KPMG

Tax & Legal

Taxes
Legal
World news
Case law
In brief

August 2018

Editorial

Summer belongs to travel, not just work. If you choose a foreign destination, while relaxing, you may also get to know foreign customs. Experiencing cultural differences may then come in handy when dealing with foreign business partners.

For instance, new opportunities are now opening for business with Japan. The EU and Japan have signed the most extensive free trade agreement ever. In times of growing economic nationalism, this is definitely a step in the right direction. Japan has been ranking high in terms of high value-added investments in the Czech Republic: currently, 229 Japanese firms are employing over 47 thousand employees. Whether Czech firms will be able to balance the score a little and find their way onto the demanding Japanese market will surely depend on understanding the cultural differences and business ethics of the Land of the Rising Sun.

Japanese workers are also sure to appreciate the modification of the social security agreement, making their employment in the Czech Republic easier – as you will read further in this issue. The same rules will also apply to Czech workers posted to Japan.

Cultural differences are also reflected in political life. While Japan, a constitutional monarchy, may well take pride in its stability, our situation is far from ideal. Yet, 264 days after the elections we now have a government that has gained a vote of confidence from the Chamber of Deputies.

As the government is on holiday in August, we may in the meanwhile at least read its manifesto. What kind of policy statement would it be if it did not promise to simplify tax administration and the entire tax system? And, as an extra bonus, to reduce one or two tax rates and, of course, fight tax evasion, an inexhaustible source of (fictitious and future) revenues to pay for pre-election promises? Yes, all of these can be found in there. We shall see which of its proposals the government will actually be able to push through by the end of its term. Will it be the same as for all previous governments? Or will our beer-loving nation indeed get to enjoy a reduced VAT rate on draught and well-chilled 10 degree beer during the next hot summer?

Jan Linhart
Partner
KPMG Czech Republic

Research and development allowance revisited

Late in June 2018, the Council for Research, Development and Innovations adopted a proposal for measures aiming to eliminate companies' uncertainties when claiming R&D allowances. The new conditions have been agreed on by a working group comprising representatives of business associations, the Ministry of Finance, and the General Financial Directorate. Below, we summarise the proposed changes, which are yet to go through the legislative process.

Michaela Thelenová
mthelenova@kpmg.cz

Bohumil Dopita
kpmg@kpmg.cz

Notice of intention to claim a research and development (R&D) allowance
Taxpayers would have to notify the tax administrator of their intent to claim a R&D allowance, thereby complying with the requirement of planning the research and development activities, which is presently the most frequently challenged issue, both by tax administrators and the courts. The notice should include the taxpayer's identification, the name of the project, and the name and position of the statutory representative or an appointed representative authorised by them. The technical aspects of the notification are yet to be discussed.

Deadline for preparing the project
Under the proposed legislation, a research and development project would only have to be prepared as at the date of filing the tax return for the period in which the taxpayer first claims the R&D allowance for the project. This means that the project would no longer have to be prepared prior to the commencement of project activities, but instead at a time when the taxpayer already has more information about the project. Activities carried out within the project and incurred costs would qualify for the R&D allowance once the above mentioned notice is sent.

Project review and assessment
The members of the working group have also agreed that the manner of reviewing and assessing R&D projects shall be fully within the taxpayers' discretion. The Income Tax Act will therefore not stipulate any specific manner or frequency of reviews. However, taxpayers will have to state the manner of review (including frequency) in the R&D project and maintain evidence of the chosen manner of review.

Responsible persons to sign the project, and the place of signing
Apart from the statutory body, an appointed representative will also be authorised to sign the project. It will also no longer be necessary to state the place of signing, as this had been just a formality anyway.

Persons involved in project implementation
In the course of a project's implementation, the persons participating in the project may change. In this respect, we expect Instruction D-288 to be amended to confirm the possibility of making these changes in the course of the project's implementation.

The problem of having to name all persons participating in the project already at its very beginning should also be eliminated, as taxpayers would only have to prepare the R&D project as at the date of filing the tax return. The possibility to replace project workers and to change their number should be specified in more detail by an

amendment to Instruction D-288.

Taxes

2019 VAT amendment: Are limited liability company statutory representatives VAT payers? When not to worry about a time shift in declaring VAT?

In the third article on the most important changes in VAT effective from 2019, we provide answers to the above questions.

