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Tax & Legal

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Editorial

With the 100th anniversary of the Czech Republic approaching, allow me to make this editorial about good news. The Czech economy is in full swing; businesses and households are doing well. And this is as good a piece of news as is this year's Indian summer. Looking at the Forbes list of the 80 wealthiest Czechs, I am pleased to see a number of people who gained their wealth by hard work combined with the courage to stake their money on a good idea. For me, this is confirmation that the values on which our state was built are still valid.

It seems that in the period to come, speed will be a key feature. How are we to cope with the speed of changes in our working lives? Personally, I believe that investments into automation and the greater involvement of artificial intelligence in data processing will be the only way. This trend will have a fundamental effect on the profession of tax specialists, auditors and lawyers, and should also affect state administration. So far however, instead of making tax laws easier to understand and printed forms simpler, the administration seems to devote its energy to organising carpet bombings of newlyweds. If things are to continue in this style, we may soon have tax administrators demanding receipts for anniversary or birthday celebrations. But things may always get worse – alternatively, they may simply crash the party as uninvited guests.

To conclude on a more positive note: if you have not had the chance to go mushroom picking this autumn (which you may still do, and with no tax consequences, for the time being), you may at least get to gather some news from the digital world. According to our recent survey, for instance, many Czechs have become avid followers of cooking blogs. Our colleagues from KPMG Legal decided to respond to this demand – instead of recipes, however, their new blog will be filled with articles about law and technology. I personally predict their project will become a star among legal web periodicals.

Daniel Szmaragowski
Partner

Stricter criteria for granting investment incentives

Following discussions regarding the future of investment incentives, the government plans to use this important investment tool to respond to the actual needs and priorities of the Czech Republic and focus on projects with a higher added value. In fact, however, the government's amendment primarily introduces stricter criteria for granting investment incentives, possibly resulting in a drastic decline in the number of supported projects.

Jan Linhart
jlinhart@kpmg.cz

Jana Doškářová
jdoskarova@kpmg.cz

The government's role in approving investment incentives will strengthen significantly. Until now, the government only approved strategic investment projects; from now on, it will approve all projects. This should help the government direct the provision of aid in line with its priorities and the needs of the state at the time. On the other hand, however, this will result in an outflow of good-quality projects, as the decisions will have to be made under time pressure. Under the existing wording of the law, it was relatively easy to outline the investment incentive amount and conditions beforehand. Investors could therefore make decisions regarding the placement of their investments based on relatively reliable information. The approval itself was more or less an administrative matter if conditions for granting aid were met and all necessary documentation was provided. Once the amendment is passed, investors will only gain a reasonable level of assurance that an investment incentive will be granted after it is approved by the government. Moreover, the criteria for assessing projects will not be known in advance. In addition to the usual qualification criteria, other facts, such as to what extent an investment will help increase the competitiveness of the Czech Republic and what benefits will be generated for the region and the state, will be taken into account. The subjective evaluation of immeasurable criteria and, especially, a time delay of up to several months compared with the current situation will cause uncertainty that may sway investors to invest in other countries.

Major changes proposed by the draft amendment are as follows:

- Investment incentives will only be provided in respect of investment projects that help increase the competitiveness of the Czech Republic and promote its economic development. The law directly stipulates the applicant's duty to calculate expected benefits for the region and the state and give appropriate reasons.
- Certain criteria for obtaining investment incentives will not be determined by law but by a government decree, which will help flexibly respond to current economic developments.
- The duty to create at least 20 new job opportunities, in fact disallowing the provision of investment support to the automation of existing productions in the manufacturing industry, will be excluded from the law.

The amendment transfers a number of provisions from the law to a separate government decree. Under the new amendment, the government decree should regulate the following:

- Types of investment projects for which investment incentives can be granted.
- The definition of an investment project with a higher added value. In accordance with the proposed decree, these involve:

    - Investment projects in technology centres or strategic services centres.
    - Investment projects in manufacturing where the wages of 80% of employees amount to at least the average monthly gross pay of the region in which the investment project is carried out. Simultaneously, the investment incentive recipient must cooperate with a research organisation or a university and must employ at least 10% of personnel with a university degree or at least 2% of research and development personnel.
- The minimum amounts for acquisition of tangible and intangible fixed assets or the minimum numbers of newly created jobs (the minimum number of newly created jobs should not apply to investments in manufacturing);
- Examples of prescribed forms declaring an intention to obtain investment incentives.

