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Editorial

The turn of the year is usually a time for balancing and predictions. Sometimes, however, it is hard to say whether what we hear from the media are truly serious predictions or just New Year's Eve pranks. For instance when the customary threat of the real estate bubble bursting is replaced by the sensational information that property prices have reached their ceiling and will no longer grow.

I dare say that there is no such thing as a ceiling in the property market, and in spite of what the quoted experts think, prices will continue to grow, although perhaps not so steeply. Yet, demand still exceeds supply, the economy is doing well and there remains enormous demand for mortgage loans, despite slightly growing rates. I for one believe the real property market will be much more affected by the recent Supreme Administrative Court decision that VAT shall no longer be included in the tax base of immovable property acquisition tax not even where the acquirer is the taxpayer.

We can just hope that there will be more similarly good news in the upcoming year, and not just for property buyers. By the way, in the Chinese calendar, it is the Year of the Dog. I hope it will be successful for you. May neither the changes to the electronic reporting of sales (ERS), nor the possible loss of tax advantages for investment funds or a legislative explosion on the level of the EU make a dog's dinner of it.



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VAT not to be included in acquirer's immovable property acquisition tax base

VAT will not be included in the immovable property acquisition tax base even if the person liable to this tax is the acquirer. Based on this, persons liable to immovable property acquisition tax may file additional tax returns and claim part of the paid immovable property acquisition tax back.



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In its summer 2017 decisions, the Supreme Administrative Court (SAC) held that it is not necessary to include VAT on the agreed price in the immovable property acquisition tax base, thus deviating from the explanatory memorandum to the Senate's statutory measure regulating immovable property acquisition tax. The memo states that the agreed price for immovable property acquisition purposes is the total price including VAT. The SAC dealt with cases when persons liable to immovable property acquisition tax were transferors and did not voice an opinion on cases when persons liable to this tax were acquirers.

Based on these court decisions, the Financial Administration of the Czech Republic issued a press release in September 2017 stating that administrative practice will be adjusted accordingly: the agreed price excluding VAT will be accepted as the agreed price for immovable property acquisition tax base purposes. However, this procedure was only to be applied to immovable property acquisitions between 1 January 2014 and 31 October 2016 and in situations in which the persons liable to immovable property acquisition tax were the transferors.

The financial administration has recently given its views on situations in which persons liable to immovable property acquisition tax are acquirers, confirming that the SAC's decisions may also be applied to acquirers irrespective of when tax has to be paid. This change in the administrative practice gives both acquirers and transferors the opportunity to file additional immovable property acquisition tax returns and claim back part of the paid tax. We will be happy to help you prepare your additional tax returns.

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Amendments to GFD's information effective from January

The General Financial Directorate (GFD) announced that the existing approach to the waiver of penalties for the failure to file VAT ledger statements will also be applied in 2018 and that the unreliable payer concept criteria will be extended effective from 1 January 2018.



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On 2 January 2018, the GFD published an update of Instruction D-29, regulating the waiver of penalties for the failure to file a VAT ledger statement. As in the previous year, taxpayers will again be allowed to apply for one waiver of a penalty of CZK 10 000, CZK 30 000 or CZK 50 000. The same applies to the penalty for a late response to the call to file a VAT ledger statement or the penalty for a late response to the call to change, amend or confirm data in a VAT ledger statement if the taxpayer responds within five working days of the deadline for responding to a call. In the first case, the waiver is conditional on the taxpayer's duty not actually having arisen; in the second case, on the taxpayer only confirming the accuracy of the filed VAT ledger statement. The penalty waiver options in 2018 thus remain the same as in 2017.

A less positive piece of news for taxpayers is that the criteria for applying the unreliable VAT payer concept will be extended. Payers whose originally-declared tax on output is increased by the tax administrator by a minimum of CZK 500 000 and who fail to pay the additionally-assessed tax within the additional deadline set in a payment order will be considered unreliable. The new criterion is effective for tax administrator's decisions issued after 1 January 2018 in connection with proceedings commenced after 1 January 2013.

In its information, the GFD states that the new criterion does not target taxpayers' unintentional errors or mistakes but will only be applied when it is proven that the taxpayer has acted in an abusive manner or has attempted to elicit an unsubstantiated tax benefit. When assessing the violation of statutory duties, the tax administrators should take into account the person of the taxpayer as such, their experience with dealing with this taxpayer and any objective reasons deserving of special attention that have led to the failure to meet these duties. We have to wait and see how the tax administrators will apply the new criterion in practice.

