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Editorial

On 9 February, the 23rd Winter Olympic Games started in Pyeongchang, the South Korean city many of us have trouble pronouncing. The Olympic mascot is Soohorang, a white tiger symbolising protection and strength, as its name literally means "protective tiger". A similar beast will soon swoop onto Czech taxpayers too, only under a less poetic name – the EU Anti-Tax Avoidance Directive (ATAD).

To continue with the sports terminology: referees will be using stricter measures as requirements for the tax deductibility of interest will tighten dramatically: interest and other borrowing costs will be tax deductible only up to 30% of EBITDA, and this test will even apply to interest paid to unrelated entities, such as banks! This is a fundamental change for some areas of business, for instance real estate financing. There will also be a new sports discipline at these Olympics – the CFC rules. According to these rules, Czech firms will have to include in their tax bases selected income of their controlled foreign companies. And who is going to be the star of the games? Among the expected favourites are an exit tax applied on the relocation of assets without change of ownership, and GAAR – a general anti-abuse rule.

If you haven´t had the pleasure yet, you will soon come to know them well enough. All we can do is hope for fair play on the part of the referees – the financial administration. To Czech contenders, a lot of precious metals; to CFOs, a lot of strength!

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Changes to Income Tax Act in 2019

Taxpayers are up for major changes starting from 2019. At least according to the first draft of the amendment to the Income Tax Act, released by the Ministry of Finance for external comments. The concept of taxation of individuals is to change fundamentally. Corporate entities will be subject to the EU Anti-Tax Avoidance Directive, and a general anti-abuse rule will be introduced in tax procedure.

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Personal income tax

In the tax on income of individuals, the concept of a super-gross wage and a solidarity tax increase will be abandoned. Instead, the draft amendment introduces a progressive tax rate of 19% for income of up to CZK 1.5 million and 24% for income above this amount. Entrepreneurs, including those claiming expenses as a percentage of income, will be allowed to deduct 75% of social security and health insurance contributions paid.

Deductibility of borrowing costs

Corporate entities will face a number of changes due to the implementation of the EU Anti-Tax Avoidance Directive (ATAD). It introduces, inter alia, new rules restricting the deductibility of exceeding borrowing costs (i.e. costs exceeding related revenues): these will be tax deductible up to the higher of CZK 80 billion or 30% of earnings before interest, tax, depreciation and amortisation (EBITDA) in a taxation period; borrowing costs above these limits will be considered tax non-deductible. However, the proposed amendment assumes that the taxpayer could deduct such expenses from the tax base in future periods (carry-forward), if their exceeding borrowing costs do not reach the stipulated limit in these periods. This possibility will not apply to legal successors. The existing rules limiting the deductibility of interest expense (e.g. thin capitalisation rules) will remain in force.

Unlike the thin capitalisation test, the new rules will also cover borrowings from unrelated parties (such as bank loans). Also, the definition of borrowing costs will be wider than the definition of financing costs for the purposes of thin capitalisation rules. Borrowing costs will also include interest contained in the acquisition cost of assets, finance costs embedded in financial lease payments or exchange rate differences related to financing. The new rules will not apply to financial institutions and stand-alone companies that are not members of any group. The new rules should apply irrespective of the date when the relevant financial instrument was entered into. The draft amendment contains a transitory provision only as regards capitalised interest, which will not be considered excess borrowing costs if the asset was put into use before 17 June 2016. The same approach will be applied to interest contained in a consideration under an obligation to let an asset for use for consideration with subsequent transfer to the user for consideration, if the obligation originated before 17 June 2016.

CFC rules

The draft amendment also contains rules for the taxation of controlled foreign companies (CFC), in response to the obligatory implementation of the ATAD. Under these rules, a Czech entity will have to include in its tax base

selected income of its controlled foreign company, i.e. a company in whose capital the Czech company participates directly or indirectly with more than 50%.

Another condition for the inclusion in the Czech tax base is that the foreign company does not carry out any substantial economic activity and its tax liability abroad is lower than one half of the tax liability that such company would have if it were taxed under Czech tax laws. If the foreign subsidiary qualifies as a controlled company under these conditions, its Czech parent will have to include its selected income, such as income from dividends, interest and royalties in its own tax base. The Czech parent may then offset any tax paid by the subsidiary on this income in abroad against its tax liability.