The strict criteria may give rise to investors' concerns whether they will be able to fulfil them, as they will not only have to assess their current plans but also the risk of changes in the surrounding environment. Even if investors can assume that their project meets the higher added value condition with respect to a certain level of pay, they may not be ready to risk that such a condition will still be met three years later, e.g., as a result of an unpredictable change in the salary levels in the region. This relatively unfortunate setting of conditions is also likely to result in an outflow of many projects abroad.

New criteria should apply to projects whose applications for investment incentives will be filed after the amendment's effective date. We recommend that investors consider the risks arising from the amendment and potentially apply for investment incentives before the amendment becomes effective.

Taxes

TRIO programme accepting applications within the fourth call

The Ministry of Industry and Trade announced the fourth call to participate in the TRIO subsidy programme, focusing on support of operating expenses for industrial research and experimental development projects. Compared with the previous calls, the fourth call brings a number of changes.

Karin Stříbrská
kpmg@kpmg.cz

Marie Svobodová
mariesvobodova@kpmg.cz

The TRIO programme supports projects focusing on the development of the Czech Republic's potential relating to key technologies such as photonics, microelectronics, advanced materials (also in the building industry), advanced manufacturing technologies, etc. At its conclusion, each project must prove the outcome that had been defined in advance, such as a patent, verified technology, pilot operation, software, etc. Software must be intended for commercial use, i.e. the applicant may not develop it only for its own use.

The ministry is planning to support approx. 120 projects, allocating a maximum of CZK 20 million per project. Subsidies may also be granted in respect of projects carried out in Prague.

Deadlines applicable to the projects are as follows:

- project commencement in the period from 1 January 2019 to 31 August 2019,
- project completion by 31 December 2022 at the latest, and
- project duration of a maximum of 48 months.

The fourth call introduces a number of changes compared with the previous calls. The first change is that a maximum of two project plans can be filed per one identification number (IČO), compared with three projects per one identification number allowed earlier. Another change is lower support intensity, amounting to a maximum of 70% of total eligible expenses, aggregately for all candidates. The support intensity per individual candidates depends on the size of an enterprise. The necessary precondition is efficient cooperation with at least one research organisation, which may increase the project's support intensity. The applicant may not be related to the research organisation. The scoring assessment system has also changed: increased emphasis is put on the expected project results' technical and utility parameters and their comparability in the Czech Republic and abroad.

Applications can be filed from the beginning of September until 31 October 2018. Application assessment will be completed by 12 April 2019.

2019 amendment to VAT Act: changes to original wording

The 2019 amendment to the VAT Act, discussed in the previous issues of our Tax and Legal Update, has undergone a number of first changes, including, e.g., a change in the General Financial Directorate's approach to the adjustment of VAT relating to receivables from debtors undergoing restructuring.

Veronika Výborná
vvyborna@kpmg.cz

Petra Němcová
pnemcova@kpmg.cz

Change to the definition of price subsidies no earlier than from 2021

A new concept of subsidies included in the tax base and therefore subject to output VAT has already been discussed in our JuneMay issue of the Tax and Legal Update. During the comment procedure, the effectiveness of the provisions dealing with subsidies was postponed. In accordance with the draft amendment's current wording, the amended definition of subsidies should come into effect no earlier than from 1 January 2021. Consequently, until 2021, the existing definition of a price subsidy should remain in application. From 2021, a price subsidy included in the tax base should be the amount from public resources provided in direct relation with the appropriate supply and having a direct impact on the supply price.

In its explanatory report, the Ministry of Finance gives reasons for postponing the effectiveness, claiming that sufficient time to prepare has to be given to payers whose business is fully or partially dependent on income from the public budget. A new General Financial Directorate's methodology that should help payers respond to this change should also be prepared in advance. Simultaneously, the ministry has declared that payers who proceed or will proceed in adherence to EU law, i.e. assess whether a subsidy is directly linked with a price, already before January 2021, indeed proceed in accordance with the principles of value added tax.