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Opportunity to obtain aid from public resources in 2018

Numerous businesses use various forms of public support to finance their investments. New financing opportunities for 2018 have already been announced or are currently under preparation. Utilised most commonly are investment incentives, subsidies from the Enterprise and Innovations for Competitiveness Operational Programme and subsidies from programmes announced by the Technology Agency of the Czech Republic (TACR).



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Enterprise and Innovations for Competitiveness Operational Programme

Calls to participate in the Innovations, Applications, Technologies, Renewable Energy Sources, Energy Savings, Smart Grids II. programmes are open for applications. However, a number of programmes include restrictions applicable to large enterprises and are therefore only available to small and medium-size undertakings.

In accordance with the call timetable recently published for 2018, further calls to participate in other programmes will be announced during the year. A complete list is available on the websites of the Ministry of Industry and Trade and the Enterprise and Innovations Agency. In the table below, we summarise the programmes that are also intended for large enterprises.

Programme	Planned call announcement date	Planned application acceptance date	Planned application acceptance deadline	Supported activities	Funds for allocation (in billions of CZK)
Energy Savings	11/2017	11/2017	4/2018	Activities connected with final energy consumption savings	6
Potential	1/ 2018	1/2018	6/2018	Establishment or development of industrial research, development and innovation centres	1.5
ICT and Shared Services	2/2018	2/2018	6/2018	Creation of new IS/ICT solutions	2
ICT and Shared Services	9/2018	9/2018	1/2019	Creation of new IS/ICT solutions, acquisition of new technologies	2

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Energy Savings	6/2018	7/2018	12/2018	Activities connected with final energy consumption savings	4
High-Speed Internet	To be specified	To be specified	To be specified	Modernisation, expansion and development of high-speed internet networks	2.45

TACR's programmes

A total of twelve public calls will be announced in 2018 in accordance with the planned timetable of calls. Programmes that deserve special attention are as follows:

Programme	Planned call announcement date	Supported activities
Epsilon	2/2018	Applied research and experimental development projects whose outcomes have the high potential to be quickly used in new products, manufacturing processes and services, especially with respect to competitive economy, energy sector sustainability, raw material resources or quality-life environment.
Gama	3/2018	Examination of applied research and experimental development outcomes with respect to their practical use and preparation for their commercial use.
Delta	6/2018	Support of cooperation during applied research and experimental development through joint projects of enterprises and research organisations.

Detailed information about the total funds for allocation, application conditions and eligible expenses relating to individual programmes is not yet available but, in terms of its content, is likely to derive from previously-announced calls. Should you be interested in more details regarding subsidy programmes or investment incentives, please do not hesitate to contact us.

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ERS changed and its further fate questioned

Those of you getting ready to join the ERS regime should pay attention: in the middle of last December, the Constitutional Court cancelled some provisions of the Act on the Electronic Reporting of Sales. This judgement will also affect some who are already subject to the electronic reporting of sales.



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What's more, five of the fifteen constitutional judges concluded that the Act on the Electronic Reporting of Sales should be abolished as a whole. They argued, among other things, that ERS constituted additional financial costs for every entrepreneur, and that the state had failed to make use of all opportunities already at its disposal to collect taxes more efficiently. Yet, the majority of judges eventually voted to cancel just some provisions of the act.

Effective from 28 February 2018, the Constitutional Court's judgement cancels the duty to state tax ID numbers (which for the self-employed is also their personal ID number – "birth number") on the payment receipts. This change will apply to all entities subject to ERS, regardless of whether they joined the ERS in the first or in the second wave. Another significant change, effective the same date, is the cancellation of the duty to report payment card transactions. Both these changes will have a significant effect on the scope of personal data processed by entrepreneurs.

Changes will also be made to *Účtenkovka*, a state-organised payment receipt lottery in which any holder of a payment receipt issued in the ERS regime may participate. The reason for the changes is that the seller's tax ID is currently one of the identifiers that the participant must upload to the system to register the receipt as a lottery ticket. As tax IDs will no longer be an obligatory component of the payment receipt, the Ministry of Finance will have to adjust the lottery system accordingly.

