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Editorial

Among this issue's hot topics are the news in labour law. The amendment to the Labour Code, which entered into effect this month, introduces changes for workers under agreements to perform work and to complete a job. The rules for working from home are also changing, and the reimbursement of employee home office costs is a much discussed issue, thus we present three ways how to deal with it. In addition to changes in labour legislation, employers and employees must also prepare for tax implications. We summarise the most important changes for you in the Update.

Recent developments in the courts' decision-making practice also deserve your attention. Our experts have selected the recent Supreme Administrative Court judgments, which in some respects completely change the direction of the existing case law.

The changes are so many that there is really not much time for a break. Nevertheless, I would be glad if you could save the date in your calendars for the traditional KPMG tax and legal conference. Apart from Prague, this year we will also meet in Olomouc and České Budějovice. We are fine-tuning the agenda to make it a most beneficial meeting that will provide you with a summary of all important changes that may affect your business.

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Taxes

CBAM reporting in force since 1 October

From 1 October 2023, companies importing selected products from non-EU countries whose production is CO2-intensive (e.g., cement, aluminium, fertilisers, electricity, hydrogen, iron and steel and downstream products such as screws and bolts) are required to report the import of these products and the related carbon emissions for their production (carbon footprint).

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For the time being, this only involves the reporting of 'imported carbon emissions' and not the obligation to pay a carbon border tax (on goods subject to the carbon border adjustment mechanism, CBAM). The carbon border tax will have to be paid from 2026.

The reporting period is a calendar quarter, and the report must always be submitted by the end of the calendar month following the end of the given quarter. The first report (for the fourth quarter of 2023) will therefore have to be filed by the end of January 2024 via a special electronic portal.
On its website, the customs administration issued its first brief information in this respect: *Reporting Obligation arising from the Carbon Border Adjustment Mechanism | Customs Administration of the Czech Republic (celnisprava.cz)*. The information specifies who will be covered by the reporting obligation and refers to related European legislation, including a list of products subject to the reporting obligation.

We encourage all companies that may be subject to this reporting obligation to pay close attention to this area. If necessary, we will be happy to help you identify whether this obligation applies to you, what data you will need to request from your non-EU business partners, and how to prepare the report itself.

What to watch out for when making an international request for cooperation in tax proceedings?

In the course of tax proceedings, the tax administrator may want to obtain evidence beyond the borders of the Czech Republic. One way to proceed is via an international request for cooperation by which the domestic tax administrator asks a foreign tax administrator to take evidence (typically a witness statement) abroad. However, an international request for cooperation can take months. What are its implications for domestic tax proceedings?

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Impact on the deadline for tax assessment

The most important consequence of an international request for cooperation is that it affects the deadline for assessing the tax. If this deadline expires, the state can no longer assess the tax for the taxpayer. If an international request is in progress, the law gives the tax administrator more time to assess the tax: the time limit does not run from the date on which the domestic tax administrator sends the request to the foreign tax administrator until the date the requested information is received.

However, the deadline is not always suspended, and taxpayers should therefore be alert when they learn that an international request is in progress. The deadline is not suspended where it is proven that the tax administrator has requested international cooperation without a due purpose or reason, or even solely for the purpose of artificially extending the deadline for tax assessment. It sometimes also happens that the tax administrator becomes impatient and does not wait for a response to an international request; it may appear at first glance that the tax administrator is accommodating the taxpayer, not wanting to unnecessarily burden the taxpayer or prolong the proceedings. The administrator will then issue a decision without knowing whether the foreign tax administrator has already performed the required actions and what follows from them. However, as has been confirmed by the Supreme Administrative Court, the tax administrator's impatience then refutes the reasonableness of the international request. Consequently, the deadline for tax assessment is not suspended in such cases.

And what happens if the tax administrator does not find out anything through an international request for cooperation? This is a bit more complicated because the purposefulness or reasonableness of an international request cannot be judged by its success or factual contribution to the decision on the matter. It always depends on whether the international request had the potential to clarify the relevant facts.