GFD's information on restructuring

The GFD's approach to a possible adjustment of paid VAT relating to outstanding receivables from a debtor whose insolvency is dealt with by restructuring has also changed. In connection with this, in August 2018, the GFD issued information specifying conditions under which the tax adjustment can be carried out. The crucial point is that the receivable amount must be reduced, which must be evident from the restructuring plan. It therefore involves the restructuring of creditors' receivables by waiving part of the debtor's debt and related accessories. The tax adjustment may only be performed in the taxable period in which the decision on the approval of the restructuring plan was passed.

It is not possible to adjust the paid VAT where restructuring involves a mere postponement of the receivable's due date, since this does not reduce the creditor's tax base relating to the appropriate receivable, and where co-debtors or guarantors are involved, up to the amount of their suretyship/co-debtor liability.

Supreme Public Prosecutor's Office updates methodology for corporate exoneration

Public prosecutors have so far lacked a tool to assess whether a corporate entity's internal measures and efforts to prevent criminal activity are sufficient to avoid the entity's criminal liability for their employees' wrongdoings. An updated methodology prepared by the Supreme Public Prosecutor's Office now represents such a tool.

Štěpánka Černá
scerna@kpmg.cz
+420 222 123 568

Tomáš Procházka
tprochazka@kpmg.cz

Apart from extending the number of offences that corporations may be liable for, the amendment to the Corporate Criminal Liability Act also introduced a new concept of exoneration. Corporate entities may avoid criminal liability if they are able to prove that they have made every effort that can fairly be required to minimise the risks of criminal acts performed by their employees, statutory representatives and other persons. An entity's efforts may involve, e.g., the implementation and maintenance of an internal system of measures to prevent crime, i.e. a compliance programme. The amendment itself, however, neither stipulates how the requirement to actively prevent crime should be fulfilled nor specifies any compliance programme standards. The related case law is also underdeveloped and, consequently, the exoneration concept remains quite unclear for many corporate entities. The Supreme Public Prosecutor's Office's updated methodological guide on the application of Section 8 (5) of the Corporate Criminal Liability Act dated 14 August 2018 should help change this situation.

What requirements does the new methodology impose on compliance programmes? They must be tailored to the corporate entity's needs, i.e. they must correspond to the entity' nature and line of business, products and services on offer, and structure and size. To be able to claim exoneration, the entity must implement measures preventing the types of offences of which employees or other representatives are suspected. If a corporate entity plans to exonerate itself from its employees' corrupt behaviour, efficient anti-corruption measures such as a code of ethics, training, a zero-tolerance policy against corruption, etc. must be implemented by the entity. Such measures may not be implemented only after an offence has been committed. In addition, the entity's endeavour to prevent criminal behaviour even after a crime was committed will also be taken into account.

Compliance programmes should be based on analyses of potential risks. Specific measures should include the prevention of criminal activities (a code of ethics, training, education), the detection of such activities (an ethics hotline, internal investigations and audits, modern data analysis tools) and the response to such activities (determination of unlawful conduct consequences, damage recovery, other legal measures). It will not be sufficient to have these measures implemented only formally into internal policies. These measures must be adhered to, actively promoted, checked and updated when necessary. In short, they may not just stay on paper but must be actively asserted.

Since 2012 when the Corporate Criminal Liability Act entered into effect, the total number of corporate entities

prosecuted and charged with crimes has been constantly growing. A total of 595 corporate entities faced criminal prosecution in the last two years, while 336 of them were convicted. The courts primarily imposed pecuniary punishments. The highest penalty levied was CZK 5 million but, on average, penalties amounted to CZK 150 thousand. A more serious threat is a ban on business activity or the judicial dissolution of a company (which occurred in 52 cases). Much more serious penalties await companies that are subject to legislation with international applicability (American FCPA or the UK Bribery Act). Here, the highest penalty that has so far been imposed amounted to the equivalent of CZK 12 billion. Yet, the possibility of exoneration and avoidance of punishment need not be the only motivation to implement and review adherence to a robust compliance programme. It has been proven that compliance programmes primarily fulfil a preventive role and restrict financial and reputational damage.

Another step towards EU copyright reform

The media has recently been overflowing with news about the European Parliament approving a directive on copyright on the internet, including articles about a threat to freedom on the internet or the end of the internet in its current form. What actually happened?