Exit taxation

From 2020, the relocation of assets without a change of ownership should become subject to taxation. This rule will apply when Czech companies transfer assets to their foreign permanent establishments or vice versa, or when Czech companies change their tax residence. The transfer of the assets will then be taxed in the Czech Republic similarly as if it were a sale of assets. This means that the tax base would be the difference between the market value of the assets and their tax value. In some cases, the tax may be spread over the subsequent five years.

Hybrid mismatches

From 2020, the additional taxation of hybrid mismatches has been proposed for associated entities. Hybrid mismatches may take the form of a *'double deduction*', when one amount (for instance a deductible expense) reduces the tax base in more than one jurisdiction, or the form of a '*deduction without inclusion*' of the related income in the tax base, when the tax base is reduced in one jurisdiction without the same amount (income) being included in the tax base in another jurisdiction.

Abuse of right

The implementation of the ATAD will also affect the tax procedure rules: the Tax Procedure Code will contain a general anti-abuse rule, under which the tax administrator will not take into consideration "juridical acts and other facts whose main purpose or one of the main purposes is to obtain a tax or other advantage contrary to the meaning and purpose of the legal regulation". The abuse of right concept is already being applied in the tax area, and has been formulated by Supreme Administrative Court case law. The draft amendment to the Income Tax Act and the Tax Procedure Code is currently going through the external commenting procedure and it is thus possible that the proposed provisions will still change in the legislative process.

Changes in VAT Act expected in 2019

The Ministry of Finance has submitted a draft amendment to the VAT Act with planned effectiveness from January 2019 for external comments. The amendment aims to comply with the duty to transpose new EU regulations into our legislation and to harmonise other current regulations with EU legislation and the interpretations of the Court of Justice of the EU.

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First, the proposed amendment will affect the application of VAT on vouchers. The new Czech rules will explicitly define single-purpose and multi-purpose vouchers, as prescribed by the amendment to the EU VAT Directive. The issue and transfer of single-purpose vouchers (i.e. this means vouchers for the supply of goods or services that are sufficiently known in advance) are subject to the same rules as the supply of goods or services or the acceptance of advance payment for such goods or services. The redemption of a single-purpose voucher is no longer treated as the delivery of goods or services. In contrast, for multi-purpose vouchers (i.e. vouchers for the supply of goods or services that are not sufficiently known in advance), the tax liability arises only when the voucher is redeemed.

Another novelty is the simplification of the taxation of electronically supplied cross-border services not exceeding a certain threshold value. This brings significant relief to small and medium-size businesses with registered offices in one member state. The amendment proposes an annual threshold of EUR 10 thousand. If this threshold is not exceeded, electronically supplied services will be taxed in the member state in which the supplier is established (instead of the member state in which the service recipient is established). The amendment also proposes certain simplifications for electronic service providers using a mini-one-stop-shop (MOSS). When issuing tax documents, the providers will only have to adhere to the rules of the state in which they have their MOSS registration (the member state of identification). They will no longer have to monitor the legislations of the individual member states in which the services are consumed.

In response to the Court of Justice of the EU's decision in the Enzo Di Maura (C-246/16) case, the amendment proposes a significant change to the VAT Act regarding the failure to pay consideration for the supply of goods or services. The scope of instances in which a VAT receivable is regarded as unpaid once and for all is proposed to be extended, which allows the supplier to correct the tax base, i.e. correct the VAT amount that has been originally declared.

The amendment also proposes to cancel changes associated with radio and TV broadcasting carried out by statutory operators that have been in effect since 1 July 2017, reasoning that the changes are incompatible with EU law.

Another area that should change significantly is the application of an entitlement to VAT deduction when an entity registers for VAT. Fixed assets acquired in the period of up to 60 months before registration may lead to the right to claim an input VAT deduction when other criteria are met.

Information duty towards tax administrators extended again

Right after New Year's Day, the government submitted to the Chamber of Deputies an amendment to the Tax Procedure Code, significantly expanding the extent of information that the tax authority may request from third parties. The extended information duty should be in effect as soon as the amendment is promulgated in the Collection of Laws and will primarily affect banks and liable persons pursuant to the Anti-Money Laundering Act.

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The amendment deals with two issues: the expansion of the banks' information duty in response to the interpretation of the Supreme Administrative Court from 2016 and the implementation of the EU Directive on Administrative Cooperation in the Field of Taxation (DAC 5). This directive should have been transposed into Czech legislation by 1 January 2018. The government meant to adopt it on an accelerated basis during the deputies' first reading but the chamber refused. The amendment will thus have to go through the standard legislative procedure.