Evidentiary value of documents obtained via an international request for cooperation

Domestic tax administrators should not uncritically adopt the conclusions of foreign tax administrators. They should check whether the foreign tax authority stated in their response how they arrived at their result and from which source. Otherwise, the information obtained from abroad shall have a lower evidentiary value than other evidence. The same applies where the taxpayer is not allowed to attend the examination of a witness abroad. In such cases, the evidentiary value of the information obtained is affected, regardless of whether the foreign law allows the taxpayer to participate in the examination.

Taxpayers should therefore critically review the findings and conclusions that the tax administrator has drawn from the international requests for cooperation. They may alternatively request to see the documents that the tax administrator has obtained from abroad and used as a basis for their conclusions. We describe how to request these documents in our previous article here.

Amendment to Labour Code effective: what are the changes?

Except for some provisions, the long-discussed amendment to the Labour Code entered into effect on 1 October 2023. The most significant changes concern workers under agreements to perform work and agreements to complete a job (agreements on work outside employment) as well as home office work. Apart from labour law, the amendment also changes some tax regulations.

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Major changes for workers under agreements outside employment

The amendment makes the status of workers under agreements outside employment closer to that of workers in a standard employment. For example, it will now be necessary to schedule workers' working hours in advance and inform them of their scheduled hours at least three days before the start of the shift or scheduled period; a different period of time may be mutually agreed upon. It will still be possible to terminate the agreement on any grounds, but workers will have the right to demand a written statement stating the grounds for termination. Employees whose relationships established by the agreements lasted **at least 180 days in the previous 12 months** in aggregate with the same employer may ask the employer for standard employment, and the employer must provide them with a written response stating their reasons, within one month.

The most discussed change in this area is undoubtedly the vacation entitlement. Effective from **1 January 2024**, workers under agreements whose relationship with the employer has lasted at least 4 weeks (i.e., 28 calendar days) in the relevant calendar year and who have worked at least 80 hours will be entitled to vacation under the same conditions as employees in a standard employment.

Changes in work from home

It is now necessary to conclude a written agreement with employees working from home or another location, even for one-off cases. Some employees, such as parents with children under the age of nine or pregnant employees, now have the option to request to be allowed to work from home; the employer then must state the reasons for their refusal in writing. Employers may also order employees to work from home, but only if so stipulated by measures adopted by a public authority under the Emergency Act or the Public Health Protection Act. This can be done only for the time strictly necessary if the nature of the work performed allows it and provided that the place of remote work is suitable for the performance of the employee's work.

While many of us had expected that the amendment would bring a comprehensive regulation of work from home, the law unfortunately remains silent on some of its aspects: in particular the issue of occupational health and safety, which is significantly more complicated for employers to ensure outside their workplace. This means that employers have the same obligations and responsibilities in this area as if the employee were at their workplace; this may even discourage some employers from allowing home office.

A much-debated aspect of work from home was the reimbursement of employees' costs. In the end, the issue can be addressed in three ways:

1. compensation for costs incurred and proven
2. lump sum payment for each hour worked remotely
3. written agreement that the employee is not entitled to any home-office compensation.

The amendment to the Income Tax Act also responds to the new legislation: benefits provided by the employer as a lump-sum compensation for costs associated with the performance of work from home will not be subject to income tax on the part of the employee, up to the amount of the lump sum that can be provided to employees remunerated by salary, i.e., CZK 4.60 per 1 hour.

Furthermore, up to the amount stipulated by law, this lump-sum compensation will not be subject to social security and health insurance payments. Should an employer provide a higher lump-sum compensation for working from home, the difference will be considered the employee's taxable income and will be subject to social security and health insurance payments.

On the employer's part, the costs (expenses) of lump-sum compensation for working from home will be tax deductible, in full amount, i.e., even above the statutory limit of CZK **4.60 per 1 hour**.

Other changes

The information obligation in connection with the establishment of an employment relationship has been extended, and workers under agreements outside employment also have to be informed to a similar extent. The amendment also defines a catalogue of information to be provided to employees posted to the territory of another state. The service of important labour-law documents has also seen significant changes, mainly as regards electronic service, which has been much simplified and hopefully will finally become more used in practice.
A controversial innovation is the regulation of overtime for employees in healthcare: introducing more agreed-upon overtime above the maximum permitted scope is a rather unconventional solution to long-term unsatisfactory practice. This solution will at least temporarily legalise it.

What's next?

