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Tax & Legal

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Editorial

In this Tax and Legal Update's Tax News we primarily focus on interesting judicial decisions issued by both the Court of Justice of the EU and national courts. In the labour law area, another attempt to cancel the waiting period, referred to as 'karencni doba', is worth mentioning. This would in practice mean that employees will again be entitled to receive sickness benefits in the first three days of sickness and that employers might have to deal with an additional financial burden. It is not yet sure in what shape the draft amendment will pass through the parliament, if at all. A number of alternative proposals and comments have come from both the political and business sphere.

Despite the extent of information we have already provided, we would again like to draw attention to the fact that the European General Data Protection Regulation, known as GDPR, will come into effect on 25 May 2018. It will be binding for the entire European Union. The new legislation introduces a great number of duties for corporations and entrepreneurs with respect to personal data processing and imposes relatively significant sanctions and penalties if these duties are not fulfilled.

In connection with GDPR, I would like to ask you for your consent to having our Tax and Legal Update sent to you, as we will no longer be able to do so without your consent. Your subscription may be set up here.

Enjoy this year's spring with its summery temperatures. I for one am delighted with this harbinger of summer!

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Witness testimonies in tax proceedings?

Along with supporting documentation, witness testimonies are the most common and most important means of proof. A tax administrator's refusal to hear a witness may even lead to the unlawfulness of payment assessments. What are the tax authority's duties with respect to witness testimonies? May the tax administrator refuse to hear a witness or accept their testimony made within other proceedings? The correct procedure has been discussed by the Supreme Administrative Court (the SAC), as shown in several of its recent decisions.

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In its recent decision, the SAC emphasised the importance of witness testimonies in tax proceedings: with some exceptions, the tax administrator must hear the testimony of proposed witnesses. For instance, the SAC judges dismissed the argument that all statutory representatives need not be interviewed since they will give the same testimony owing to the similarity of their positions. They also rejected the argument that in one case an excessively long time had passed from the end of the taxable period to consider the witness testimony trustworthy. The SAC instead found that the statutory representative's testimony may have brought new light into this particular case. The SAC found the tax administrator's refusal to hear a witness such a serious deficiency that it revoked the tax administrator's decision for unlawfulness.

A witness testimony is immediate and hard-to-replace evidence, according to another judgment by the SAC, in which it challenged the tax administrator's decision to accept interview protocols from other tax proceedings instead of hearing witnesses, even despite the fact that the tax entity's representative was present at a prior interview and could cross-examine witnesses. The court drew attention to the fact that the tax entity's representative could not have expected that such testimonies would be used in other proceedings as well, therefore it cannot be assumed that he would have asked questions about circumstances outside the relevant proceedings. Therefore, the the tax administrator must interview witnesses again if the taxpayer asks it to do so. Hearing witness testimonies may prolong the entire proceedings but this fact on its own cannot be taken as grounds for denying the request. The tax administrator may decide not to satisfy the taxpayer's request only if its sole intention is to obstruct or purposefully extend tax proceedings.

The SAC judgments should remind both taxpayers and tax administrators of the importance of witness testimonies in tax proceedings. The failure to hear witnesses may lead to the revocation of a decision to assess tax. We therefore recommend taking witness testimonies into proper account, since testimonies may in some cases help prove entitlement to VAT deduction or the deductibility of expenses.

OP EIC update

The media has disclosed information about the EU suspending the provision of aid within the Enterprise and Innovation for Competitiveness Operational Programme, whose governing body is the Ministry of Industry and Trade, as a result of a high error rate when paying subsidies from this programme, revealed by the Ministry of Finance as the auditor. Below we provide a short summary of the current situation.

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The Ministry of Industry and Trade issued a press release and additional information from an intermediary, the Agency for Enterprise and Innovations (the AEI). The audit revealed a high error rate, which should be rectified by means of a number of internal measures that are currently being implemented. However, the programme's **suspension** only relates to the certification of funds from the European Commission to the state budget, **which should not affect the payment of funds in respect of projects implemented by individual applicants. In the period of suspension, funds will be paid from national sources and applications for payments submitted by applicants will continue to be paid in a standard manner.**

Method of calculating newly-created jobs within the ICT and shared services programme

The second piece of information, encountered by applicants within the ICT and Shared Services programme, in particular relating to the Creation of new IS/ICT solutions call, was a message from the Ministry of Industry and Trade (the AEI) clarifying the method of calculating newly-created jobs, which is the key indicator of this programme.