Probably the biggest intervention into the entire ERS concept is the indefinite postponement of the third and fourth wave. The Constitutional Court held that the government had not sufficiently evaluated the first two waves, and that without a detailed analysis of their impacts it would not be possible to include further businesses into the system. It is thus uncertain whether and in what manner the remaining entities will be joining the ERS. The finance ministry is currently preparing an amendment to the ERS Act that should answer these questions.

The Constitutional Court's judgment comes more than one year after the act's effective date. It does not strengthen legal certainty and significantly affects business processes. Obviously, it will cause considerable problems mainly to cash teller system vendors. Other businesses may also get in trouble, for instance in connection with the General Data Protection Regulation soon to become effective.

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Will some investment funds lose their tax advantage?

In December, the Senate submitted to the Chamber of Deputies its own draft amendment to the Income Tax Act designed to narrow the definition of basic investment funds.



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Basic investment funds enjoy a tax advantage in form of a reduced corporate income tax rate of 5%. A basic investment fund is understood to be (inter alia, since the definition is much broader) an investment fund pursuant to an act regulating investment companies and investment funds whose shares are accepted for trading in a EU regulated market.

According to the draft amendment, this type of investment fund should be entirely removed from the definition of basic investment funds. The explanatory memorandum to this amendment draws attention to the fact that the current tax advantage is also used by developers, i.e. entities that are not primarily engaged in investing in the financial market. The state thus provides tax advantages to entities without any public interest, thus losing income for the state budget. The senators have therefore submitted this draft amendment to prevent undesirable tax optimisation. It will first be evaluated by the government, then by the deputies. The amendment is proposed to become effective from 1 January 2019.

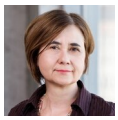
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News in international tax cooperation

We have seen many changes in international tax cooperation in recent years, especially in the area of multilateral instruments. 2017 introduced a few novelties in bilateral double taxation treaties. An overview of the changes in these treaties relating to 2017 and 2018 is shown below.



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A double taxation treaty between the Czech Republic and Chile (published under No. 5/2017 of the Collection of International Treaties) has been in effect since early 2017. An interesting situation occurred in December 2017. Pursuant to the most favoured nation clause contained in Article 11 of this treaty, a withholding tax on interest applied in the Czech Republic and Chile decreased effective from the beginning of 2017, as both countries agreed in the treaty that if Chile negotiates better contractual terms and conditions any time in the future with any other state, such conditions will also apply to Czech-Chilean relationships. In 2017, Chile entered into a treaty with Japan, agreeing on a 4% withholding tax on interest. Consequently, this rate will also apply to Czech-Chilean relationships, in contrast to the originally agreed 5% tax rate.

In 2017, a tax information exchange agreement between the Czech Republic and Belize entered into effect (under No. 62/2017 Coll. of Int. Treaties). Belize thus became the thirteenth state with which the Czech Republic has concluded a tax information exchange and tax cooperation agreement. A list of these countries is provided here.

The Czech Republic ratified a bilateral tax treaty with Turkmenistan (Chamber of Deputies' Print No. 805). It is not yet known whether Turkmenistan has also done so, making it possible for the treaty to come into effect as early as from the beginning of 2018.

In June 2017, an instruction on the application of a treaty between the Czech Republic, Serbia and Montenegro was published. The Serbian-Montenegrin tax administration draws attention to a new form, in which Czech tax residents must confirm their tax residence to claim reliefs in Serbia.

The Act on International Cooperation in Tax Administration was amended three times in 2016–2017 because of multilateral conventions or EU directives with an impact on EU member states or third countries. The Foreign Account Tax Compliance Act has also been included in the law. Up-to-date information about the automatic exchange of information among tax administrations is summarised in the Ministry of Finance's Information.

The automatic information exchange involves the exchange of information about balances on accounts provided by banks and other financial institutions as well as information about tax non-residents (employment income, income from real property, dividends, etc.), binding rulings issued by tax administrations or country-by-country reports. Another novelty with global impact is the application of certain changes to bilateral double taxation treaties through the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI), planned to be in effect from 2019. In the future, all bilateral tax treaties will have to be read in the context of this multilateral instrument, monitoring what provisions apply to the Czech Republic and a particular country with respect to specific tax situations.

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Legal

Top ten legal news items for businesses in 2018

What will the upcoming year bring for businesses? Below, we present an outline of the most important legal changes in the area of financial services, social security and personal data protection.