Pursuant to the new amendment, the financial administration should have - upon request - access to information on the following: persons authorised to dispose of cash at bank accounts; persons who have deposited funds in these accounts; payment recipients; remote access services and their utilisation, including information to identify equipment through which access is made; and information about established safe deposit boxes. In addition, to implement DAC 5, the amendment introduces a new information duty of liable persons pursuant to the Act on Some Measures against the Legalisation of Proceeds from Criminal Activity (the AML Act). Pursuant to the new amendment, the tax authority may request from various entities any information they obtained while identifying and checking clients in compliance with this act. This also involves all written documentation and information on how these data were collected. The draft amendment also enables the tax administrator to obtain information for domestic tax administration purposes, hereby surpassing the EU legislative framework requiring access to such data only for international cooperation in tax matter purposes.

The amendment derives from a draft that the Ministry of Finance had already submitted for an accelerated comment procedure in the spring of last year. Despite the original version of the amendment having been further amended, the Czech Bar Association continues to draw attention to some pitfalls of the proposed legislation. As opposed to the original draft, the Chamber of Deputies' print specifies the duty of attorneys, notaries, tax advisors, bailiffs and auditors to provide the tax authority only with information acquired within the AML processes and only for the purpose of ensuring international cooperation in the administration of taxes. The proposed legislation thus prescribes that persons involved provide foreign tax administrations with client information that would never have to be, and may not be, provided to the Czech tax administration. Despite the changes to the original version, the Czech Bar Association considers the new draft to be interfering with attorney-client confidentiality and thus

likely to be at variance with the constitutional order.

New insurance distribution

A new Czech law transposing the EU Insurance Distribution Directive into our legal system will be adopted at the last moment. It should primarily enhance the transparency of intermediaries and the protection of consumers.

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At the beginning of January, two long-awaited laws regulating insurance distribution were submitted to the Chamber of Deputies. Their primary objective was to transpose the EU Insurance Distribution Directive (IDD) into our legislation, which should be done by 23 February 2018 at the latest.

The adoption of these regulations, replacing the existing Act on Insurance Intermediaries, was delayed primarily owing to the autumn elections. The transposition deadline is not likely to be met; however, the submitted laws propose effectiveness from the above February date.

The new Act on Insurance Distribution together with an implementing statute should regulate the entire area of insurance mediation and offer. The most important change is the new categorisation of intermediaries: instead of the five categories currently in place, only separate intermediaries and tied insurance representatives should generally be involved, as in the case of the mediation of consumer loans or investments in unit funds. In addition, the act introduces new specific categories such as ancillary insurance intermediaries and insurance intermediaries established in another member state. In connection with this, the new law also institutes a new procedure for obtaining a licence to carry out the activities of an intermediary, as well as a time restriction on registrations and a reduction of mandatory registration fees.

The new law will also affect the performance of mediation, as it introduces new duties, e.g. applicable to information requirements, the provision of advice or the storage of documentation. Following the IDD, the maximum amount of penalties for administrative wrongdoings will also increase.

The proposed changes should result in the enhanced quality of insurance distribution, sorting through the network of intermediaries, as a large number of the 160 thousand currently registered persons have probably been inactive for some time.

EU removes eight countries from its blacklist

At its January session, ECOFIN crossed off eight countries from the EU tax haven blacklist: South Korea, the United Arab Emirates, Panama, Barbados, Grenada, Macao, Mongolia and Tunisia were grey listed instead.

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The EU responded to the countries' commitment to reform their tax systems in accordance with the conditions stipulated by the EU to fight tax evasion. The EU will continue monitoring these countries and assess their cooperation and to which extent they fulfil their commitments; subsequently, it will decide whether to move them back on the blacklist or to exclude them from the monitoring process.

As yet, blacklisting does not entail any sanctions. Recently, however, the European Commission announced that in the upcoming weeks it will publish a list of penalties: the sanctions will include, for instance limited access to money from EU funds. Tax-related measures, such as the non-deductibility of expenses arising from transactions with these countries or a special withholding tax, are also being considered.

OECD proposes new disclosure rules

The Common Reporting Standard (CRS) is an approved global standard for the automatic exchange of information between tax authorities of individual states. It aims to prevent tax evasion and money laundering. Within the CRS, selected information on financial accounts and their owners are exchanged. The OECD has now come out with an initiative aiming to prevent bypassing the duties under the CRS.