An audit of this programme revealed discrepancies in the payment of aid for newly-created jobs due to an error in the definition of the methodology within the above call to participate in the programme. According to the audit findings, in addition to expenses incurred for newly-created jobs, the programme also covered the payroll expenses of existing employees who had been merely relocated to the project, which is in compliance with the call conditions but at variance with the EU rules, according to which **aid may only be provided in respect of jobs created within a project as a net increase in the total number of jobs.**

We do not know either the exact number of projects whose expenses have already been covered based on the incorrect interpretation, nor its overall impact. A large number of projects are currently being implemented and subsidies have not yet been applied for. The AEI is communicating directly with the applicants concerned to ensure compliance with the EU rules.

No sanctions for breach of GDPR for ČEZ and non-profits?

A group of deputies headed by Marian Jurečka (KDU-ČSL) has submitted a draft amendment to the Personal Data Protection Act. The deputies have taken on the role of protectors of public institutions and non-profit organisations against the harsh sanctions introduced by the General Data Protection Regulation (GDPR): the proposed amendment aims to exempt these entities from the GDPR sanctions to be imposed by the Office for Personal Data Protection.

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The authors of the draft intend to make use of an option provided by the GDPR allowing the member states to lay down the rules of imposing administrative fines on their public authorities and entities; the GDPR thus responded to the fact that some member states' constitutional law explicitly forbids penalising public authorities. However, taking advantage of this option in a Czech legal context goes against the intentions of the EU legislators. Moreover, the proposed amendment extends the term 'public entity' to non-profits as well, thus embarking on a rather extensive interpretation of EU standards, while such a task ought to pertain solely to the Court of Justice of the EU, to ensure their uniform application across all member states.

The submitted draft amendment also adapts the GDPR in a rather unsystematic way, by simply exempting some institutions from sanctions. Not to mention that comprehensive GDPR adaptation laws abolishing the Personal Data Protection Act altogether are already being debated in the Chamber of Deputies. The whole proposed amendment does therefore seem rather redundant.

While the proposers emphasise that the exemption is meant to make life easier for small municipalities and non-profits, the wording is so wide that it would also apply to ministries and governmental institutions that process large quantities of personal data in their systems. The proposed amendment also exempts from the sanctions public institutions including, according to the government's statement, public transport companies or business entities such as ČEZ (a partly state-owned Czech energy company). Such a wide exemption is obviously contrary to the principle of equality before the law and puts some entities in an unreasonably advantageous position. While the proposers obviously intended to provide relief for some entities such as non-profit organisations for whom the sanctions would be unnecessarily harsh, the manner of implementing the exemption is far from ideal, considering the above.

Moreover, non-profits or other entities do not need to worry about unreasonably high sanctions, even without the amendment: in accordance with the principles of imposing administrative sanctions, no penalty shall be destructive for the entity affected and shall always reflect the gravity of the breach of duties stipulated by the GDPR.

The proposed amendment is unsystematic and most likely also in breach of the constitutional principle of equality before the law. Moreover, it uses undefined and misleading legal terms. The government in resignation is of a similar opinion and has already expressed its disagreement with the draft. We therefore recommend focusing primarily on the development of the laws adapting the GDPR as proposed by the government, which are to be discussed in the committees of the Chamber of Deputies in May and then put on the chamber's agenda. If these laws are passed, the mentioned amendment will be pointless, as the entire Personal Data Protection Act will thereby be abolished.

First three days of sick leave paid again?

Under presently applicable legislation, employees are not entitled to wage compensation for the first three days of temporary inability to work. This practice, referred to as ‘karencni doba’, or a ‘waiting period’ was introduced in 2008 by Mirek Topolánek’s government as a part of some measures to stabilise public budgets. From the very beginning, it was strongly opposed by left-wing deputies, who repeatedly attempted to abolish it. The admissibility of the regulation was also reviewed several times by the Constitutional Court. An amendment to the Labour Code aiming to cancel the waiting period is now, yet again, to be debated by the Chamber of Deputies, and this time it seems to stand a chance of succeeding.