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Registration of trusts

With the amendment to the Civil Code, from January 2018, trusts have to register in a public register. The basic data of the trust, including the identity of its trustees, shall be publicly accessible. Other data and identifications, such as those of the beneficiaries, shall be non-public. New trusts will only be established upon their registration in the register; existing ones have to register by 1 July 2018, otherwise be terminated.

Registration of beneficial owners

On 1 January 2018, an amendment to the Act of Public Registers of Corporate Entities and Individuals enters into effect, implementing yet another part of the Fourth AML Directive. It introduces the duty to register the beneficial owners of corporate entities and trusts in a new register maintained by registration courts. The register is non-public and extracts from it will only be available to persons stipulated by the act.

New Payments Act

On 13 January 2018, the new Payments Act enters into effect. It mostly implements the rules contained in the EU Payment Services Directive (PSD2) and will mainly affect online services, including authorisations of payments, card payments, provisions of information on payment accounts, or making changes to bank contracts.

Co-owners' pre-emptive right reinstated

With the amendment to the Civil Code, effective 2018 the pre-emptive right to a co-ownership share in real property has been reinstated, with the exception of transfers to a close person. If a co-owner transfers the title gratuitously, the other co-owners have the right to purchase the share for its usual price.

Increase in the minimum wage

Effective 1 January 2018, the minimum wage increased by CZK 1 200 to CZK 12 200. The eight levels of guaranteed wage increased as well.

Paternity leave

New fathers may take one week paid leave during the first six weeks after their child is born. The benefit is paid

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from sickness insurance and is similar to the maternity benefit provided to mothers. It may be first used by fathers with children born on or after 21 December 2017.

Drawing of parental allowance

Effective 1 January 2018, the amendment to the State Social Support Act cancelled the maximum limit of the monthly parental allowance amount of CZK 11 500. The allowance can now be drawn depending on the parent's assessment base.

Employment of disabled persons

Effective 1 January 2018, an amendment to the Employment Act provides a new regulation of the employment of disabled persons, including contributions paid to employers. It is meant to reduce the administrative burden for all parties involved.

Unsellable food to charities

Starting from 1 January 2018, large market chains must offer their unsellable foodstuffs to charities. Unsellable means mislabelled or badly wrapped foodstuffs, not those after their best before date.

Personal data protection

The General Data Protection Regulation (GDPR) will become directly effective on 25 May 2018. At the Czech national level, adoption of a new law replacing Act No. 101/2000 Coll., on Personal Data Protection, is planned. The new act would, however, only contain a fragment of the present regulation, as the majority will be provided for directly by the GDPR.

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EU to liberate non-personal data?

Recently, much attention has been paid to the new EU General Data Protection Regulation (GDPR) that provides for the protection and free movement of personal data. The European Commission has now passed a proposal for a directly applicable regulation on the free movement of non-personal data. Together with the EU regulation on personal data protection, it will allow for the free movement of all types of data in the EU internal market.



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Entities operating in the EU encounter various territorial restrictions on the storing of data files. For instance, confidentiality and professional secrecy regulations in healthcare, e.g., provide that data be stored and processed exclusively in the medical professional's home state. Also, legal regulations of some EU member states stipulate that public sector entities store their data exclusively in the territory of the state. Finally yet importantly, there are recommendations of supervisory authorities in the financial sector regarding the storage of data at the place of financial companies' registered offices.

Vendor lock-ins constitute yet another obstacle companies may come across, as providers of cloud services try to make transfers of uploaded data to a competitor impossible. All of the above, together with the legal uncertainty, explains why companies cannot, or feel they cannot, use cloud services of various providers across the European Union and transfer data back to their servers or between competing data storage providers. They hence believe they cannot freely chose the most cost-effective location for their files.

The proposed solution should finally eliminate these problems. EU member states should not in any manner be able to force companies to store or process non-personal data in the territory of a concrete state, except for reasons of national security. It should also be easier for companies to transfer uploaded files between various data storage providers. The European Union will encourage the creation of codes of conduct providing detailed conditions for the transfer of data files.

The proposal also deals with the issue of regulatory supervision by various national authorities: by placing the data in another state companies will not avoid regulatory supervision; in cooperation with authorities of other member states, national supervisory authorities will still have access to the needed data, even if it is stored in the territory of another member state.

The draft regulation now has to go through the EU legislative process. It is hard to estimate how long this may take, but, considering the political consensus, we do not expect major obstructions.