Klára Sauerová
ksauerova@kpmg.cz
+420 222 123 613

Petra Němcová
pnemcova@kpmg.cz

Nikoleta Ščasná
nscasna@kpmg.cz
+420 222 123 161

Are statutory representatives of limited liability companies subject to VAT?
The VAT status of statutory representatives of limited liability companies was repeatedly addressed by the Court of Justice of the EU, and by the Czech courts (see, e.g. SAC: is a statutory representative of a limited liability company a taxable person?) The proposed amendment responds to the case law by modifying the definition of taxable persons, i.e. persons that are subject to the VAT system and may or must become VAT payers (Czech entities mainly by exceeding a turnover of CZK 1 million). The amendment proposes to explicitly exclude employees and other persons carrying our economic activity under an employment, civil service, or a similar relationship from the category of taxable persons.

The proposed amendment provides no further criteria to determine this 'similar relationship'. The explanatory report only states that when assessing whether a relationship similar to employment or civil service exists, the circumstances shall be assessed on a case-by-case basis. For statutory representatives of liability limited companies it will be necessary to analyse in particular whether, and to what extent, elements of subordination are present in their exercising the offices or in their remuneration schemes. If the statutory representatives are determined to be taxable persons, it will be necessary to ensure that they are registered for VAT, and carefully regulate their activities and transactions from the VAT perspective.

Time shifts in VAT
The developments concerning familiar Section 104 of the VAT Act, which makes it possible, under certain circumstances, to avoid the unnecessary administrative burden of preparing and filing an additional VAT return, are certainly worth paying attention to. Under this provision, it is possible to declare 'late' VAT in a regular tax return, as in cases resulting in a temporary curtailment of the state budget late payment interest will be charged, but no further penalty. Nonetheless, the present wording of the provision is not exact and brings many interpretation issues.

The amendment clarifies the section's wording and explicitly states that it shall also apply to reverse charges. Late payment interest, if any, shall only be charged on the difference between output VAT and the related deduction of input VAT (relevant for a partial entitlement to VAT deduction).

As the proposed amendment in fact reflects the conclusions already approved by the Coordination Committee of June 2018, it is possible to follow the modified rules starting today.

Another obstacle to posting of workers by Japanese investors gone

On 1 August 2018, a protocol amending the Social Security Agreement between the Czech Republic and Japan entered into force. This step will be most welcome by Japanese workers temporarily posted to key positions in the Czech Republic.

Iva Krákorová
ikrakorova@kpmg.cz

Radka Velebná
rvelebna@kpmg.cz

Under the original treaty it was not possible to exclude these workers from obligatory participation in the Czech social security and health insurance system if their employment contracts were concluded directly with a Czech subsidiary of a Japanese enterprise: in these cases, they had to obtain an exception from Czech insurance institutions. Japanese corporations have perceived this as an obstacle to expanding their investments in the Czech Republic. Czech authorities have therefore agreed with Japan on relaxing the administrative rules. Hence, Japanese workers may now be employed in the Czech Republic for up to five years, while at the same time remaining insured exclusively in the Japanese social security system. At the same time, workers must maintain a sufficiently close labour relationship with the posting enterprise, meaning that the workers must continue to be managed by their Japanese employers.

From August 2018, posted Japanese workers may thus remain insured exclusively in the Japanese social security and health insurance system despite their employment contract with a Czech company. This is conditional upon the workers obtaining a certificate designating them as being subject to Japanese social security regulations applicable to posted workers. The respective Japanese institution should also specify how it will collect insurance premiums on wages paid by the Czech company for the Japanese insurance system.

According to current interpretations, the described approach could also be applied to Japanese workers posted in the Czech Republic to take on an office in a statutory body (for instance a statutory representative of a limited liability company) who have concluded an agreement on exercising the office with a Czech company. The same rules will also apply to Czech workers posted in Japan.

Omnibus passed – administration to resume for suspended payment requests

On 16 July 2018, the Council of the EU adopted an amended omnibus regulation that lays down the conditions for drawing support from EU funds. The omnibus promises an overall simplification of the system of support. It constitutes a positive step for support applicants and will affect projects already in the implementation stage, as well as future ones.