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In the beginning, employees were entitled to sickness benefits paid from the sickness insurance system for the entire time of their inability to work. The waiting period was enacted to save costs and also to prevent the abuse of sickness benefits. Upon a proposal of left-wing deputies, the Constitutional Court foiled the first attempt to introduce the waiting period, arguing that the situation whereby the state required employees to pay insurance premiums unconditionally, but only paid benefits under certain conditions, was unconstitutional. The court also emphasised that the state should prevent feigned sicknesses by checking the doctors issuing the sick notes and the employees more thoroughly, rather than by punishing all by blanket sanctions.

Since 2009, however, employees’ wage compensation for the first 14 days (or for the first 21 days) of sickness have been paid by their employers; sickness benefits from the sickness insurance system are only paid from the 15th day of sickness (or from the 22nd day). In response to the mentioned Constitutional Court judgement, the rate of social security premium paid by the employees was reduced by 1.5%. The next right-wing government managed to put through the waiting period, and this time it passed the test of constitutionality.

Employers are, understandably, very happy about the waiting period – since its introduction, the employee sickness rate has dropped significantly. At this point, employers would only agree to abolish the waiting period if an ‘electronic sick note’ system were introduced, allowing them to check up on their sick employees more efficiently. Trade unions, on the other hand, have never really come to terms with the waiting period, arguing its negative impact on employees’ material security and health, and objecting that employees now have to take part of their (paid) vacation instead of sickness leave. However, repeated motions by deputies to abolish the waiting period have so far failed.

Now the situation seems to be different. The new draft amendment proposed by the deputies has gained the support of the government (in resignation) and has a real chance to pass through the legislative process. The original wording of the amendment would abolish the waiting period altogether – employees would be entitled to wage compensation at 60% of the adjusted average earnings starting from the first day of sickness. Employers would be compensated for the increased costs by reducing the rate of sickness insurance premium paid by the employers by 0.2%. The government had previously proposed that if the waiting period was to be cancelled, employers would only pay wage compensation until the 11th day of sickness; now the government suggests that the wage compensation for the first three days of sickness be reduced to 30% of the adjusted average earnings. It is therefore not yet sure in what shape the draft amendment will pass through parliament, if at all.

Scent trademarks and other news

A major amendment to the Act on Trademarks is currently being debated, with the planned effective date on 1 January 2019. If passed, the amendment will fundamentally change the system of registering trademarks in the Czech Republic. The amendment brings a wide range of novelties: for instance, there will be no need for a registered trademark to be represented graphically, and the Industrial Property Office will no longer automatically refuse to register trademarks identical with previously registered trademarks.

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The present definition of a trademark stipulates that any trademark must be capable of being represented graphically; indications that cannot be expressed graphically shall not be registered by the office. Starting from next year, however, this should be possible. As the explanatory report to the draft amendment states: "The new definition does not limit the admissible means of representation to graphical or visual ones but also makes it possible to register trademarks that are capable of being represented by any technological means available." The choice of the technological means to represent the trademark is not limited by the amendment and is left fully to those applying to register the trademark.

The option to register the traditional verbal, graphical or combined trademark, of course, remains unchanged. However, it will now be possible to register a 3D trademark too, as well as a sound, motion, audio-visual or even holographic trademark. Such trademarks will typically be represented in JPEG, MP3 or MP4 files. Even scent or taste trademarks will be possible, even though their representation will be somewhat problematic. Interestingly, a scent (olfactory) trademark had already been registered: the smell of freshly cut grass for tennis balls. Although this was not a Czech or European trademark, there is clearly a way to represent and register a scent trademark.

Another fundamental change concerns the refusal to register an indication which is identical to a trademark previously registered for the same goods or services. At present, the procedure is that if someone applies to register a trademark that is identical to a trademark already registered for the same goods or services, the office will simply refuse such an application. Owners of current trademarks do not have to monitor new applications to register identical trademarks, and may simply rely on the office to proceed as appropriate.