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The OECD proposes mandatory disclosure rules imposing a duty on certain persons (namely intermediaries and advisors) to inform tax administrators on structures or transactions (arrangements) that aim to avoid the information duty under the CRS. The rules assume that the obtained information, including the identity of any user of the given structure or beneficial owner, will be made available to other tax authorities, in accordance with the requirements of the applicable agreement on information exchange.

In December 2017, the OECD released a draft of the new rules and invited the professional public to provide comments. The comments were published in January on the OECD website. Their assessment and the possible modification of the proposed rules will follow.

Can we look forward to new VAT rates?

In mid-January, the European Commission submitted a proposal to amend VAT rate rules and adopt a number of VAT measures that should help small and medium-size businesses reduce their administrative burden in connection with cross-border transactions. This is part of an action plan aiming to introduce, inter alia, a definitive VAT system.

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The current VAT rate rules are no longer suitable for member states, as they are restrictive. Nowadays, member states may only apply reduced VAT rates on a relatively limited number of specifically defined products. Some member states have also been enjoying exceptions to the rules that arose historically. It may therefore happen that whereas one member state applies a reduced or a zero VAT rate on a particular product, another member state must apply the standard VAT rate.

Member states regard VAT rates as one of their most efficient tools to achieve their political goals. They welcome the European Commission's response to their call for a greater flexibility in this area. This is part of the preparations for the adoption of a definitive VAT system that plans to tax the supply at the place of consumption. It will thus no longer be necessary to ensure the highest possible uniformity in applying VAT on individual commodities. To enhance flexibility, member states will be allowed to apply two reduced rates ranging from 5% to up to the basic rate amount, the zero rate and another reduced rate ranging from 0% to the reduced rates. The current list of products to which reduced rates may be applied will be cancelled. In its proposal, the Commission further defines supplies that should be liable to the basic VAT rate, such as arms, alcoholic beverages, hazardous games, smartphones, household appliances, fuels, consumer electronics and tobacco products.

The proposal also contains VAT measures meant to support medium-size and small businesses by reducing their administrative burden connected with cross-border transactions and related duties. Administrative expenses incurred for cross-border transactions are approx. 11% higher than expenses of businesses operating on a local level. Generally, the proposal also extends the benefits that have so far been used only by smallest businesses to a wider range of medium-size and small businesses.

In addition to the existing limits for mandatory registration, which are often applicable only to domestic entities, the Commission proposes other thresholds within which certain simplifications would take place. These involve a limit of EUR 100 thousand for businesses operating in several member states that could claim exemption from VAT or a limit of EUR 2 million allowing further simplification and the member states to determine relief for small businesses regarding tax registration, invoicing, accounting and frequency of tax returns. The proposals will be subject to further legislative procedures and will be effective only after the implementation of a definitive VAT system.

First country-by-country reports handed in – what's next?

The first round of country-by-country reporting (CbCR) is over. Each group subject to the reporting duty had to provide selected financial and non-financial data, for the group and broken down by individual jurisdictions, in a special format.

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From the perspective of companies, this means an additional administrative burden. The crucial question thus is: what use will tax administrations make of the data? The BEPS Action Plan 13, based on which the country-by-country reporting has been implemented, only states that the data will be used by tax administrators for a high-level review of the correctness of transfer prices. What exactly does this entail?

An answer may be found in the handbook for tax administrators issued by the OECD in September 2017, which is freely available on the OECD website. It will come as no surprise that, according to the handbook, tax administrators should use the data obtained to calculate key indicators (ratios) that would subsequently help them identify possible transfer pricing risks. The key indicators include, for instance, revenues per employee, earnings before tax per employee, or effective tax rate.

A group whose ratios place the actual taxation into countries with advantageous tax regimes may be suspected of aggressive tax planning. The handbook also recommends that administrators analyse whether the group reports significant revenues without carrying out substantial activity or contrary to the group's value chain in a specific jurisdiction, or whether the development of the values is contrary to the market development. The methodology also recommends reviewing whether the location of intangible assets and related revenues is separated from the respective business activities, and comparing changes in time, e.g., changes in the group structure and assets' location.

An important methodological recommendation is that country-by-country reporting should not be used to calculate adjustments to the tax base in transfer pricing inspections. Such a recommendation is undoubtedly positive, as it is impossible to make any conclusions on transfer prices in specific business relationships based on the aggregated data.