Karin Stříbrská
kpmg@kpmg.cz

Silvie Jurčíková
sjurcikova@kpmg.cz

In the fall of 2017, applicants for support within the Energy Savings Programme (Priority Axis 3) were notified that the administration of their requests for payment was to be suspended on the grounds of a possible application of Article 61 of Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013. The article defines net revenues generated by a project as the positive difference between operating revenues and expenses, and stipulates that projects whose total eligible costs exceed EUR 1 000 000 and that achieve certain level of profitability shall not be entitled to support, or only to a very limited extent. This information brought uncertainty for the applicants as to the supportability of projects already running; an omnibus regulation being debated at the time was seen as a possible solution.

Among other things, the omnibus simplifies the system of inspections by relevant authorities, and emphasises better availability and transparency of support, greater flexibility, and easier administration of applications for support from EU funds. The omnibus was published on Monday, 30 July 2018 and entered into effect on 2 August 2018.

The passed omnibus regulation means a breakthrough in the application of Article 61, changing both its wording and the scope of its applicability to selected projects. For projects falling under the legislation regulating state aid, it should be possible not to apply Article 61 at all, meaning that the support should not be limited by this provision. Furthermore, the definition of net revenues has been modified for projects aiming to increase energy efficiency.

It should be possible to apply the omnibus to both new and on-going projects, i.e. projects in the assessment stage waiting to be recommended for support, as well as projects already selected for support and that have entered the implementation stage. Applicants should be contacted by their project managers for further steps.

Support under the Energy Savings Programme is still available also for large enterprises. Two calls are currently open to support energy saving measures. The level of support is 30% or 60%, depending on the type of supported activity, with support amounting up to CZK 400 million per one project. Both calls will remain open through 2018, and a total of up to CZK 6 billion should be allocated. The minimum number of points needed by a project to

succeed has also been reduced, making it easier to obtain support for planned investments in energy saving measures. We will be happy to provide you with more information in this area, should you be interested.

Financial administration's report for 2017: revenues have grown, mostly from VAT

In July, the Czech financial administration published a report on its activity for 2017: revenues have grown for both direct and indirect taxes. The main cause is the Czech economy's faster growth and related higher spending by households and governmental institutions.

Martina Valachová
mvalachova@kpmg.cz
+420 222 124 370

Tereza Funioková
tfuniokova@kpmg.cz
+420 222 123 174

More efficient tax collection remains the financial administration's priority, as well as higher tax revenues. These are traditionally topped up by VAT revenues, followed by personal income tax, with corporate income tax coming in third.

The highest year-on-year growth – by roughly 9.1% – is attributable to VAT, primarily thanks to the electronic reporting of sales (ERS), as entrepreneurs in catering and accommodation joined the system in the first stage (from December 2016), and wholesalers and retailers in the second stage (from March 2017). Contrariwise, the reduction of VAT rates from 21% to 15% for catering services had a negative effect on the growth of VAT revenues. According to the financial administration, revenues from personal and corporate income tax grew noticeably as well; the main reasons for this are the favourable development of the Czech economy, growth in wages, and a declining unemployment rate.

In 2017, the financial administration was busy with inspection activities. Procedures to remove doubts were used in 14 651 cases, nearly 50% of which ended up with different amounts of tax being assessed than had been declared by the taxpayers. Although the number of procedures to remove doubts may seem high, it is still less by 23.7% than in the past year. The total number of tax inspections also dropped year-on-year, by 25.7 %. This was mostly due to taxpayers correcting their errors through informal procedures, without the tax administrator having to initiate a formal procedure to remove doubts or a tax inspection. VAT came first in this respect, too: of the total amount of additionally assessed tax, VAT accounted for the highest share with 89.6%. The number of transfer pricing inspections was also considerable, with taxpayers responding by more frequently applying for binding rulings (APAs).

2017 was also rich in terms of appeals lodged: the financial administration was a party to a total of 13 478 appellate proceedings, with only 1 624 ending favourably for the taxpayer, which is by 20.7% less than in the previous year. Taxpayers were mostly unhappy about tax administrators' decisions in the VAT area.

Compared year-on-year, a drop by 9% in the number of orders to secure tax becomes visible for 2017; the amount of the funds thus secured was also lower by 52.1%. Contrariwise, the tax administrators grow fonder of using pledges to secure unpaid tax – the number of decisions to this effect grew by 56.9% year-on-year.

For the future, the financial administration will yet again aim to make taxpayers' lives easier by digitalising tax administration, improving the quality of outputs addressed to taxpayers and the public, and generally enhancing its client-oriented approach. Despite these ambitions, we can hardly expect tax administrators to ease off their inspection activities or efforts to recover unpaid tax.