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EU responds to challenges of profit taxation in digital economy

On 5 November 2018, ECOFIN adopted conclusions summarised in the document titled "Responding to the challenges of taxation of profits of the digital economy". They are aimed at defining a common EU approach to the issue, in view of the expected international debate at the OECD level.



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The EU initiated the discussion on legislative solutions to the challenges raised by the digital economy in September 2017 during an informal ECOFIN meeting in Tallinn. Although an 'equalisation tax' as proposed by France, Germany, Italy and Spain, was accepted as a potential solution by some member states, consensus was not reached, as a number of other member states favoured a long-term solution building on traditional international tax rules. Following the meeting, the European Commission issued a communication on a fair and efficient tax system in the European Union for the digital single market, presenting tasks it deems critical for the taxation of businesses providing services or selling goods through digital platforms. The communication proposed both long-term – a fundamental reform of the international corporate tax framework – and short-term solutions, such as the introduction of an equalisation tax on turnover, a withholding tax on digital transactions or a levy on revenues generated from the provision of digital services or advertising activity.

Regarding the taxation of the digital economy, ECOFIN suggests that the concept of a 'virtual permanent establishment' be explored, allowing to tax profits in the state of the source without the seller being physically present there. The Council also recommends adjusting transfer pricing and profit attribution rules to reflect value creation in the individual digital economy business models. Data, including user ones, are important for both value creation in the digital economy and profit generation. The role of the data therefore has to be considered and taken into account in the context of transfer pricing and profit attribution rules.

Presently, the OECD is finalising a document on the taxation of the digital economy within its BEPS initiative. The document is to be published in April 2018. ECOFIN has urged the OECD to find appropriate solutions for upgrading the global network of bilateral tax treaties, the OECD Model Tax Convention and accompanying commentaries, as well as the various OECD guidelines on transfer pricing and profit attribution to permanent establishments. The Council also invited the Commission to submit its proposed solution, including an assessment of its legal and technical feasibility and the economic impact of possible responses to challenges of the taxation of profits in the digital economy at the beginning of the year.

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MOSS: the future of e-commerce?

At its December session, ECOFIN adopted new VAT rules that should make things easier for e-commerce businesses.



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The changes have been reflected in the revised VAT Directive and the Directive on the Exemption from Value Added Tax and Excise Duty of Goods Imported by Persons Travelling from Third Countries. The EU sees the simplification namely in extending the option of VAT collection through a single point of administration – the Mini One Stop Shop (MOSS). In MOSS, tax is collected by means of a VAT registration in a single state, and then divided among individual member states depending on the location of the end user/consumer. The proposed changes can be classified into two categories based on their planned effective date: those effective from 2019, and those effective from 2021.

The first category, i.e. changes effective from 2019, includes proposals for modifications of the existing MOSS, as several improvement opportunities have been identified since its introduction in 2015. These are primarily:

- setting a threshold for taxation in the supplier's state for electronic services (similar to the threshold for sending goods); the threshold has been proposed at EUR 10 000 per a calendar year;
- billing for the services should be governed by the legal regulation of the supplier's state of identification;
- extending the option to use MOSS also to non-EU entities registered for VAT in the EU;
- simplifying the requirements for supporting the location of the electronic services recipient.

Another significant change, effective from 2021, is extending the possibility of using MOSS also to the sending of goods. This should concern goods sent by EU suppliers as well as those from third countries. The amendment cancels the exemption of small parcels from import VAT to level the playing field for EU and third country suppliers. To make the application of the regime feasible, third-country entities should be allowed to use a representative seated in the EU. With the extension of MOSS, the regulation on administrative cooperation and the fight against VAT fraud has also been amended, as taxation through a single point of administration (MOSS) requires much closer cooperation among member states.

Obviously, MOSS' extended application will have a significant effect on the future of VAT. The question remains whether a similar manner of taxation is also optimal for standard intra-EU B2B supplies, as currently proposed by the Commission.

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An end to statutory representative and proxy-holder acting jointly

A proxy-holder acting jointly with a statutory representative: is this what is recorded in your company's entry in the Commercial Register? If so, you have a problem, as indicated by a recent Supreme Court decision, responding to the inconsistent practice applied by courts maintaining the Commercial Register when recording the manner in which statutory bodies act on behalf of limited liability companies. The court regards the statutory representative and the proxy-holder acting jointly to be against the sense and purpose of the law.