The Labour Code has undergone major changes that will have to be reflected in employment contracts, agreements on work performed outside employment, internal policies and other labour-law documents. It will now also be necessary to prepare and conclude agreements on the performance of work from home. Turn to us, we will be happy to help you with the preparation of new documents or the revision of existing ones.

Temporary protection for Ukrainian citizens extended for one year

As the continued Russian invasion of Ukraine does not make it safe for Ukrainian citizens to return to their homeland, the government has proposed to extend their temporary protection for another year, until 31 March 2025. Currently, the blanket validity of visa stickers granting temporary protection expires on 31 March 2024, and if its holders wish to continue to reside in the Czech Republic, they will have to apply for an extension of temporary protection again.

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The procedure to extend the temporary protection status should **be the same as in 2023**: online registration and making an appointment to obtain a visa sticker, through the Foreigners Reservation System (FRS).

If a foreigner wishes to extend their temporary protection status, they will have to register exclusively through the FRS by **15 March 2024**. A confirmation sent to the email address that the foreigner has stated in the registration form will complete their registration. The confirmation shall indicate the date and the office at which they are to appear to obtain the visa sticker extending their temporary protection.

Unlike under the previous procedure, it will be necessary to submit proof of accommodation in the Czech Republic – a document granting the foreigner the consent with their accommodation, with an officially verified signature of the property owner or rightful user. Under the proposed amendment, the proof of accommodation will have to be submitted at the personal visit for obtaining the visa sticker even if the foreigner's residence has not changed since the previous extension.

If the foreigner does not register for the extension of temporary protection status by **15 March 2024**, it will expire on **31 March 2024**. At the same time, if the foreigner does not appear at the assigned office of the Ministry of the Interior to obtain the visa sticker by **30 September 2024**, their temporary protection will expire on **30 September 2024**.

The extension of temporary protection will preserve current benefits such as free access to the labour market, support regarding accommodation, and financial aid. The amendment introduces a new concept: assisted return to the home country upon the foreigner's request. On the negative side, the proposed amendment does not allow for the secondary migration of holders of temporary protection status granted in another member state, even though this issue was raised during the comment procedure.

The legislative process is not over yet; hence it cannot be ruled out that the final wording of the law may still change.

Liability for employee wage claims in subcontracting chains in construction

Although a major amendment to the Labour Code has only entered into effect recently, the Ministry of Labour and Social Affairs is already preparing further changes and has submitted to the government a draft amendment introducing the liability of contractors in the construction sector for the wage claims of their subcontractors' employees. Its purpose is to adopt measures that would apply to both cross-border and domestic employers. The proposed amendment aims to establish liability within the subcontracting chain, so that workers in the construction sector will be able to assert their claims also against the main contractor rather than just against their employer without affecting the investor of the construction work.

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The draft amendment to the Labour Code transposes the Posting of Workers Directive (2014/67/EU), specifically its Article 12. Although it has already been transposed in the current wording of the Labour Code, the liability for wage claims of subcontractors' employees currently applies only to those posted within the transnational provision of services in the Czech Republic.

The proposed legislation specifically stipulates that a construction entrepreneur (contractor) who within their construction activities provides supplies to a customer through a subcontractor shall be liable for the wage claims of the subcontractor's employees, up to the minimum wage. An employment agency that has assigned its employees to the contractor for construction activities would also be considered a subcontractor.

By adopting the amended wording of the Labour Code, the current validly transposed general regulation would be supplemented so that the same liability would apply not only to posted workers but also to domestic ones. However, the statutory liability is limited to subcontracting in the construction industry, as only a construction entrepreneur as defined in the Building Act shall be liable for the wage claims. However, the proposed amendment does not limit the scope of activities to be performed by subcontractors within a subcontracting relationship, meaning that the construction entrepreneur should be liable for the wage claims of subcontractors performing both construction work and other activities directly related to the execution of the construction (e.g., construction supervision, design work).

Liability within the subcontracting chain should apply at more than one level. Thus, in a contractual chain encompassing several subcontractors, the supplier at the highest level of the contractual chain (the main contractor) would be liable, jointly and severally, with the contractor.

