taxation.



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In the case in question (10 Afs 171/2019), the court dealt with the issue of what amounts shall increase the tax base upon the assignment of contractual sanctions that were recognised as an income and previously had been reducing (excluded from) the tax base. The SAC did not accept the tax administrator's approach that the loss upon the assignment of the receivable is not tax-deductible, while, at the same time, the tax base must be increased by the full nominal amount of the contractual sanctions assigned. The SAC unambiguously concluded that this would be contrary to the linguistic and systematic interpretation of the relevant provisions of the law.

At the heart of the dispute was Section 23(3)(a)(6) of the Income Tax Act. The provision states that a creditor who assigns a receivable arising from contractual sanctions the amount of which was an item reducing the economic result (profit or loss), is obliged to increase the economic result by the amount of such a receivable, unless it has already been increased by the same amount under Section 23(3)(a)(2) of the Income Tax Act. The SAC emphasised that the term 'the same amount' does not necessarily mean an identical sum. In the court's opinion, increasing the tax base by the loss on the assignment of the receivables rules out the possibility to also again increase the tax base by the entire amount of the assigned contractual sanctions. The SAC also referred to the amendments to the Income Tax Act and deduced that the aim of the regulation was to prevent a double increase in the tax base upon the assignment of contractual sanctions.

In other words: in the year when a receivable from contractual sanctions is assigned, the tax base shall be increased solely by the total nominal value of the contractual sanctions (leaving aside the loss on assignment concerning the remaining portion of the receivable), and not again be increased by the loss on the assignment. The approach applied by the tax administrators has been also accepted as a conservative option by some members of the professional public. The recent SAC conclusions now offer a chance to modify this approach in the future, and to revise the historical approach to the assignment of contractual sanctions.

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Case law

SAC opines on frequent tax inspection targets

In its recent judgment (7Afs 472/2018) the Supreme Administrative Court (SAC) confirmed the conclusions of a tax administrator and the Regional Court of Justice in Ústí nad Labem. The SAC opined on supporting the tax deductibility of advisory and consulting services provided between group companies, and on the (un)lawful creation of estimated payables for expected price reductions in the automotive industry.



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Proving the provisions of consulting and advisory services

The SAC has confirmed that the burden of proof as regards tax deductibility of expenses for consulting and support services is with the taxpayer. In the case in question, the tax administrator refused to accept expenses incurred on the provided services as tax deductible, mainly on the grounds that under the contract, the provider was supposed to issue an activity report every six months, upon whose approval by the service recipient invoices were to be issued, for a half of the annual fee. The company, however, did not have this crucial piece of evidence, explicitly stipulated by the contract, at their disposal. Furthermore, in the opinion of the tax administrator, and subsequently the court, the pricing of services did not reflect the actual volume of services rendered; the price was calculated from the total planned expenses of the service provider, multiplied by a coefficient determined as a ratio of the service recipient's planned turnover to the planned turnover of all European group companies.

According to the tax administrator, this manner of setting the fee did not allow to determine whether expenses incurred by the company actually corresponded to services rendered. The same conclusion was then confirmed by the SAC, stating that the taxpayer failed to carry the burden of proof, neither did they prove the benefits of the services received (the 'benefit test').

In our experience, this has recently been a common practice in tax inspections and other audits. Existence of an invoice and a contract is no longer accepted as sufficient evidence that services have been rendered, while the tax administrators also increasingly focus on the mentioned benefit test; in other words: there must be a direct and immediate relation between the incurred expenses and the expected income.

(Un)lawfulness of estimated payables for price matching

The SAC also dealt with the (un)lawfulness of estimated payables created for expected future price adjustments. However, neither the tax administrator, the regional court nor the SAC challenged the practice common in the automotive industry whereby prices may be adjusted retrospectively (even with delays spanning over several taxable periods).

In the adjudicated case, a company established estimated payables for expected retrospective changes to prices. In general terms, the procedure was that once the negotiations were closed, a credit note was issued, and the estimated item was to be released. During a tax inspection, the company itself confirmed that unless the price negotiations were completed, a credit note could not be issued.

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In the case in question, a credit note was indeed issued, but the estimated payable was only released in one of the subsequent taxable periods. The tax administrator raised the objection of a time mismatch between issuing the credit note and releasing the estimated payable. The company argued that in some cases further price adjustments may need to be done in the periods after a credit note had been issued. This was, however, contrary to their own previous assertion, and no sufficient evidence was produced to support this. The conclusions of the tax administrator and the regional court were also confirmed by the SAC, stating in its judgement that credit notes had already been issued for the products and therefore no longer provided a reason for creating estimated items. The taxpayer's assertion that prices might be reduced repeatedly over subsequent years were considered unsupported by evidence.