VAT on services connected with import and export of goods

In June, the Coordination Committee of the Chamber of Tax Advisors and the General Financial Directorate (GFD) issued a statement on the VAT exemption of services directly connected with the import and export of goods. The information confirms the intention to tighten the conditions for applying the exemption, based on the recent case law of the Court of Justice of the EU.

Petr Toman
ptoman@kpmg.cz

Tomáš Havel
thavel@kpmg.cz

Hana Hašková
hhaskova@kpmg.cz

Services connected with the export of goods
According to the GFD, the exemption of services directly connected with the export of goods shall only apply to services rendered to the person that actually supplies the goods, where such supply is an exempt export of goods. Usually, this is the owner, the seller, or the exporter stated in the customs declaration. Only services rendered to this person can be exempt. This means that the exemption cannot be applied for sub-supplies of such services. When applying the exemption, the service provider shall take into account all information from the customer that may be indicated, e.g., by a customs declaration, a tax document (invoice), or a recipient's declaration that a tax-exempt export of goods was effected. The recipient of services directly connected with the export of goods is obliged to notify the service provider of the fact that they are to apply VAT exemption upon the export of the goods to a third country. If they fail to notify the service provider of this fact and the service provider then ('wrongly') applies VAT to the services, the customer's entitlement to deduction will not be accepted, according to the GFD.

Services connected with the import of goods
Services directly connected with the import of goods may be exempt in two cases.

In the first case, it is necessary for the services to be directly connected with the import of goods and, at the same time, to be rendered directly to the importer of the goods (similarly as for exports).

In the second case, the prerequisite for applying a tax exemption is that the value of the services shall be included in the tax base of the goods being imported, in accordance with the VAT Act. It is not relevant whether the value of the service has been or will be included in the tax base by the importer. This means that to meet this condition the value of the service may be exempt even where the service provider is in the position of a sub-supplier (i.e. the service is not rendered directly to the importer of the goods).

In both described cases, it must still be made sure that the goods have been/will be imported (i.e. released to a free circulation in the EU, not another customs regime, such as transit, etc.).

The Coordination Committee's conclusions also allow for the possibility of services being exempt under other

provisions of the VAT Act – for instance Section 68 of the VAT Act, concerning supplies to ships or airplanes.

The GFD interpretation contained in the Coordination Committee's conclusions will make the practical application of VAT rather complicated, in particular for logistics companies. Obviously, situations will occur where the transportation of cargo between two identical points will be tax exempt in some cases, and not in others. In view of the possibility of the service recipient's entitlement to deduction being challenged by the tax administrators, we expect increased calls on taxpayers to correct already issued tax documents, and to obtain additional evidence to support crucial facts.

If this situation concerns you, we recommend reviewing the relevant services in terms of procedures applied and documentation available.

Another step towards greater transparency of corporate structures?

An extensive amendment to the Corporations Act, prepared by the Ministry of Justice, is presently being debated by the Chamber of Deputies. In this article, we look into the changes that the amendment should bring for members of elected bodies of corporations, in particular where such members are other corporate entities.

Lenka Kučerová
kpmg@kpmg.cz

Lucie Patková
kpmg@kpmg.cz

Effective 2014, the Civil Code enables corporate entities to elect other corporate entities as their bodies. Such corporate entities may then appoint a representative (an individual) to act on their behalf, otherwise, they are represented by their statutory body. This regulation was adopted to respond to the needs of global corporations that are used to such an approach from their home countries. However, it has allowed for rather non-transparent structures: corporate entities acting as elected bodies of other corporate entities may themselves elect corporate entities as their bodies, which leads to 'chains' where it is virtually impossible to identify a concrete individual acting on behalf of a company. The concerns about the possible abuse of the regulation have now led to the proposed amendment.

The proposed regulation significantly emphasises the representatives that corporate entities elected as members of statutory bodies of 'capital' companies (joint-stock or limited liability companies) or cooperatives must appoint and record in the Commercial Register without undue delay. Such a record will be a precondition for recording a corporate entity as a member of an elected body. If the corporate entity fails to appoint its representative within three months from being elected into the office, and if such a representative is not recorded in the register by that time, the corporate entity's office as member of an elected body shall cease to exist by operation of law. The three-month deadline has been set for the sake of companies that, whatever their reasons and intentions, are not sure what 'without undue delay' means. The option to appoint a representative thus becomes a duty.