Ondřej Vykoukal
kpmg@kpmg.cz

First, it must be said that that the voting in the European Parliament ("EP") did not involve a final decision but an agreement on the EP's bargaining position in a trialogue, i.e. negotiations between the European Commission, the European Parliament and the member states regarding the directive's final wording. However, it is quite likely that the final version will not vary much from the existing version. So what did the EP actually pass?

In addition to provisions regulating text and data mining for scientific research and cultural heritage preservation purposes, Articles 11 and 13 garnered most attention, as they introduce concepts such as a link tax or meme killers.

Article 11 of the Copyright Directive introduces the entirely new right of periodical publishers to obtain fair and reasonable compensation for the digital use of their printed publications by search engine providers such as Google or seznam.cz. Under this provision, Google in its search results would not be able to publish the title and lead paragraph of an article without having a proper licence from the publisher. Despite praiseworthy intentions, the draft directive also gives rise to risks, as shown in Germany and Spain that introduced this right in the past. In Germany, this legal regulation led to up to a 40% fall in the visitor numbers for websites that no longer appeared in search results, as Google refused to pay any royalties and decided not to disclose any of them in their search results. The outcome of all this was that a group of more than 200 VG Media publishers, including such significant publishers as Axel Springer or Handelsblatt Media Group, decided to provide licences to Google free of charge. The question is whether the same will happen with the new regulation applicable in the whole of the European Union.

Another controversial article regulates online sharing of copyright works, typically via YouTube or Facebook. Until now, under the e-Commerce Directive, users sharing content were primarily responsible for the content being shared. Website operators must remove content at the moment they learn about its unlawfulness. In practice, the copyright holders (e.g. a film producer) must on their own monitor what files are being shared and alert the website operators if illegal files are shown on their sites. The proposed directive fully removes the existing system and explicitly states that providers of services for online sharing of content are the ones who make the works available to the public, i.e. use the works in the meaning of the Copyright Act. It also explicitly stipulates that, for the above reasons, service providers must enter into fair and reasonable licence agreements with copyright holders. If they fail to enter into such agreements, they may not share copyright works on their websites.

Article 13 is also not risk-free. The definition of service providers involved in sharing content online gives rise to uncertainty. It is especially not clear what will happen with the e-Commerce Directive whose provisions are often at variance with the proposed directive. Another question remains how website operators will discourage users from sharing the protected content. Only large operators such as YouTube have sufficient funds to develop filtering systems. YouTube calls its system Content ID but admits that it is not faultless. At the beginning of this year, the Content ID system marked 10 hours of background noise recorded on YouTube as defective from the copyright

perspective, as it judged it to be identical with previously recorded noise. Whatever the directive's final wording, it is obvious that it will affect the life of each individual internet user.

We will keep you informed about further developments in this respect. You may also monitor the situation via KPMG Legal's new blog that in addition to copyright will also deal with intellectual property rights, protection of privacy and personal data, and information technologies.

Generally applicable reverse charge mechanism

At its October session, the Economic and Financial Affairs Council (ECOFIN) approved a proposal allowing the EU member states to temporarily implement a generalised reverse charge mechanism until 2022.

Tomáš Havel
thavel@kpmg.cz

Martin Krapinec
mkrapinec@kpmg.cz

The proposal to implement a generalised reverse charge mechanism (i.e. a regime in which VAT is declared by the supply recipient) was adopted in December 2016 based on an initiative of the states that are most severely affected by VAT fraud. Despite a significant deviation from the basic VAT principles, according to which VAT is generally declared and paid by the person effecting a taxable supply, this temporary solution should help member states affected by VAT fraud effectively collect tax.

The conditions for the implementation of a generalised reverse charge regime will be specified in Article 199c of Council Directive 2006/112/EC, on the common system of value added tax. Member states will have to prove that carousel fraud represents more than 25% of the VAT gap, give reasons why the measures so far adopted have been insufficient or ineffective, and document that the expected effect will be positive for all parties concerned despite the increased additional administrative burden. Moreover, they will also have to submit the design of a suitable control mechanism to ensure that the desired regime operates effectively and cannot be easily evaded.