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In its October decision, the Supreme Court dealt with whether a company's memorandum of association may determine that the statutory representative together with the proxy-holder act on behalf of the company as its statutory body. The law itself is very inexplicit in this respect, leaving the specification of the manner in which the statutory body can act on behalf of a company to the memorandum of association. In principle, the law only prescribes that each statutory representative acts on behalf of a company independently unless the memorandum association determines otherwise. According to the Supreme Court, any modification to the basic statutory rule is only possible within the statutory body. This means that the memorandum of association may determine the joint acting of more than one statutory representative but may not authorise persons that are not statutory body members such as proxy-holders to act in the power of a company's statutory body.

The Supreme Court went even further in its contemplation and held that the joint acting of the statutory representative and the proxy-holder is a null and void juridical act, despite the fact that many authors of professional literature regard the joint acting of the proxy-holder and the statutory representative as an acceptable method of representing a corporation, especially in cases when a greater number of statutory representatives have been appointed and may not act independently. The court believes that the memorandum of association may not award unlimited power to act on behalf of a company to any third person that is not a statutory representative, thus making this person equal with the statutory body. The court is of the opinion that such a provision of the memorandum of association violates public policy.

Even though we may argue about the Supreme Court's conclusions in many respects, it can be expected that the courts maintaining the Commercial Register will succumb to the Supreme Court's ruling and will not enter the proxy-holder and the statutory representative acting jointly in the Commercial Register in the future. Corporations that use this type of representation, following an example from, e.g., the German legal environment, should therefore immediately reassess their position in this respect, as their representation may be null and void.

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SAC: VAT cannot be levied twice on the same transaction

The Supreme Administrative Court (SAC) granted many VAT payers' Christmas wishes by its favourable ruling regarding the fight against tax fraud. In the FAU case, attracting considerable media attention, the court said no to the concurrence of liability for VAT and denying the entitlement to VAT deduction. In the SAC's opinion, the tax cannot be levied twice on the same transaction.



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According to the financial administration, it is possible to combine a supply recipient's liability for VAT (if not paid by the supplier) with denying them the entitlement to deduct VAT, thus collect VAT twice on the same transaction. In the case in question, the tax administrator first requested that taxpayer pay VAT for the supplier on the grounds of their liability (for unpaid VAT). A year later, the tax administrator issued securing orders for a tax not yet assessed equalling the denied entitlement for VAT deduction reasoning that the taxpayer could have known that the supply they received had been affected by VAT fraud. In some cases, the tax clearly concerned identical transactions.

The SAC agreed with the taxpayer and with the Regional Court in Ostrava and said no to the described approach. It unambiguously confirmed that it is not possible to issue an order to secure tax if another enforceable decision already exists regarding the same tax – in this case the request to pay the tax under the liability concept. At a more general level, the judges held that taxpayers cannot be forced to pay VAT twice, once on the grounds of being liable for the unpaid VAT, and again as a result of being denied the entitlement to deduct input VAT. The SAC emphasised that the tools for fighting tax fraud cannot be used for the enrichment of the state budget and multiple collection of tax by collecting the same tax repeatedly from individual links of the chain. Finally, the SAC noted that the tax administrator's approach must be rational, responsible and must respect the rights and protected interest of taxpayers.

Let's just hope that the tax authorities will indeed take a more rational approach to fighting tax fraud in the upcoming year, rather than assuming that "you have to break an egg to make an omelette", an attitude that was criticised by the Constitutional Court before the holidays. Another harbinger of a more positive trend may be the decision of the Regional Court in Ostrava confirming that requests to pay tax under the liability concept have preference over denying the entitlement to VAT deduction. We expect the SAC to rule on this issue sometime in 2018.

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Case law

SAC on international requests for cooperation and time limits for tax assessment

Effective 1 January 2014, pending international requests for cooperation extend the period for which a tax may be assessed by the tax administrator. The SAC has now dealt with the interpretation of the effect of this regulation in terms of time: Do international request procedures initiated in 2014 also extend the deadlines for tax assessment that started to run in prior years? Theoretical as it may seem, the SAC's ruling on this question may lead to the termination of a number of pending tax inspections.



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The international request procedure, serving Czech tax administrators to obtain information needed for tax administration from their foreign colleagues, can indeed be a time consuming process. And Czech tax administrators have no control of its duration. Therefore, in 2014, a new rule was introduced under which pending international requests suspend the deadline for assessing tax. The new regulation, however, did not contain any specific transitory provisions. It thus was not clear whether dispatching a request for international cooperation also extended deadlines that had already started to run before 2014. The financial administration believed that this was the case.