The current regulation also allows for speculations as to whether more than one representative may be appointed, and, if so, in what manner they shall act on behalf of the company. The proposed regulation stipulates that there shall be just one representative of a corporate entity. To avoid any doubts, it is also proposed to explicitly state that the appointed individual must meet the same statutory conditions as those stipulated for membership in the elected bodies, i.e. no criminal record and full legal capacity.

Is this change a benefit, or just another red-tape obstacle hindering business? The public interest in eliminating the possibilities to bypass law indicates the former. The same goes for removing the uncertainty as to the number of appointed representatives, and the fact that one record in a public register will make it clear who acts on behalf of the company, for a long time and many acts ahead.

It is yet to be seen how the proposed change will be approached by either chamber of parliament, and in what shape the amendment will be eventually signed by the president. It is also yet to be seen whether it will meet the declared purpose. Hopefully, we will avoid situations similar to those in England, where following negative experience the above described concept locally known as 'corporate directors' has been almost fully abandoned.

Japan-EU Economic Partnership Agreement signed

Representatives of the EU and Japan met in Tokyo to sign an agreement on economic cooperation. It aims to create new opportunities for the import of agricultural products from the EU, remove Japanese customs duties on products such as cheese or wine, while also protecting EU originated intellectual property in the Japanese market

Tomáš Havel
thavel@kpmg.cz

Dominik Kovář
dkovar@kpmg.cz

Negotiations between both parties were launched in 2013. The final wording of the agreement was preliminarily approved in December 2017.

Annually, goods worth approximately EUR 58 billion are imported to Japan from the EU; nonetheless, companies have been facing restrictions on the Japanese part complicating imports. The signed agreement is very ambitious and comprehensive in this respect. Once fully implemented, it is to eliminate 99% of import duties on EU goods, with the value of the customs duties amounting to EUR 1 billion. Removing the duties is expected to increase imports of some products such as processed foodstuffs (by 120%), chemicals (by 22%) or machines (by 12%).

The EU also provides services worth more than EUR 28 billion per year to Japan. The new agreement should make it easier for EU companies to access the lucrative Japanese market. The agreement contains some provisions that should apply across the board to all services, e.g. the option for both parties to regulate some parts of the trade. Also, Japanese state enterprises will have to treat foreign companies as they do domestic ones, with no discrimination allowed.

Finally but importantly, the agreement contains a commitment to fight fraud. The anti-fraud clause is an EU condition for granting tariff preferences for Japanese goods. The tariff preferences may be withdrawn if abused.

Rosy prospects for green investments

In May 2018, the European Commission (EC) presented a package of legislative proposals aiming to promote sustainable finance. The package includes a regulation on disclosures concerning the sustainability of investments, and a regulation on the establishment of a framework to facilitate sustainable investment. If passed, what practical effect will the new regulations have on companies issuing and distributing investment instruments such as shares or bonds?

Filip Horák
kpmg@kpmg.cz

Pavel Martiník
kpmg@kpmg.cz

The proposals aim to redirect at least 40% of funds invested to sustainable investments, including:

- investment in economic activities that contribute to environmental preservation, such as activities reducing the speed of global warming, or activities protecting individual ecosystems;
- investments in economic activities that contribute to achieving social goals, in particular activities promoting social cohesion or investments in human capital; or
- investments in companies that follow the good practices of corporate governance.

To achieve this, the EC prepared a set of rules to apply to all investment instruments and investment services. These will mostly affect investment advisory and portfolio management: providers of such services will be obliged to include sustainability issues in the questionnaires they use to determine their clients' investment concepts. The same should also apply to distributors of insurance-based investment products, typically unit-linked life assurance.

Selected providers of services in financial market, such as investment and pension fund managers, will also have to prepare and publish the internal sustainability policies that they follow when providing the services.

The regulation also imposes duties on those creating individual products: for each investment instrument, a sustainability analysis will have to be prepared, reviewed and updated on a regular basis. For financial products, the analysis will also have to include information on the number of reduced emissions, serving as a kind of eco-label already known from electronics or real estate.

The new rules should apply from 2022.

SAC on proving VAT exempt supplies to another EU member state

In its recent judgment, the Supreme Administrative Court (SAC) dealt yet again with the case where the VAT exemption of a cross-border supply of goods was challenged by a tax administrator. Apart from the specific circumstances of the case, the court also commented on the significance of the customer's (acquirer's) written declaration pursuant to Section 64 (5) of the VAT Act, and the possibility of pleading good faith.