After fulfilling all prescribed conditions, member states will be allowed to apply to ECOFIN for the approval to implement the reverse charge mechanism. Once approved, the member state will be authorised to implement the reverse charge mechanism in respect of all sorts of domestic supplies of goods and services, above a threshold of EUR 17 500 per transaction.

The Council agreed that after being approved the regime will be applicable until 30 June 2022 at the latest. After that date the entire EU should head for a definitive VAT system.

Clearer rules for cross-border tax dispute resolution

In the autumn of 2017, the long-awaited EU directive on tax dispute resolution mechanisms in the European Union was passed. It aims to unify international cooperation in the resolution of tax disputes mainly arising from interpretation ambiguities or from different approaches of individual states in applying international treaties or setting transfer prices. Usually, an unresolved dispute results in a taxpayer's double taxation.

Jana Fuksová
jfuksova@kpmg.cz

Milan Hladík
kpmg@kpmg.cz

At the moment, the regulation of cross-border tax dispute resolution is rather fragmented. On the one hand, it is based on rules contained in individual double taxation treaties usually providing for the settlement of disputes by mutual agreement – a mutual agreement procedure or MAP; on the other hand, the Arbitration Convention also provides for tax arbitration outside of mutual agreement procedures.

Presently, if any measure adopted by one or a number of states results or could result in double taxation, taxpayers may, apart from using standard national remedies, also approach a competent authority in their state. This authority will then endeavour to eliminate the dispute, by itself or in collaboration with the corresponding authorities of other states. This procedure remains unchanged by the directive but should be codified in a new procedural rule. Member states have to transpose the directive into national legislation by the middle of next year.

In August of this year, the Ministry of Finance released the bill on international cooperation in tax dispute resolution for interdepartmental comments. The act is expected to enter into effect on 30 June 2019. The bill mainly sets clear deadlines for tax dispute resolutions, and introduces the concept of an 'independent person of standing'. The independent person will be involved in dispute resolutions where the member states' competent authorities fail to reach an agreement. In the Czech Republic, the list of independent persons will be maintained by the Ministry of Finance.

The new law is to comprehensively regulate the procedure of amicable settlement of all cross-border tax disputes, also including disputes involving states outside the European Union. For EU states, some additional concepts will apply, such as access to tax arbitration. Apart from regulating the process itself, the new act should also clarify how it relates to other proceedings, including administrative justice (judicial review of administrative decisions). In this respect, the codification will be surely welcome by taxpayers, as it will provide more legal certainty in this area.

Concurrence of offices, yet again

The concurrence of offices is an evergreen in corporate law. The present back-and-forth exchange of opinions between the Supreme Court and the Constitutional Court is certainly interesting. But will they finally arrive at a straightforward result?

Iva Baranová
kpmg@kpmg.cz

Linda Kolaříková
lkolarikova@kpmg.cz
+420 222 123 889

The (prohibited) concurrence of offices is a skeleton in the cupboard of many a managing director. According to previous Supreme Court case law, an employment contract of a member of a statutory body was null and void, except where it had been concluded for an activity completely unrelated to business management. In April of this year, however, the Grand Chamber of Judges of the Supreme Court turned around and admitted, following the Constitutional Court's judgement, that even a contract for activities that fall under the responsibility of a statutory body may be (within certain limits and under certain conditions) governed by the Labour Code.

Now the Constitutional Court has yet again dealt (judgement III. ÚS 669/17) with the validity of an employment contract concluded between a company and its statutory body, who at the same time served as its managing director. The Constitutional Court pointed out that the Supreme Court failed to properly justify why it was not possible to choose the Labour Code to govern the contract. Note, however, that the Supreme Court's decision challenged by the constitutional complaint had been issued before the mentioned Grand Chamber's judgment. The Constitutional Court also disagreed with the (quite surprising) Supreme Court's opinion that it was unacceptable for a management agreement to be signed by the same person on behalf of both parties, i.e. by the statutory body signing on behalf of the company, and as an employee. Here the Constitutional Court pointed out that such approach would render it impossible to conclude employment contracts even where the job descriptions did not at all concern business management (the responsibility of the statutory body); yet so far, such employment contracts have generally been accepted by the Supreme Court.