From January 2019, the office will no longer follow this procedure; it will be up to the trademark owners to watch whether a registration of a trademark identical with their trademark has been applied for. If a trademark being applied for is identical to an existing trademark, it may still be prevented from being registered, but only upon the motion by the owner of the previously registered trademark. If the owner of the previously registered trademark does not speak up in time, the office will register the new trademark, even if it is identical with such a previously registered trademark.

Every registered trademark owner thus should monitor the applications for new trademarks on a regular basis, and respond in time if a trademark registration is being applied for that is identical to their trademark.

The amendment contains a number of other, less important changes, such as the trademark owners' right to prevent transportation of goods from third countries to the Czech Republic, if such goods unlawfully infringe on their trademarks, or a provision explicitly allowing the trademark owner to ban the trademark being used as

a name of a company.

The effective date of all the changes proposed is planned for 1 January 2019. Since the changes are based on the EU directive that has to be transposed in the Czech law by 14 January 2019, we expect that the Czech legislators will endeavour to meet this date

Crowdfunding under regulator's scrutiny

The proposal for a regulation on crowdfunding platforms in the EU is currently subject to a comment procedure. Such platforms allow the public to invest in projects using relatively small amounts of funds, while the final collected sum may amount to tens of millions of Czech crowns. The regulation aims to harmonise rules applicable to crowdfunding service providers across member states.

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The proposed regulation introduces an option for crowdfunding platforms to choose whether they will be governed by national legislation or this regulation. If a crowdfunding platform decides to be governed by the regulation, it will be subject to supervision performed by the European Securities and Markets Authority (ESMA) and not by the national bodies.

If the regulation is adopted in the version that has been submitted for comments, it will affect not only crowdfunding service providers that choose to proceed in accordance with the regulation but also persons who disclose their projects intended for funding on these platforms, as these may also be inspected by ESMA to ascertain whether or not these persons' duties have been violated. The draft regulation also introduces the duty to prepare a document with key information for investors whose concept is similar to the concept of documents prepared in connection with the provision of investment services.

Another novelty is the regulation of advertising of projects published via these platforms. It will no longer be possible to promote specific projects but only the platform as a whole. The proposal also prescribes the rules to settle conflicts of interest that may arise when providing crowdfunding services.
It is no coincidence that a number of proposed rules resemble the existing rules applied within the financial sector, especially the capital market. The European Union does not disguise its attempt to regulate and harmonise this sector, claiming that their intention is to protect the platforms' investors whose number is in the hundreds and even thousands.

Burden of proof for shortages ascertained

In its judgment No. 1 Afs 327/2017, the Supreme Administrative Court (SAC) dealt with an additional assessment of value added tax on shortages recognised during stock takings. The judgement provides insight into how shortages are viewed by the Czech tax administration, and how the burden of proof is distributed. What should taxpayers watch out for?

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In the case in question, a tax administrator denied a taxpayer's entitlement for VAT deduction on invoices issued under an advertising contract, and also assessed additional output VAT on shortages recognised on stock taking of inventories. The SAC eventually admitted the taxpayer's entitlement for deduction but confirmed the additional VAT assessment on shortages.

From the perspective of the VAT Act, a shortage, i.e., an unsupported loss of goods in stock, is viewed as a taxable supply, therefore subject to VAT. Unsupported shortages do not include cases where inventories were provably stolen or destroyed, or where employees were ordered to compensate the missing inventories. Furthermore, according to Czech Accounting Standards, shortages do not include natural shrinkage and technical or technological losses occurring in the manufacturing, purchasing or sales process (retail shrinkage); in these cases, the taxpayer has to issue an internal policy stipulating the usual shrinkage rate. It is always up to the taxpayer to prove the stated facts.

In the case in question, the taxpayer recognised stock-taking differences at the end of 2010 and 2011, and accounted for them as shortages. According to the interpretations of the legislation applicable at the time, these should have been subject to additional output VAT. However, the taxpayer declared that the recording of the differences in account 549 (shortages over the standard) had been incorrect as they should have been recorded in account 504 (goods consumed) because they involved shrinkage within the standard stipulated by an internal policy and as such were not subject to VAT. Therefore no additional output VAT should be assessed.