The SAC dealt with a case of a tax inspection for 2010 and 2011, initiated in 2012. In 2014 and 2015, i.e. after the effective date of the amendment, the tax administrator dispatched a request for international cooperation. It thus believed that the deadline for the assessment of tax had not run out and that the tax inspection could continue. The SAC was of a different opinion: it refused to apply the new regulation on the running of the tax assessment period that started before the effective date of the amendment, which would have been harder on the taxpayer, without there being a special transitory provision saying so. Simply speaking, dispatching a request for international cooperation does not suspend/extend a deadline for assessing tax that started to run before 1 January 2014. In the case in question, the period for tax assessment had therefore already elapsed and the administrative courts prohibited the tax administrator from continuing the tax inspection.

For tax inspections concerning older taxable periods with an international aspect, we recommend paying increased attention to this judgement and reviewing whether the period for assessing tax has not already lapsed. In such cases, the tax administrator must not continue with the tax inspection and shall not assess tax.

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Case law

SAC: lapse period must be examined for securing orders as well

The Supreme Administrative Court (SAC) dealt with the question whether the lapse of the deadline for the assessment of tax renders it also impossible to issue orders to secure tax, and whether the tax administrator even has to examine this. The Court sided with the taxpayers and held that the stipulated deadline has to be observed not only for the assessment of the tax, but also for the issuance of an order to secure tax.



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In an appellate procedure against orders to secure tax, the Appellate Financial Directorate refused to deal with an objection that the period for assessing the tax had already elapsed. In its opinion, this only had to be examined in the procedure to assess tax and had no relevance for the issuance of securing orders for a tax not yet due that had been based on issued notices of tax assessment; it sufficed that the notices on tax assessment existed. Any objections as to the non-observance of statutory conditions for tax assessment should have been asserted in the appellate procedure against the tax assessment notices, not in the appellate procedure against the subsequently issued securing orders.

The SAC disagreed. In its opinion, the objection of the lapse of the deadline for assessing the tax is relevant both in the tax assessment procedure and in relation to securing the tax. If a taxpayer raises the objection that the period for assessing the tax elapsed in the appellate procedure against the orders to secure tax, the tax administrator has to deal with this objection in a convincing manner. Otherwise the tax administrator's decision becomes unreviewable, which renders it illegal. It is of no relevance whether the notices on assessment of tax had already been issued or whether the tax was yet to be determined in the future.

The SAC also rejected the regional court's approach in which it itself had reviewed whether the right to assess the tax had actually lapsed. The regional court had supplemented the tax ruling with its own ideas, while instead it should have reversed it for deficiencies in reasoning. Although the cassation complaint procedure did not prove that the period to assess the tax had in fact lapsed, the SAC reversed both the decision on the appeal against the securing orders and the securing orders themselves. This judgement further confirms that securing orders should only be issued in exceptional and well-substantiated cases.

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Case law

New opportunity for Czech taxpayers to decrease VAT on unpaid receivables?

At the end of last year, the Court of Justice of the European Union issued a judgment in the Italian Enzo Di Maura case (C 246/16), which involved a VAT refund relating to unpaid receivables from debtors subject to bankruptcy or insolvency proceedings. Is Czech VAT legislation compliant with the EU directive by not allowing for a reduction of VAT on receivables unpaid by end consumers who are not VAT payers?



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With this particular case, the Court of Justice of the EU (CJEU) answered the question whether Italian law complied with Directive No. 2006/112/EC, on the common system of value added tax, when it made a refund of VAT on unpaid receivables conditional upon the provision of evidence of prior unsuccessful insolvency proceedings. The average insolvency proceedings in Italy often take more than ten years. The Italian court's opinion, as opposed to the view of the Syracuse province's tax committee, was that the restriction of a right to reduce the tax base set by Italian law is disproportionate since the directive links the restriction with non-payment and not with insolvency proceedings with a demonstrably unsuccessful outcome.

The CJEU confirmed that a member state may not make the reduction of the VAT base conditional upon the failure of insolvency proceedings, if such proceedings can last more than ten years.