It is expected that the Supreme Court will revise its original decision along these lines: hopefully, it will thus be made clear that it is acceptable for an agreement on exercising an office to be governed by the Labour Code. Yet, it is still necessary to bear in mind the pitfalls of such a solution: importantly, the mandatory provisions of the Corporations Act regulating the relationship between the statutory body member and the corporation must always be observed when these concern, e.g., the limitation of liability or the necessity for remuneration to be approved by the corporation. In our opinion, the above mentioned case law means a certain mitigation of risks associated with historical employment contracts of statutory body members rather than guidance on how to proceed in the future. There are certainly smarter approaches to addressing the issue of managers' positions in a company than subjecting their contracts to the Labour Code.

SAC on proving intra-group services

In November 2017, the Regional court in České Budějovice ruled against a taxpayer in a dispute concerning the provision of services within a group. The court agreed with the tax administrator's conclusions as to the lack of probative value of the evidence supporting the price of the services. The taxpayer then filed a cassation complaint with the Supreme Administrative Court, which recently dismissed the complaint as groundless.

Zdeněk Řehák
zrehak@kpmg.cz

Milan Kůta
kpmg@kpmg.cz

The SAC pointed out, among other things, that the more difficult it is to verify the costs incurred by taxpayers for services, the more emphasis is put on taxpayers conclusively proving them. In the case in question, the taxpayer failed to do so: to support the specific cost (price) of individual services received, the taxpayer only provided a general description of the services. The taxpayer was neither able to allocate the time spent for individual services nor to quantify the amount attributable to specific services of the total invoiced amount.

The SAC agreed with the tax administrator's conclusions: the submitted documents' lack of probative value is due to the fact that it was not clear who had prepared them and when; as for the calculations, the court as well as the tax administrator challenged, among other things, a year-on-year increase in the remuneration of the service provider's staff not corresponding to the development in staff numbers or the time supposedly spent on the services. As for transfer prices, the SAC confirmed the unsuitability of using a simple allocation key (50% of costs) for the specific type of expenses. According to the tax administrator, the key did not reflect the relative performance of the taxpayer compared to other divisions of the group.

As the taxpayer failed to bear the burden of proof, and, at the same time, the tax administrator proved that there were serious and justified doubts as to the reliability and completeness of the evidence submitted, the SAC approved the tax administrator's decision to assess additional tax using auxiliary tools. Using the Amadeus database, the tax administrator had determined the usual (arm's-length) percentage of intra-group services as a proportion of turnover, resulting in the exclusion of a major portion of tax-deductible expenses. From the transfer pricing perspective, it is worth mentioning that the court in fact approved the use of turnover as a relevant criterion. Also interestingly, the SAC did not find it at all unusual that the final comparable sample only included two (!) companies.

In light of the presented case law, please note that documentation should capture the substance of the services received, as well as support the manner of setting the transfer prices, which should be based on mutually linked information and considerations. The continuing logic of the setup of intra-group relations is equally important. In disputes with tax administrators it is crucial not to underestimate the comparative analyses prepared by them using the Amadeus database, and to thoroughly look into their deficiencies in the process.

Transfer price checks also in personal income tax inspections

Transfer prices between related parties remain a priority of tax administrators' inspection activities. As much as the general public believes that this only concerns corporate entities and cross-border transactions, the recent Supreme Administrative Court's judgement clearly shows that the arm's-length principle also applies to individuals, and to intra-state transactions.

Zdeněk Řehák
zrehak@kpmg.cz

Stanislava Volková
kpmg@kpmg.cz

Most of these cases concern rental payments. For instance, in an inspection of personal income tax for 2011, the tax authority for the Vysočina region reviewed the rent charged by a member of a limited liability company to the company in which he owned a 50% share. The tax administrator determined the reference amount of the rent based on rent paid for other (in their opinion comparable) property and on an expert opinion. The taxpayer then had the chance to disprove this by submitting his own evidence, namely to prove that the property had been unsuccessfully offered for rent to third parties; the taxpayer, however, failed to produce any such evidence.