To the tax administrator, the taxpayer submitted an internal policy stipulating the rate of natural losses and shrinkage in retail. However, the tax administrator determined from the information obtained from the taxpayer and its website that the taxpayer actually carried out a wholesale activity, which was not at all specified in the submitted policy. The tax administrator then requested the taxpayer to define what portion of the shrinkage occurred in retail, and what in wholesale. The taxpayer did not provide the information. The SAC concluded that the taxpayer failed to carry the burden of proof and confirmed the assessment of additional output VAT. The judgement shows the importance of properly drafted internal policies stipulating the amount of justifiable shrinkage of inventories.

Substance-over-form rule not applicable to research and development allowances

In its judgement No. 3Afs 304/2016 – 37, the Supreme Administrative Court (SAC) confirmed once again that compliance with formal essentials stipulated by the Income Tax Act is a prerequisite for claiming research and development allowances. If taxpayers fail to meet these conditions, their claims may be challenged by the tax administrator.

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According to the tax administrator, taxpayers should treat the formal requirements as an essential element without which the research and development project cannot be implemented. In the given case, the taxpayer objected that the tax administrator's assessment of the project was purely formalistic and did not at all deal with its substance. The SAC, however, confirmed the tax administrator's conclusions and held that compliance with the statutory requirements stipulated for research and development projects was indeed a prerequisite for claiming the allowance. If formal requirements are not met, the tax administrator is not obligated to proceed in assessing whether a project in fact involved research or development activities.

The SAC also agreed with the regional court's criticism of further project deficiencies: inaccurate identification data of the taxpayer such as the trade name, registered office and identification number, or the missing name and surname of the authorised person who had approved the project before starting its implementation. The project in question had only been signed with an illegible signature with no identification, which was also considered insufficient. According to the SAC, another deficiency was the manner of project review and assessment: the taxpayer supported these by separate documents, which were, however, only prepared after the project implementation had started. In this respect, the SAC emphasised another crucial prerequisite: the research and development project has to have been written before any research and development activity can be initiated.

Last but not least, the SAC stressed the need for a project's completeness. In the case in question, the taxpayer first submitted the project to the tax administrator only in electronic form that did not contain the necessary underlying materials. Only upon the tax administrator's request were further underlying materials produced. According to the taxpayer, the tax administrator should have been able to deduce that all formal requirements had in fact been met. Instead, the SAC emphasised that the burden of proof is with the taxpayer, and it is not the task of the tax administrator or administrative courts to actively and subsequently combine unrelated documents to deduce from them the project's compliance with requirements stipulated as to its form and content.

Dependent agent permanent establishment

The Regional Court in České Budejovice held that if an agent's activity forms a separate and essential part of a non-resident taxpayer's activity, it gives rise to the taxpayer's permanent establishment in the Czech Republic. The activity does not necessarily have to be carried out under a power of attorney. It is also irrelevant whether the agent carries out the activity for multiple entities.

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At the heart of the dispute was the question of whether activities carried out by a Czech company in the Czech Republic for a company tax-residing in Germany met the criteria of a dependent agent's activity, giving rise to a permanent establishment. The German company's scope of business was the sale of working apparel and tools. It claimed that all its business activities were managed and carried out in Germany, and that the activities of the Czech company (the agent) were solely of a preparatory or auxiliary nature. The company also argued that the Czech agent was not authorised to conclude contracts or orders for sale of goods in its name, nor did it have any power of attorney, and only provided administrative and call centre services for the company. At the same time, the Czech agent also provided services to other entities. The company thus believed that under the Income Tax Act and the Double Tax Treaty between the Czech Republic and Germany, no permanent establishment had arisen in the Czech Republic.

The tax administrator disagreed. In an on-site investigation, it ascertained that the Czech agent accepted shipments, dispatched ordered goods to customers, arranged for goods replacement, dealt with customer complaints, and invoiced on behalf of the company. Based on this, the tax administrator concluded that the extent of matters arranged by the agent on behalf of the company was such that it in fact replaced the company's own activity. According to the tax administrator, the foreign taxpayer's permanent establishment had thus arisen, as the agent's activity formed a separate essential part of its business; it was irrelevant that the Czech agent did not have a power of attorney. The regional court confirmed the tax administrator's approach.