The liability would only apply in the event of a failure of the employer (subcontractor) to meet their primary obligation to settle employee's wage claims after their due date has expired. Notably, wage claims are payable no later than in the calendar month following the month in which the worker was entitled to a wage or salary or a part thereof.

If the subcontractor fails to pay the employee the wage claims for the work performed as part of the supply for the contractor, the employee (or a trade union organisation) could assert their claim against the contractor under statutory liability, thereby demanding the contractor settle the unpaid wage claims within three months of the expiry of their due date.

The liable entity (the contractor) would then be obliged to settle the employee's wage claims no later than **10 days** after receiving the request, while they should also inform their employer of the amounts paid to individual employees. In a chain of several subcontractors, they shall also inform the other persons liable.

The amendment should be limited to the construction sector as, according to the European Commission's statistics, the vast majority of unpaid wage claims have been happening there. The proposed amendment only applies to claims arising from employment relationships, i.e., it does not cover cases of failure to pay wage claims in the context of illegal employment.

The amendment is proposed to enter into effect on **1 January 2024**.

Act on investment companies and investment funds: transfer of assets and liabilities as mutual fund conversion

At the beginning of August, the Ministry of Finance submitted to the government a draft amendment to the Act on Investment Companies and Investment Funds, explicitly stipulating the possibility of mergers (acquisitions) between capital companies (joint stock or limited liability companies) and mutual funds.

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Summary information about the draft amendment was presented in the Update’s September issue.

The amendment explicitly allows for the transfer of a capital company’s assets and liabilities to a mutual fund if the acquiring mutual fund is the sole shareholder/member of the capital company, which is thereby being dissolved and transfers its assets and liabilities to the assets and liabilities of the investment fund. The transfer must not violate the statutes of the acquiring mutual fund or harm the interests of the unitholders of the acquiring mutual fund.

The decision to transfer assets and liabilities shall be made by the statutory body of the manager of the acquiring mutual funds after having obtained a statement from the depositary of the acquiring fund, unless such a decision is within the powers of the meeting of unitholders of the acquiring mutual fund.

In its statement, the depositary of the acquiring mutual fund shall state whether the transfer of assets and liabilities would violate the statutes of the mutual fund.

Draft terms of transfer of assets and liabilities

The draft terms of the transfer of assets and liabilities shall be prepared by the fund’s administrator and the dissolving capital company. Under the proposed amendment, they must contain the designation of the acquiring mutual fund, its manager, administrator, and depositary; the designation of the capital company being dissolved; the reasons for the transfer of assets and liabilities; the likely impacts of the transfer of assets and liabilities on the interests of the unitholders of the acquiring mutual fund; and the decisive date of the transfer of assets and liabilities. The draft terms must have the form of a notarial deed.

For conversions of collective investment funds (‘retail investment funds’ under the Act), the draft amendment requires a CNB permit to ensure greater protection for investors. On the other hand, no permit shall be required for a conversion of qualifying investors funds or for the transfer of assets and liabilities of a real estate company to an acquiring collective investment fund that invests in real estate or shares in a real estate company.

What if the conditions are not met?

The amendment explicitly stipulates that if the conditions for the admissibility of the transfer of assets and liabilities to a mutual fund are not met, such a legal act shall be null and void, i.e., as if it had never happened. It is therefore necessary to carefully assess whether all legal requirements have been met when transferring assets and liabilities. We will be happy to assist you in setting up the conversion process and preparing related documentation.

ViDA and its impact on platform economy

The draft VAT in the Digital Age (ViDA) Directive promises to modernise the VAT system across the European Union. The aim is to increase EU tax revenues, digitalise reporting, defend against tax fraud more effectively, and move towards a definitive VAT system. The directive also regulates the platform economy environment.

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According to the directive, a platform is an electronic marketplace where supply and demand meet to conclude a deal. Currently, the use of platforms has created a strong market imbalance through the consolidation of small and medium-sized entities that are individually below the VAT registration threshold but together, via a platform, create a network effect. At the same time, they gain an economic and price advantage over established competitors who, due to exceeding the VAT registration threshold, are VAT payers in their countries and the price for their services is thus higher by the VAT amount. Due to the large volume of transactions, platforms themselves are VAT payers, but they only charge VAT on the service they provide (intermediary service) and not on the value of the entire supply for the final customer.