Aleš Krempa
kpmg@kpmg.cz

Martin Krapinec
mkrapinec@kpmg.cz

The SAC (8 Afs 179/2016 - 33) dealt with a situation where a tax administrator challenged the VAT exemption of a cross-border supply of mobile phones to Sweden. The invoicing took place through entities established in Sweden or Lithuania and the taxpayer did not have sufficient (suitable) evidence supporting the transaction. In the course of a tax inspection at the supplier, the tax administrator ascertained the facts of the case and reviewed them by means of an international request for information from foreign tax administrators. From the information thus obtained, the tax administrator ascertained that the customers' books did not contain any records of any business transactions with the supplier, and that one of the customers had gone bankrupt. It was not confirmed that the companies had effected any sales of goods such as those that had been purportedly supplied to them by the supplier.

During the tax inspection the taxpayer then stated that the customer's statutory representative had given him incorrect invoicing data upon the delivery of the goods, and submitted an authenticated declaration of the customer's statutory representative stating the actual recipient of the goods. However, the tax administrator by means of a request for information ascertained that criminal proceedings were pending against the statutory representative in the EU for VAT fraud and smuggling.

In its ruling, the SAC referred to current case law stating that if a taxpayer proves the entitlement to VAT exemption by means of a written declaration pursuant to Section 64(5) of the VAT Act, yet if there are doubts as to the facts of the case, the taxpayer's burden of proof also includes having to prove the existence of the conditions for such exemption. The taxpayer was requested to support the entitlement to claiming the VAT exemption. Subsequently, the supplier changed his assertions as to the facts of the case, and stated that he had handed over the goods to the customer's carrier in Bohumín in the Czech Republic or in Poland, and that the delivery notes submitted had been confirmed by the driver upon delivery.

As expected, the SAC came to the same conclusions as the regional court: it stated that the supplier failed to take adequate measures to ensure that the transaction would not lead to an involvement in tax fraud. In fact, the court held that the taxpayer had been rather reckless to hand the goods over to the customer's carrier without having checked the final destination of the goods, and whether they actually had been delivered there. According to the SAC, in circumstances where taxpayers are entirely passive and do not make any efforts to verify the information provided by the customer, they cannot plead good faith.

Active defence pays off in tax fraud investigations

The Supreme Administrative Court (SAC) has brought a new perspective on proving the taxpayer's involvement in a transaction affected by tax fraud. While remaining consistent with its previous case law as to the distribution of the burden of proof, in its recent judgement (9 Afs 194/2017) the court pointed out that it may be quite harmful for taxpayers not to make any efforts to prove their non-involvement in a tax fraud.

Martina Valachová
mvalachova@kpmg.cz
+420 222 124 370

Karolína Tomsová
ktomsova@kpmg.cz

The taxpayers have by now become used that based on case law, when proving involvement in tax fraud, the burden of proof lies primarily with the tax administrator. This, however, does not mean that it is tactical not to challenge the tax administrator's arguments during tax fraud investigations. According to the SAC, the intensity of a taxpayer's defence plays an important role. The more effort a taxpayer makes, the more demands are placed on the arguments of the tax administrator who has to defend their assertions.

In the case in question, a taxpayer was denied an entitlement for VAT deduction on received advertising services on the grounds that the chain of transactions had been affected by tax fraud. According to the SAC, the tax administrator had gathered a fair amount of evidence and had come to completely logical conclusions. Although the taxpayer disagreed with the conclusions, the taxpayer did not challenge them with any relevant arguments or evidence. The SAC thus considered the conclusions as to the taxpayer's involvement in tax fraud sufficiently proved, emphasising that the tax administrator was not obliged to consider and take into account all possible versions of the facts of the case and assertions to be made by the taxpayer.

The judgement sends a clear message to taxpayers that the courts' leniency as to proving the taxpayers' non-involvement in a transaction affected by a tax fraud is not boundless. It is thus recommendable for taxpayers not to rely on their (presumed) unaccountability for producing evidence. Instead, they should actively cooperate in ascertaining the circumstances of the transactions under review, and not underestimate the importance of proper argumentation.