According to the timeline given in the handbook, the exchange of information obtained from the reporting should take place within 15 months after the end of the group's fiscal year. This roughly corresponds to the information provided by the Czech financial administration, which expects the first exchange of information between tax administrations to take place in June of this year.

The Czech tax administration's methodology has not been published, but most likely will not substantially differ from the OECD handbook; at the moment we can just wait. In the meantime, using the published handbook, any company may interpret the CbC reporting data to get the same view of its group as will be available to the tax administrator.

Case law

Interest on interest according to SAC? Yes, sometimes

The Supreme Administrative Court (SAC) has recently dealt twice with the possibility of awarding a taxpayer interest on the interest that the tax administrator refused to award and pay for a long time. It is for sure good to know that this possibility exists and that the financial administration's approach of persistently refusing to award and pay neither interest arising from its unlawful acts, nor interest on retained VAT deductions (referred to as 'Kordárna' interest, after the company who first won such interest before the SAC in 2014) may not pay off after all. For putting up a fight, taxpayers may be rewarded with interest on interest, again, at more than 14% a year.

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In the first of the two cases before the SAC, a penalty was returned to a taxpayer, but the tax administrator waited more than nine months before awarding any interest on the penalty. The court first generally admitted that even interest due to the taxpayer may be viewed as tax, whose unlawful assessment shall be compensated by interest on the tax administrator's unlawful act, at over 14% p.a. The court then proceeded to further specify its previous case law on the issue of interest on interest. This did not involve interest continuously charged on the gradually increasing first interest, but interest on a fixed amount, which has to be viewed as a new principal. The SAC emphasised that the tax administrator's refusal to pay the initial interest cannot be tolerated. The taxpayer must also be entitled to the secondary interest, which is, by its nature, damage compensation.

The other case involved the 'Kordárna' interest on retained VAT deductions. This type of interest was first awarded by the SAC in the autumn of 2014, yet it took the tax administration nearly three years to change its approach and begin awarding it. Many VAT payers had to fight for this interest for a long time. The SAC now admitted the tax administrator's duty to award additional interest – on the late payment of the initial interest, again amounting to more than 14% per year. The SAC denied that the 'Kordárna' interest would have to be paid by the tax administrator automatically, which would mean that there would also be an automatic entitlement to the interest on such interest. Yet, where a tax administrator repeatedly refuses to award and pay the 'Kordárna' interest despite the taxpayer's requests, it has to be determined which of these requests can be viewed as a request to pay interest, and based on this, the taxpayer will then be entitled to interest on such interest.

The judges yet again sided with the taxpayers. Both judgements clearly indicate the effort of the court to compensate for any unreasonable delays by the tax administrator, as in extreme cases, defending themselves against the tax administration may cost taxpayers more that the interest they may end up winning. The SAC has thus sent a clear signal that it is impossible to delay awarding and paying interest without taxpayers being entitled to an adequate compensation.

Schrems versus Facebook, take two

Maximilian Schrems, an Austrian citizen, has become known in connection with the CJEU's ruling annulling the Commission's decision that declared the USA a safe country to transfer personal data from the EU ('Safe Harbour'). Now the Court of Justice of the EU ruled on the preliminary question whether in his litigation with Facebook, Schrems should be viewed as a consumer under EU laws even though he uses his profile also as a professional activist.

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Schrems filed several lawsuits with Austrian courts, seeking a decision on the unlawfulness of processing his and seven other users' personal data by Facebook. In this respect, the Austrian Supreme Court submitted a preliminary question to the CJEU as to whether Schrems may be viewed as a consumer under EU laws even though he uses his profile also for his activist efforts (among other things, to inform on his litigations against Facebook). The answer to this question plays a crucial role in the decision whether the respective courts of EU member states (in this case the Austrian court) even have the jurisdiction to deal with such lawsuits.

The SDEU concluded that users of private Facebook accounts do not lose their consumer status just because they publish books, give lectures, operate websites, fundraise and have other consumers' claims assigned to them to subsequently assert those in court. On the other hand, a person asserting not just their own claim, but also other persons' claims before their home court (a court determined according to their domicile) cannot be considered a consumer.