The above conclusions of the court indicate that the existence of a permanent establishment may also be deduced from the factual content of the relationship between the contractual parties, regardless of the Czech agent not having the legal basis for the activity in the form of a power of attorney. In the rationale of the judgement, the regional court stated that the authorisation to conclude contracts or orders was deduced from the factual nature of the contractual relationship between the company and its Czech agent. The taxpayer has appealed, so the case will be dealt with by the Supreme Administrative Court.

Case law

CJEU: deduction of VAT on input must be allowed upon assessment of additional VAT on output

Recently, the Court of Justice of the European Union (CJEU) dealt with two interesting and in principle similar cases that both involve the rectification of incorrectly declared supply in terms of VAT. Whereas national courts denied the customer's entitlement to deduct the additionally assessed VAT, the CJEU issued a decision in the customers' favour. The important fact was that neither case involved fraudulent behaviour. In the court's opinion, it is actually impossible not to be able to claim VAT deduction if output VAT is additionally assessed.

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In the first case in question (C-533/16), moulds were being delivered within the territory of Slovakia without applying local VAT under the assumption that this involved financial settlement. Subsequently, the supplier rectified its mistake and paid VAT on output. The customer, Volkswagen AG, then applied for a refund of the additionally-assessed tax. The tax administration agreed only partially, claiming that the time limit for exercising the right to a refund had started to run from the date of supply of the moulds and had therefore expired in respect of certain supplies.

A similar situation was discussed in the Biosafe case (C-8/17). Instead of a basic 21% VAT rate, a reduced 5% VAT rate was incorrectly applied on supplies. The tax authority assessed additional VAT after an inspection. Biosafe as the supplier asked its customer for reimbursement of the additionally-assessed tax, but the customer refused, claiming that it could no longer deduct the tax since the time limit for exercising the right of deduction under the Portuguese VAT law had already expired.

In short, in both cases the CJEU made a stand for the taxpayers and held that national legislations preventing to deduct VAT on input (or to refund VAT in the Volkswagen case) on the grounds of an expired time limit that had started to run the moment the goods in question had been delivered, were at variance with the basic principles of the EU's VAT legislation.

The important aspect was the absence of tax evasion. According to the CJEU, in the Volkswagen case the company could not objectively exercise its right to a VAT refund before the tax was rectified. It did not have invoices at its disposal and therefore could not have known that VAT was payable.

Similarly, in the Biosafe case, the CJEU concluded that, only after rectifying the tax, the factual and formal requirements in terms of the substantive law were met and could give rise to the entitlement to deduct VAT. Since

the customer did not act without due care and no fraudulent agreements were entered into, the limitation period could not be applied against exercising the right to deduct VAT. The time period started to run from the date the original invoices had been issued and for some supplies expired before the tax was corrected.

The above court decisions may significantly affect similar cases in which, without acting fraudulently, tax is incorrectly paid and subsequently rectified.

End of never-ending story on concurrence of offices?

Czech judiciary again dealt with the (un)acceptability of the concurrence of offices, i.e. whether members of a corporation's statutory body may at the same time perform activities for the same company under an employment relationship. This time, this issue was discussed by the Grand Panel of the Supreme Court, subsequently issuing Decision 31 Cdo 4831/2017 on 11 April 2018. What was their view?

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In the case in question the defendant, a chairman of a board of directors, entered into an employment contract with a company for the performance of a managing director's office. The managing director's office involved the same activities as those falling within the field of activity of the board of directors.

In its past decisions, the Supreme Court had been of the opinion that a contract concluded between a member of a corporation's statutory body as an employee and the corporation as the employer under the labour-law regime, under which the member was to perform activities pertaining to the statutory body, was invalid and at variance with the law. The court argued that such activities did not represent dependent activities and that the occurrence, termination and content of a relationship between the statutory body member and the corporation was not governed by the Labour Code. It also argued that under an employment contract, the statutory body member may only perform activities for the corporation not falling within the scope of activity of a statutory body.

In its finding under file no. I. ÚS 190/15, the Constitutional Court found the above arguments at variance with the right to act freely and going against the principle according to which contracts should be adhered to. In addition, the court drew attention to the basic principle of interpreting contracts: the priority is to interpret a contract in a way that does not result in the invalidity of the contract rather than interpret it in a way that results in its invalidity if both interpretations are equally feasible.