The new ‘deemed supplier’ concept

The ViDA Directive plans to eliminate the imbalance especially in the mediation of short-term accommodation (airbnb, Booking), passenger transport (UBER), and advertising services (Facebook, Google) by introducing the deemed supplier concept. This would mean that platforms would have to tax the entire output (i.e., both the service being mediated, and the intermediary fee) even though they may purchase services from non-VAT payers – natural persons. This is to ensure a level playing field for service platforms and for other, traditional providers in the sector (hoteliers, taxis).

At the time of providing the service to the final customer, platforms will be obliged to settle their tax obligations in the customer's country through a one-stop-shop (OSS) system.

Change in the definition of short-term lease

The directive introduces further changes, the most fundamental one being a change in the definition of short-term leases. In the future, the provision of a short-term lease of up to 45 days will be considered a taxable supply. Only afterwards, i.e., from the 46th day, will the lease be considered long-term and can be exempt from VAT. Platforms will also need to adapt their systems to collect data on suppliers, transaction flows, and customers. Such data will need to be archived by the platforms for 10 years. The EU estimates that the EU budget will increase by EUR 6.6 billion in the next 10 years after the directive is adopted.

In the next article on the ViDA Directive, we will take a closer look at the issue of expanding the one-stop-shop (OSS) system and the introduction of a single VAT registration across the EU.

BEFIT: Another step towards uniform income taxation rules in EU

The European Commission has published its draft BEFIT (Business in Europe: Framework for Income Taxation) directive, which proposes a uniform approach to the taxation of large multinational groups in the EU and is the result of the EC's continuing efforts to introduce a common consolidated income tax base in the EU. The proposal also builds on the results of negotiations on a global minimum tax and a directive on the introduction of a minimum taxation level.

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The new directive is based on the following principles:

- The BEFIT rules shall apply to EU tax residents and permanent establishments in the EU if the consolidated annual turnover of the whole corporate group (including non-EU members) exceeds EUR 750 million. Such a corporate group will then be referred to as a BEFIT group.
- The preliminary tax result of a member of the BEFIT group shall be determined based on the profit or loss recognised in the financial statements for consolidation purposes, before adjustments for intragroup transactions.
- Intragroup transactions must meet the arm's length principle. However, the directive introduces certain simplifications as well as specific safe harbour rules for transactions with related entities that are not part of the BEFIT group.
- The preliminary tax results of member entities shall be adjusted by specific items (similar to the calculation of the top-up tax; however, the directive proposes a smaller number of adjustments). The directive also introduces a uniform approach to the calculation of depreciation and loss allowances, and to certain derivatives.
- The tax results of individual member entities adjusted in this way shall be aggregated into a single BEFIT tax base. This procedure should allow the (cross-border) offsetting of tax bases and tax losses of individual member entities.
- The BEFIT tax base shall be allocated to each entity based on the ratio of the average tax base of the member entity for three preceding years to the total BEFIT tax base. In the first three years, the average tax base shall be determined using the local tax rules in force before the implementation of the BEFIT directive. However, this is a transitional rule, with the understanding that a permanent but not yet specified rule for the reallocation of the tax base will be determined in the future.
- The local income tax rate shall be applied to the allocated BEFIT tax base. The member states will be able to adjust the allocated BEFIT tax base according to domestic legislation.
- Withholding taxes on, e.g., dividends or interest between individual group members should not be applied.
- The directive is expected to enter into effect on 1 July 2028.

For the BEFIT directive to be implemented, it must be unanimously approved by all EU member states. Historically, attempts to harmonise direct taxes have not been successful, mainly due to concerns about the loss of revenue to national budgets.

Impact of sanctions against Russia on importers of iron and steel products

From 30 September 2023, importers of iron and steel products into the EU are newly obliged to prove that they did not use iron or steel of Russian origin in their production. The measure is part of a package of sanctions against Russia that had been postponed to give the importers more time to prepare. A necessary condition for the purchase and import of iron and steel products from non-EU countries will be to prove the origin of the raw materials used in processing.