The case in question thus also involved a procedural issue: whether the assigned claims may be asserted in the plaintiff's home court (the court of his domicile). The court denied this. A total of 25 000 Facebook users have assigned their claims arising from consumer protection and alleged breaches of personal data protection to Schrems; the court's negative answer thus means that at the moment, a collective lawsuit of consumers from several member states is not possible in the EU (unlike class action suits in the USA). This will, however, be allowed in the personal data protection area by the upcoming GDPR. Making this option generally available is also currently being discussed at the EU level.

Better times ahead for cross-border trading taxpayers?

The Supreme Administrative Court has recently stood up for a taxpayer who effected a supply of goods to another member state, i.e. a transaction exempt from VAT with entitlement to deduction. The crucial point of the dispute was the taxpayer's good faith based on checking the customer's registration in a publicly accessible system, and the issue of how to divide the burden of proof between the tax administrator and the taxpayer in this respect.

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The taxpayer submitted to the tax administrator documents supporting the transportation of the goods to Poland, and a confirmation from July 2008 on having checked the valid tax identification number of the Polish customer. According to this confirmation, the number was valid and the customer was officially identified as a VAT payer. Upon every billing, the taxpayer then checked the VAT registration of the Polish business partner in publicly available sources.

When reviewing the circumstances of the transportation, the tax administrator ascertained, among other things, that the Polish customer's VAT registration had already been removed in March 2008, while the transactions in question only took place later. The tax administrator therefore classified the supplies as domestic taxable supplies, and assessed additional tax to the Czech taxpayer. The taxpayer claimed good faith, as from his perspective nothing indicated a possible involvement in a tax fraud on the part of the customer, but to no avail.

The court held that the burden of proof as to good faith cannot be transferred solely onto the taxpayer; otherwise, it would mean presuming a taxpayer's knowing involvement in tax fraud; and such a presumption has no support in law. Despite submitting repeated international requests for information to the Polish tax administrators, the Czech tax administrator was unable to obtain any verification as to the authenticity of the confirmation submitted, i.e. it could not be confirmed whether the Polish taxpayer might have been deregistered retrospectively. As the authenticity of the documents submitted was not challenged by the tax administrator, it is possible that the customer's tax identification number may have seemed valid at the time of effecting the supplies, probably due to an administrative error. The taxpayer thus had no evidence of the customer acting fraudulently, and would have had to assume this without any relevant indications.

In light of the produced evidence, the taxpayer's assertion that he had been checking the information on the customer's registration on a continuous basis in the respective system and had therefore been in good faith as to his Polish partner's VAT registration at the time of trading, cannot be considered implausible.

Beyond the above stated, the court also voiced the idea that, in practice, the constellation that a supplier would take all conceivable measures against being involved in fraud is very unlikely to occur in cross-border trading. In this connection, the court explicitly stated that is these cases, the taxpayers should not be denied the benefit of good faith, as such a denial would be unreasonably harsh. Perhaps we may thus hope that the tax administrators' approach to good faith will change in the future, along the lines of this Supreme Administrative Court's decision.

Discriminatory severance pay

According to the Supreme Court, a collective bargaining agreement's provision making the payment of severance pay above the statutory amount conditional upon an employee not yet being entitled to old-age pension is contrary to law.

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The defendant (a company) undertook in its collective bargaining agreement to pay severance pay equalling 14 average monthly earnings to its employees whose employment had been terminated for organisational reasons, who had worked with the company for more than 30 years, and were not yet entitled to old-age pension. The case before the Supreme Court involved an employee who because of not meeting the last one of the described conditions was only paid out severance pay in the statutory amount of trice his average monthly earnings.

Both lower degree courts dismissed the plaintiff's lawsuit seeking severance pay equal to the amount awarded by the collective bargaining agreement (despite being entitled to the old-age pensions). However, in decision No. 21 Cdo 5763/2015, the Supreme Court ruled that the condition of not being entitled to old-age pension in the collective bargaining agreement is unlawful; specifically, it is in breach of the anti-discriminatory rules.

The Supreme Court argued that such discriminatory conduct is not justifiable and that the unequal treatment of employees cannot be considered proportional. In its opinion, old-age pension (or another financial security, for instance the employee's own property), should have no effect on the severance pay, which is a one-off compensation for the loss of employment by no fault of the employee. The court also concluded that severance pay provided above the statutory limit may be seen as a kind of a reward for the years of work of employees who, over the time of their employment, contributed to the employer's good financial results. Denying such benefit to long-term employees solely on the grounds that they are already entitled to old-age pension goes against this purpose.