In the light of the above finding, the Grand Panel of judges of the Supreme Court deviated from the conclusions made in its previous decisions. It concluded that although the relationship between a corporation's statutory body member and the corporation should reasonably be governed by a contract of mandate under Section 66(2) of the Commercial Code in effect until 31 December 2013, the parties concerned may agree that their relationship will be governed by the Labour Code. Such an agreement, however, does not make their relationship an employment; it remains a commercial-law relationship, while it is only governed by those Labour Code provisions that are not at variance with the obligatory provisins of the Commercial Code, such as the rules regulating the origination and termination of an office of a statutory body member, the prerequisites of exercising such an office and the consequences of their absence, the remuneration of statutory body members via an executive service agreement that must be approved by appropriate bodies, the duty to exercise an office with due managerial care, and the implications of the breach of such duty.

The same applies where, in addition to an executive service agreement, a statutory body member and a corporation

enter into an employment contract to perform some activities falling within the scope of activities of a statutory body. In such cases, the employment contract should be regarded an amendment to the executive service agreement.

Even though it appears that concurrence is admissible, the above situation lacks transparency for both corporations and statutory body members. Moreover, the implications in relation to the Corporations Act are still being discussed. We therefore recommend avoiding the concurrence of offices and concluding a good-quality executive service agreement that may also include traditional employee benefits.

CJEU again ruled on transport in chains of transactions

In its February decision (C-628/16), the Court of Justice of the European Union (CJEU) again dealt with how to attribute transport or dispatch to two successive intra-community supplies. According to the CJEU, transport may not be ascribed to the first supply in a chain of transactions if the second transfer of the right to dispose of the goods as owner took place before the intra-community transport occurred. Moreover, the CJEU also opined on the question of claiming the entitlement to VAT deduction based on an incorrectly issued invoice.

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Company A seated and identified for VAT in Germany sold crude oil products to Company B identified for VAT in Austria. Company B received all necessary documentation from Company A and committed itself to ensure the transportation of products from Germany to Austria.

Subsequently, Company B sold the goods to Company C and agreed with Company C that it would ensure transportation. Company A did not know about the second supply and assumed that the delivery of goods to Company B represented an exempt intra-community supply. Company B then issued an invoice to Company C including Austrian VAT. Company C paid this tax and subsequently claimed it on input, whereas Company B never paid tax to the state. After a tax inspection by the tax authority, Company B rectified invoices and issued them excluding VAT but never refunded the received tax to Company C.

The CJEU held that since Company C had disposed of the goods as owner earlier than the intra-community transport took place, the transport cannot be ascribed to the supply between Company A and Company B. It is clear from the above that only the second supply, i.e. the delivery between Company B and C could have been treated as exempt from VAT. The delivery between Company A and B should have been liable to German VAT.

Following its conclusions, the CJEU also had to give its opinion on whether Company C was entitled to claim the Austrian tax paid on input. It was no surprise that the court emphasised that the entitlement to deduct VAT is only limited to taxes that are actually due and payable and cannot be extended to overpaid input VAT. The fact that VAT is included in an invoice does not give rise to the entitlement to VAT deduction.

The CJEU's decision again points out that ascribing transport to the correct sale in a chain of transactions between EU member states is vital for determining the VAT regime. Corporations engaged in this type of business should pay attention to this issue, especially where the responsibility for the transport of sold goods lies with somebody else.

In brief

Latest news - May 2018

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

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- In connection with the planned fourth call to participate in the TRIO programme, the Ministry of Industry and Trade submitted to the government a proposal to extend the TRIO programme and increase its budget. The government approved the proposal on 30 April 2018. Another call to participate in the programme should be announced sometimes during September 2018. The TRIO programme focuses on providing support to research and development projects, reimbursing mainly operating expenses. Project financing will commence in 2019 and other criteria will be explained in detail at seminars that are planned for September and October 2018.

- Draft amendments to tax laws for 2019 in the government's publicly available e-library have been amended. An amendment to the Income Tax Act no longer contains the abolishment of the super-gross salary and the subsequent adjustment of tax rates. The Ministry of Finance proposes the introduction of a reporting duty for taxpayers whose income flows abroad if this income is liable to withholding tax, is exempt from tax, or is not liable to tax under an international tax treaty.

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