The tax administrator thus assessed additional tax on the part of the taxpayer – the member charging the rent. Logically, this should have been followed by increasing the expenses, and subsequently reducing the tax liability, on the part of the other party to the transaction – the company. However, because of the length of the proceedings and the time limit for filing an additional tax return, the other party was most likely unable to do this. Unfortunately, this situation is not uncommon in the Czech Republic.

While personal and corporate income tax inspections are not primarily focused on transfer prices, tax administrators may still open this topic in the course of the tax inspection. It is therefore necessary to keep records supporting the arm's-length character of transfer prices. Quite often, tax administrators do not hesitate to obtain an expert opinion or a specialised study, even where no significant additional tax assessment is expected.

The commented judgement further shows that tax administrators are also looking into intra-state transactions. It is thus recommendable that taxpayers respond actively during the tax proceedings, making sure that the principle of 'neutrality of additional tax assessment' is observed, i.e. that the other party to the transaction gets the chance to reduce their tax liability accordingly.

Case law

SAC: filing additional tax return a preferred option to initiating tax inspection

Where the tax authority has reason to expect that additional tax will be assessed, taxpayers must be given a chance to correct their error by filing an additional tax return. Typically, these are cases where the conclusions of a single tax inspection can be applied to numerous periods. The Supreme Administrative Court (SAC) thus confirmed our opinion that the tax administrator cannot immediately initiate a tax inspection, which, apart from the 20% penalty, also involves more time and effort on the part of the tax administrator.

Jana Fuksová
jfuksova@kpmg.cz

Viktor Dušek
vdusek@kpmg.cz

In its recent judgment (7 Afs 229/2018) the SAC dealt with a case where a tax administrator, based on the results of a tax inspection of selected months from 2011 to 2014, initiated a targeted tax inspection of other, not yet inspected periods. In the first tax inspection, the tax authority disagreed with the VAT qualification of selected supplies of goods: at the heart of the dispute was whether the standard VAT treatment or a reverse charge should be applied to the goods in question. The taxpayer carried out similar trading in other periods as well. The tax administrator first checked, by means of an on-site investigation, which periods the trading involved, and subsequently initiated a tax inspection of these periods, targeted on the disputed supplies.

Courts of both instances disagreed with the tax administrator's approach and noted that the hierarchy of procedures as per the Tax Procedure Code has to be followed, with a voluntary correction of errors by filing an additional tax return clearly being preferred over a tax inspection. Thus, if a tax administrator becomes aware, otherwise than by a tax inspection of the period in question, that additional tax should be assessed, then the tax administrator has to first call upon the taxpayer to file an additional tax return. If the tax administrator fails to do so and immediately initiates a tax inspection, such an inspection is unlawful, and shall be viewed as if it had not happened at all. It therefore can also not have any effect on restarting the time limit for assessing tax. The courts also refused to accept the tax administrator's argumentation that the unlawfulness of the tax inspection might be rectified (and the inspection considered lawfully initiated) by not assessing the penalty in the end. No such option, however, is allowed by the Tax Procedure Code.

Both courts' decisions are welcome, for numerous reason. After many months, our objections proved to have been justified. These objections then led to the discontinuation of an unlawful tax inspection. We are also seeing some indications that the courts' conclusions are being respected, as in practice, we have already come across the first calls to file additional tax returns.

Case law

Not granting personal data subject's request is an administrative decision

The Supreme Administrative Court (SAC) dealt with the admissibility of an action for protection against unlawful infringement by an administrative body in a case where a personal data subject was not satisfied with how their request under the personal data protection regulation was dealt with. In the case in question, the infringement was allegedly committed by the Police of the Czech Republic, as it denied a request to delete personal data from the national Record of Undesirable Persons and from the Schengen Information System (SIS II).

Ladislav Karas
lkaras@kpmg.cz

Martina Okáčová
kpmg@kpmg.cz

In the case in question, the complainant was apprehended upon his arrival at an international airport in Paris and denied entry into France on the grounds that he had been recorded by the Czech police in the national Record of Undesirable Persons and in the SIS II system. The complainant then approached the Czech police with a request for information as to what personal data they had processed about him, and how long they intended to keep such data if it cannot be deleted immediately. The police responded by a notice stating what personal data of the complainant it had processed, and after what time the data would be deleted; the request to delete the data was not granted.