SAC ruling: 'mistakes can cost you' also applies to excess deductions

The Supreme Administrative Court (SAC) continues the trend of defending taxpayers against unlawful or incorrect practices of tax administrators. In its recent judgement 1 Afs 28/2018, it awarded a taxpayer interest on the wrongful conduct of a tax administrator at 14% (plus repo rate) p. a., even though the excess deduction declared by the taxpayer was only acknowledged in court.

Tomáš Búry
tbury@kpmg.cz
+420 222 124 293

Milan Hladík
kpmg@kpmg.cz

The taxpayer reported an excess deduction (of approximately CZK 10 million) in a VAT return, but, following a procedure to remove doubts, the tax administrator instead assessed additional tax (of approximately CZK 0.5 million). The taxpayer's appeal against the order to pay tax was unsuccessful. A favourable result was only achieved in court, which reversed the tax administrator's decision. The tax was then assessed as reported in the tax return originally filed.

However, the original order to pay tax was only overruled more than four years after the filing the tax return. For the entire time, the taxpayer was prevented from using not just the amount of the incorrectly assessed tax, but also the amount of the excess deduction that had not been paid to him.

Upon the taxpayer's request, the tax authority acknowledged the taxpayer's entitlement to interest on the wrongful conduct of the tax administrator (pursuant to Section 254 of the Tax Procedure Rules), but only on the tax paid, not on the much higher excess deduction denied. The tax administrators applied a very formalistic linguistic interpretation of the law, arguing that, according to the wording of the law, interest should only be awarded if the incorrectly assessed amount had been 'paid'.

SAC disagreed with this interpretation, referring, among other things, to the well-known Kordárna judgement. According to the court, it follows from economic logic that taxpayers should be compensated for the tax administrators' wrongful conduct also in cases where they did not actually pay anything, but were denied the right to use the funds in the form of excess deductions.

The SAC judgement is certainly positive. Considering the average length of court proceedings in the Czech Republic, taxpayers often accept tax administrators' decisions rather than embarking on a lengthy court dispute. However, in view of the compensation in a form of potentially high interest, waiting for justice may eventually pay off.

Latest news - August 2018

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

Lenka Fialková
lfialkova@kpmg.cz

- An amendment to the Code of Administrative Justice has been submitted to the Chamber of Deputies. The proposed changes concern the cassation complaint - an extraordinary remedy against the final and conclusive decisions of regional courts in administrative justice. The admissibility of cassation complaints is to be limited solely to cases whose importance significantly exceeds the complainant's own interest. The amendment aims to ease the burden for the Supreme Administrative Court, and speed up the proceedings. On the other hand, the change would significantly limit the participants' chance to defend themselves against the administrative courts' decisions: the law provides no other remedy in administrative justice, except for a retrial.

- UBER concluded a tax memorandum with the Ministry of Finance, aiming to ensure the proper administration of taxes of all drivers and co-operators of this growing transportation platform. Part of the memorandum is an agreement that starting from October 2018, UBER will launch the pilot operation of electronic reporting of sales for its new drivers; information on cash payments received by drivers or companies driving for UBER will thus be provided on a voluntary basis, even before the effect of the amended EET Act.

- According to the Advocate General of the Court of Justice of the EU, the financial administration proceeded in accordance with current case law. On 25 July 2018, in Luxembourg, the CJEU Advocate General Juliane Kokott issued an opinion in the crucial AREX CZ case. The case may bring some clarity to disputes concerning the medialised orders to secure tax, and is of a key importance in the fight against VAT carousel fraud.

- Among other things, the July ECOFIN session dealt with the InvestEU programme, lower VAT on e-books, and American tax reform efforts. Upon the Czech Republic's request, the new Austrian presidency also put a proposal for extending the reverse charge mechanism on the agenda.

- For sake of legal certainty, time savings, and to avoid more complex administrative procedures in the future, the Ministry of Internal Affairs urges all British citizens residing in the Czech Republic who want their rights preserved after Brexit to apply for a certificate of temporary residence. Citizens of the United Kingdom without a residency permit at the end of the transitory period will have to prove that they are covered by the rules stipulated in the exit agreement in another, more complex manner. The certificate of temporary residence is issued free of charge. The application is to be filed in the territory of the Czech Republic, at any office of the Ministry of Internal Affairs of the Czech Republic (see the list of offices at: http://www.mvcr.cz/mvcren/article/contacts.aspx).

LinkedIn | Twitter | Facebook | Instagram

www.kpmg.cz
Tel.: +420 222 123 111