Even though we cannot find much inspiration for Czech taxpayers in the rulings on these prejudicial questions, we can see a certain potential in the CJEU's views that preceded the actual judgment. The CJEU emphasised that, pursuant to the directive, member states are not authorised to entirely deprive VAT payers of the possibility to correct VAT relating to unpaid receivables, simultaneously referring to the principle of proportionality, according to which means used to achieve goals set by the directive may not exceed the level of what is necessary to achieve them.

Czech legislation completely excludes the possibility of correcting VAT on unpaid receivables arising from transactions with entities that are not VAT payers (B2C). In the light of the above, we may ask whether Czech VAT legislation is actually compliant with the EU VAT Directive.

Another question is whether Czech legislative requirements for the correction of VAT on unpaid receivables from debtors in insolvency are proportional as required by the CJEU. Taking into account the above judgment, we believe that there might be a corrective potential for Czech VAT payers who have to deal with their customers' insolvency in the future.

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CJEU: Uber indeed a transport company

Uber's activities should be regarded as transport activities and not as the mere mediation of services, according to the Court of Justice of the European Union (CJEU) and the opinion of the Advocate General. Uber should thus be considered a company providing regular taxi services.



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In its decision of 20 December 2017, the CJEU held that the services involving the establishment of communication between customers and non-professional drivers provided by Uber fall within the category of transport services and as such should be excluded from the general application of free movement of services as well as from the application of the Directive on Services in the Internal Market and the Directive on Electronic Commerce. This means that member states may regulate the conditions for providing these services themselves.

The Czech Minister of Transport has already commented on this decision, voicing the opinion that the Czech courts should reassess their existing decisions regarding Uber in the light of the CJEU's new ruling. In addition to this, the minister also admitted that some requirements on taxi drivers, such as taximeters or topographical testing, should be made less strict via a draft amendment to law. The new government also wants to introduce the duty of companies operating in the sharing economy to send information about their operations to the tax authorities.

The CJEU's ruling explicitly deals with non-professional drivers using their own cars. Another question that is currently globally discussed is whether Uber drivers are indeed self-employed persons. According to the London Appeal Tribunal, for example, Uber drivers have employment rights. A similar question is currently being discussed in the USA.

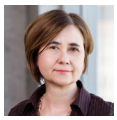
Other questions that may arise in connection with this are, for example, the approach of insurance companies to damage caused by drivers holding such an uncertain position. We will have to wait and see what implications this ruling will have in practice.

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In brief

Latest news - January 2018

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



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- Amendments to accounting decrees were published in the Collection of Laws under No. 441/2017 (for business entities using double-entry bookkeeping), No. 442/2017 (for banks and other financial institutions) and No. 443/2017 (for insurance companies).
- Notice of the Ministry of Labour and Social Affairs No. 447/2017, on the average wage in the national economy for the first to the third quarter of 2017 for the purpose of the Act on Employment, was published in the Collection of Laws.
- Meal allowance and travel expense rates for 2018 were published via Decree of the Ministry of Labour and Social Affairs No. 463/2017 Coll.
- A group of ODS deputies filed the motion to cancel the Act on the Electronic Reporting of Sales. Another two motions to amend this act filed by other groups of deputies await discussion in the chamber. One of the motions proposes, inter alia, to restrict the ERS only to VAT payers.
- On its website, the GFD published Instruction D-36, determining uniform FX rates for the 2017 taxable period pursuant to Section 38 of Act No. 586/1992 Coll., on income taxes, as amended until 31 December 2017.
- The Ministry of Finance submitted to the Chamber of Deputies a draft amendment to the Tax Procedure Code and other relevant legislation, transposing the DAC5 (Directive on Administrative Cooperation in the Field of Taxation) into the Czech legal system. The directive plans to use the selected information collected pursuant to the Anti-Money Laundering Directive (AML) for the purpose of international cooperation in tax matters in compliance with the DAC. Owing to the fact that the transposition deadline has already elapsed, the government proposes discussing the amendment on an accelerated basis, i.e. in the first reading only.
- On its website, the GFD recommends that entities registering for VAT should provide - along with their registration application - other documents in form of attachments substantiating basic facts stated in the application (such as the registered office, VAT registration reasons, bank accounts, etc.), as this will substantially accelerate the entire VAT registration process. In connection with this, the financial administration issued its new Information on VAT Registration.
- The General Financial Directorate issued its new Information on the VAT Application upon Exemption of Services Directly Associated with the Import and Export of Goods in the light of Section 69 of the VAT Act.
- On its website, the Ministry of Labour and Social Affairs has summarised news in the pension and social area.

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