The complainant then sought the deletion of his personal data or its exclusion from the Record of Undesirable Persons and SIS II by means of an action for protection against unlawful infringement by an administrative body filed with the Municipal Court of Justice in Prague. The Municipal Court of Justice in Prague found the complainants' inclusion in the Record of Undesirable Persons in compliance with legal regulations, and dismissed the action as groundless. The complainant then filed a cassation complaint with the SAC against this decision.

To decide on the merits of the case, it was crucial to determine the nature of the notice given by the Czech police stating that the request for deletion of personal data was not to be granted. In line with its previous case law, the SAC held that although the notice had not been issued in an administrative procedings, it was still the result of a certain formalised process (under Section 83 of the Act on the Police of the Czech Republic). The fact that the notice by the Czech police is not a result of administrative procedings governed by the Administrative Procedure Code or another procedural regulation does not mean that it cannot be considered an administrative decision. The court mainly based its conclusions on the previous decision of the extended panel of judges of the SAC summarising the characteristic features based on which certain act can be viewed as an act issued in a formalised procedure (having a concrete addressee, written form and delivery, required essential content – namely a rationale and advice/caution), as well as on the structure of the notice, which was similar to a decision statement.

The SAC thus held that the notice by the Czech police was not just a declaratory letter, but an act capable of infringing on the complainant's rights. According to SAC, the Czech police's notice on not granting the request to delete personal data was, in effect, a negative administrative decision.

The complainant sought his rights by means of an action for the protection against unlawful infringement by an

administrative body; such action is only admissible where no other remedy is available – in the case in question, the complainant should have first sought remedy by means of an action against the administrative body's decision.

For the sake of completeness, please note that the present regulation of notices given by the Czech police is to be transferred to the new Personal Data Processing Act, which is currently going through the legislative process. It is impossible to predict what the content of the act will be when finally passed, yet, the present wording of the bill as proposed by the government does not indicate any conceptual changes in this respect.

Latest news - October 2018

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

Lenka Fialková
lfialkova@kpmg.cz

- Early in October, the Chamber of Deputies will debate in the second reading an amendment to the Labour Code proposed by the deputies. It abolishes the 'waiting period' – the first three days of temporary inability to work during which employees and civil servants do not receive any wage or salary compensation. This legal concept was introduced into Czech law in 2008, then abolished by the Constitutional Court, and reintroduced in 2009. The present motion intends to abolish it again, with the proposed effective date of 1 July 2019.

- After a stormy debate, the Chamber of Deputies passed an amendment to the Criminal Code, which introduces an entirely new offence – perverting the course of justice. The offence is committed by submitting false or modified evidence. Perverting the course of justice will involve exclusively real and documentary evidence that has a significant effect on the court's decision – namely forged bills of exchange and promissory notes, contracts with purposively stated dates or falsified signatures, modified photographs or data. Unlike originally proposed, it will not be a serious crime, meaning that wiretapping cannot be used to investigate it. The amendment is now going to the senate.

- The Chamber of Deputies concluded its 19th session. The deputies did not have time to discuss the 2019 Tax Package (Print 206) in the first reading. The first reading of another closely watched bill –Print 205, an amendment to the ERS Act – was interrupted.

- The CNB Bank Board has increased the two week repo rate (2T repo) by 25 basic points to 1.50%. At the same time, it decided to increase the Lombard rate to 2.50 % and the discount rate to 0.50%. The new interest rates are valid from 27 September 2018.

- Government Decree No. 213/2018 on the amount of the general assessment base for 2017, the recalculation coefficient for adjusting the general assessment base for 2017, the reduction limits for determining the calculation base for 2019 and the basic amount of pension for 2019, and on increasing pensions in 2019 was published in the Collection of Laws. As a result, the limit for participation in sickness insurance increases from CZK 2 500 to 3 000 per month in 2019. Also, the maximum assessment base for social security premiums increased to CZK 1 569 552; this amount will also affect the solidarity tax surcharge.

- Effective 1 July 2019, the Ministry of Labour and Social Affairs proposes to increase the parental allowance (for children up to four years of age) from the present CZK 220 thousand to CZK 260 thousand. Families with twins and multiples would be entitled to CZK 390 thousand instead of the present CZK 330 thousand.

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Tel.: +420 222 123 111