Delivery of goods or provision of services?

Late last year, the Supreme Administrative Court (SAC) ruled in case 3 Afs 96/2016, dealing with whether a transaction should be viewed as a delivery of goods or a provision of a service; this had an effect on the correct VAT treatment.

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The case involved a sale of cereal grains growing on leased land. At the time of the sale, the grains were not yet ready for harvest. The supplier viewed the sale as a delivery of goods. The tax administrator disagreed, stating that it was a provision of a service (transfer of the right to harvest the grains). The tax administrator based this on the legal assessment that crops not yet harvested are a part of the soil where they grow and are only viewed as a separate thing once harvested.

The SAC disagreed with the tax administrator and held that the grains do not have to be necessarily harvested once ripe. For the grower, even harvesting the crop before ripe, or not harvesting it at all, may have economic meaning. According to the SAC, even a thing that in the legal sense is part of another thing can be considered goods, as long as the goods to be delivered can be clearly identified and separated from the parent thing (in this case the soil) without substantially diminishing its value.

Although the judgement dealt with a highly specific issue, it is important nonetheless: it shows that to determine the VAT treatment of a transaction, its legal definition or accounting recognition is not always decisive. The judgement also confirms the case law of the Court of Justice of the EU to the effect that the term ‘delivery of goods’ has to be interpreted in a uniform manner in all EU member states, irrespective of how it is defined in the private or commercial law of the given country.

Case law

SAC: tax inspections can be initiated by any tax authority

The 2016 amendment to the Act on the Financial Administration gave tax authorities country-wide jurisdiction in two areas: the fact-finding activity in tax administration, and the scrutiny procedures by the tax authorities, including tax inspections.

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Before the Supreme Administrative Court (SAC) was the case of a company with its registered office in Prague, where the tax authority for the Vysočina region tried to initiate a tax inspection. The company objected, eventually filing a lawsuit with the regional court.

The company believed that its taxes may only be inspected by a tax authority in whose "district" it has its registered office; it also argued that should the tax authorities have country-wide jurisdiction, a tax inspection could be carried out at a single taxable entity by an unlimited number of tax authorities at once; this would constitute inacceptable harassment by financial administration.

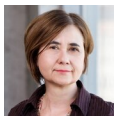
The SAC disagreed with the plaintiff. It pointed out the difference between the general regulation in the Tax Procedure Code, and the 'selected jurisdiction' introduced by the 2016 amendment to the Financial Administration Act; the latter gave the financial administration country-wide jurisdiction in two areas: the first one being the fact-finding activity in tax administration, the other being the scrutiny procedures by the tax authorities, which also includes tax inspections.

The SAC also dealt with the issue of several tax inspections being carried out by a number of tax authorities at a single tax entity. In this respect it pointed out that such a situation is excluded by law. Although a tax inspection can indeed be carried by any tax authority of the Czech Republic, there is no need to worry that taxable entities would be terrorised by the financial administration by an uncontrollable maelstrom of tax inspections – this would be contrary to the principle of helpfulness and decency.

In brief

Latest news - February 2018

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



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- According to information disclosed on the financial administration's website, entrepreneurs and lessors claiming expenses as a fixed percentage of income whose tax base from business or lease (or the sum of both) exceeds one half of the total tax base have the opportunity to choose the more advantageous option for them of the two when preparing their personal income tax return for the 2017 taxable period.

- The Chamber of Notaries approved an opinion of interpretation, according to which notaries may not accept as a supporting document for notarial activities a deed with an authenticated signature (typically, a power of attorney) consisting of more than one sheet unless these sheets are fixed together with a seal and a stamp of the body performing the authentication. In connection with this, it is necessary to be aware of the incorrect interpretation of the Act on Authentication, leading local authorities and the Czech mail service (Česká pošta) to bind individual sheets of a deed subject to authentication only upon request.

- The Ministry of Justice disclosed information about a special website on which forms for recording trusts and beneficial owners into new evidence are available.

- The statistics for 2017 confirm an increased number of inspections and sanctions imposed by the State Labour Inspection Office for wrongdoings under agency employment regulations.

- On its website, the European Commission published the tax and customs implications of Brexit. Great Britain will turn into a third country for EU member states on 30 March 2019, 00:00 (CET) unless a different date is set in a ratification contract. Preparing for Brexit in terms of taxes and customs is a task for member states and their offices as well as for corporations and individuals doing business with Great Britain.

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