The judgment underlines the necessity to have supporting documentation available for each individual transaction, so that the taxpayer can carry the burden of proof. In our experience, companies often keep estimated items on their books, claiming that price negotiations have not yet been closed. Taxpayers should always be able to support this, while it is important that the reason for not releasing or creating estimated items also be implied by other supporting documentation, and, most importantly, corresponds to the respective contractual or other arrangement. Otherwise it may be difficult for taxpayers to defend their approach to the tax authority or in court.

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Temporary assignment of an employee: provision of service for VAT purposes

The Court of Justice of the EU (CJEU) dealt with the Italian San Domenico Vetraria SpA case (C-94/19) where a parent company assigned one of its directors to its subsidiary on a temporary basis. For this, they 'only' charged their costs incurred for the employee, without any mark-up. In the court's opinion this constitutes a supply subject to VAT, regardless of the setting of the price to be charged.



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In 2004, Avir, an Italian company, seconded one of its directors to its subsidiary, San Domenico Vetraria, to hold the position of director of one of their establishments; for this, they only invoiced the costs incurred for the seconded manager, without any mark-up. Avir applied VAT on the invoices, which San Domenico Vetraria claimed to deduct in its VAT return. The Italian tax authorities took the view that those reimbursements fell outside the scope of VAT as they did not concern supplies of services for VAT purposes: under Italian legislation valid at the time, a temporary assignment or secondment of employees where only the related costs were reimbursed was not relevant for VAT purposes.

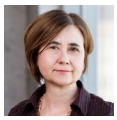
The Italian Supreme Cassation Court referred a prejudicial question to the CJEU in this respect. The CJEU concluded that a temporary assignment or secondment of employees provided for the reimbursement of related costs shall be considered a supply relevant for VAT purposes, if the amounts paid on the one hand and the lending or secondment on the other are interdependent; the CJEU thus opposed the Commission's arguments that there was no direct link between the supply and the consideration. The CJEU concluded that Italian legislation under which a temporary assignment or secondment of employees where 'only' the related costs are reimbursed is not relevant for VAT purposes was incompatible with the EU VAT directive.

Since the current approach of Czech VAT payers and established practice additionally confirmed by the Coordination Committee differ from the above (and are in fact identical with the challenged Italian legislation), we recommend reviewing cases of temporary assignment of employees considering the above judgment and applying its conclusions correctly. Generally, temporary assignments of employees can no longer be viewed as supplies outside the scope of VAT, regardless of how the invoiced amount is calculated. The judgement is thus expected to have a crucial effect on the future treatment of the temporary assignment of employees as a taxable supply for VAT purposes by tax administrators.

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News in brief, April 2020

Last month's tax and legal news in a few sentences.



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DOMESTIC NEWS IN BRIEF

- The average gross annual wage for 2019 was published in the Collection of Laws for the purpose of issuing blue cards pursuant to the Act on Residence of Foreign Nationals in the Czech Republic.
- An amendment to the Act on the Regulation of Business in Financial Markets, adapting the Czech legal order to Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 effective from 1 May 2020, responds to certain deficiencies of the current legal regulation.
- The senate has approved an amendment to the Civil Code that is now to be signed by the president. The amendment is effective from 1 July 2020 and primarily deals with the legal regulation of associations of residential unit owners.
- With amending proposals, the senate referred back to the chamber of deputies a draft amendment to the Tax Procedure Code aiming to implement the MOJE daně project.
- The government submitted to the chamber of deputies a draft amendment to the Energy Act, responding to the incorrect transposition of EU directives (2009/72/EC of 13 July 2009 and 2009/73/EC of 13 July 2009).

FOREIGN NEWS IN BRIEF

- The Austrian Ministry of Finance has published additional information on the digital service tax which became effective on 1 January 2020. The update outlines the rules on registrations for the tax and clarifies that the digital service tax will be payable on a monthly basis.
- The Spanish Government has given its approval for draft legislation for a digital service tax (DST) to be presented to the Spanish parliament. The proposed DST would be imposed at a rate of 3% on income derived from certain digital services .
- Under Russian tax law, it is possible to employ the look-through approach to identify the ultimate beneficial ownership of Russia-sourced income, and thus apply the withholding tax rate provided under the tax treaty with the residence state of the ultimate beneficial owner instead of the residence state of the direct recipient. The Russian company (withholding tax agent) must disclose the application of the look-through approach in the withholding tax return that is filed with the Russian tax authorities .
- Up-to-date information on measures adopted in connection with COVID-19, prepared by KPMG member firm's colleagues, can be found at: KPMG Tax News Flash Covid-19 Tracker and KPMG Mobility News Flash Covid-19 Tracker. You may also watch our global webinars.

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