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The measure applies to products included in Chapters 72 and 73 of the Harmonised Commodity Description and Coding System and the Combined Nomenclature, except for Subchapters 7201-7205. The ban on the purchase and import of products originating in Russia has already been in place but will now be extended to iron and steel products of Russian origin but processed outside Russia. Declarants should therefore check whether they import products that fall under those chapters or chapters regulating exemptions.

How to prove the origin of raw materials?

To prove the origin of raw materials, the European Commission recommends completing a mill test certificate (sometimes also a material test report), which importers should present to customs when crossing the EU border. Such a certificate shows where the product was finally processed and what the origin of its individual components is. The importer is responsible for the accuracy of the information in the mill test certificate (MTC) and the customs authority shall have the power to request additional information or evidence.

The customs administration also considers other documents permissible to prove that no raw materials with any relation to Russia were used in production: such as one-off or long-term supplier declarations or commercial, production and customs documents proving the non-Russian origin of iron and steel. The procedure to prove origin for re-imports and other non-standard consignments has yet to be clarified.

Proposal for transfer pricing directive

The European Commission has published a proposal for a transfer pricing directive to unify procedures for the application of EU transfer pricing rules regarding the definition of related parties and the setting of arm’s length prices.

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In their tax administration, most member states apply, to some extent, transfer pricing rules contained in the OECD Transfer Pricing Guidelines ('OECD Guidelines'). However, the OECD Guidelines have a different status and significance in the legislations of individual member states. The new directive therefore aims to harmonise transfer pricing rules within the EU, probably in response to a series of defeats of the European Commission in European courts regarding state aid: the courts repeatedly rejected the EC's attempt for harmonised interpretation of transfer pricing rules.

The directive introduces several new rules:

- obligation to implement the rules laid down in the Transfer Pricing Directive into national legislations and to interpret them in accordance with the OECD Guidelines, which are to become a legally binding regulation for the application of the arm's length principle in the EU
- unification of the definition of a related party (associated enterprise) at a threshold for capital participation of 25 percent (some countries apply a threshold of 50 percent), which, among other things, will make it easier to use pan-European comparative studies for all groups in the EU carrying out the same activity
- determination of the arm's-length range when setting prices based on comparable transactions
- harmonised treatment of permanent establishments (the permanent establishment’s founder and the permanent establishment as separate entities)
- introduction of a simplified procedure for adjustments to the tax base resulting from the assessment of an additional tax in another member state and from voluntary adjustments to the tax base (corresponding and compensating adjustments)
- obligation of taxpayers to have documentation proving the compliance of intragroup transactions with the arm’s length principle. However, the current wording of the directive does not introduce the obligation to have standard transfer pricing documentation according to the OECD rules. The European Commission plans to soon specify the requirement and content of the documentation that companies must prepare.

The directive’s implementation may also have an impact on the use of safe harbour rules in the EU. In the Czech Republic, this may include, e.g., a restriction on the use of the simplified procedure for interest-free loans and borrowings. The EC proposes that the directive should apply from 1 January 2026.

Subsidies for water saving in industry

On 14 September 2023, the Ministry of Industry and Trade announced Call I – Sustainable Water Management under the Operational Programme Technology and Applications for Competitiveness. Support can be granted to projects that reduce and optimise water use in enterprises. The call has also been designed for large enterprises.

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Applications for support will be accepted from **2 October 2023 to 28 June 2024**. The funds for allocation are CZK 1.2 billion, but the amount may be increased in the event of an excess of quality projects and, contrariwise, the receipt of applications may be stopped if twice the funds for allocation are reached, but not before 18 October 2023.

The programme can provide support for four basic activities that will reduce water consumption in the operation of an enterprise:

- increasing the efficiency of the distribution system
- reducing water consumption while maintaining the productivity of technologies
- using rainwater
- recycling or circulation of water.

Projects applying for the aid must prove that water savings will reach at least 5% or 100 m3/year.
The minimum aid amount is **CZK 1 million**, while the maximum amount is **CZK 100 million**. The aid intensity for large enterprises is 40% of eligible costs, which include costs incurred for tangible fixed assets and intangible fixed assets (necessary for the proper operation of tangibles) as well as the cost of construction work but only to the extent strictly necessary for the implementation of the project.

One applicant may submit up to three applications. Projects can be implemented throughout the Czech Republic outside of Prague.

If you are interested in obtaining this type of aid, we will be happy to check the compliance of your activities with the conditions of this call.

Companies can now submit applications to participate in Call 1 of THETA 2

On 13 September 2023, the Technology Agency of the Czech Republic announced Call 1 of THETA 2, a programme supporting applied research and innovation in the transformation and modernisation of the energy sector.

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Applications for support will be accepted from 14 September 2023 to 27 October 2023. The programme is divided into three sub-programmes:

- **Sub-programme 1 ("PP1")** – Research in the Public Interest – focusing on the decarbonisation, decentralisation, digitalisation, and democratisation of the energy sector in the public interest. The maximum subsidy amount is CZK 10 million.
- **Sub-programme 2 ("PP2")** – Energy Technologies for Competitiveness – focusing on projects dealing with the preparation of technologies and solutions with rapid application in practice with regard to energy technologies for competitiveness. The aid intensity is limited to 60% of eligible costs, with no maximum subsidy amount per project.
- **Sub-programme 3 ("PP3")** – Technologies to Ensure Long-term Sustainability of the Energy Sector – focusing on projects not expected to be put into practice swiftly but instead leading to new solutions in industrial innovations. The aid intensity is 60% of eligible costs, with no maximum subsidy amount per project.

The aid intensity for large enterprises is 25-65% of eligible costs, depending on whether the project consists of the implementation of industrial research or experimental development or is carried out in cooperation with a research organisation. Eligible costs may include personnel costs, subcontracting costs, other direct costs, and indirect costs.

The project implementation period must not exceed 48 months for PP1 and PP2, while for PP3, the maximum project implementation period is set at 90 months. Projects must be started between May and July 2024 and can be implemented throughout the Czech Republic including Prague.

If you are interested, we will be happy to check whether your project's activities are in accordance with the terms and conditions of this programme.

Until when can additional tax return for lower tax be filed?

The extended chamber of the Supreme Administrative Court (SAC) has ended a long-standing dispute between the financial administration and taxpayers regarding the deadline for filing an additional tax return for lower tax. In doing so, the SAC sided with taxpayers and completely reversed the existing case law: an additional tax return for a lower tax may be submitted at any time during the deadline for assessing tax.

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The extended chamber of the SAC dealt with a case where a taxpayer had paid VAT on receivables from a customer. According to the customer, however, the receivables did not in fact arise; this was later confirmed by the civil court. This eliminated the reason for the payment of the (already paid) VAT on the non-existent receivables. Therefore, following the judgment of the civil court, the taxpayer filed an additional tax return, asking the incorrectly paid VAT be refunded.

The tax administrator refused to do so because, according to them, the taxpayer had filed the additional return late by not sending it by the end of the month following the month in which they had learned of the final and conclusive dismissal of their action against the customer (i.e., within the subjective deadline). This tax administrator’s conclusion was also supported by the Supreme Administrative Court’s case law at the time, whereby the SAC had repeatedly deduced that upon the expiry of a subjective deadline, the taxpayer's right to file an additional tax return reducing the originally claimed tax liability ceases to exist. The rejection of additional tax returns was subsequently confirmed by both the Appellate Financial Directorate and the Municipal Court in Prague.

The taxpayer did not agree with their opinion, and neither did the second chamber of the SAC, which dealt with the cassation complaint. However, because they were bound by the SAC’s previous case law, they had to present the differing opinion to the extended chamber of the SAC as the only one that may change the conclusions of the existing case law.

Game-changing verdict

After a comprehensive assessment of the case, the extended chamber concluded that the subjective deadline shall not apply to the filing of an additional tax return for lower tax (the judgment can be found on the SAC website under file No. 2 Afs 363/2019). According to the judgment, **the taxpayer may file an additional tax return for lower tax at any time during the deadline for assessing tax**. Thanks to this, taxpayers will have more freedom to decide when to file an additional tax return for a lower tax liability, not only for VAT, but also for all other taxes, especially income taxes.

The obligation to file an additional tax return for a **higher tax liability** within the set deadline does not change, and the taxpayer is subject to sanctions for missing it. Other deadlines, such as the three-year deadline for exercising the right to deduct VAT, also remain unchanged.

SAC's view on parent company orders

Any influencing of an uncontrolled transaction by a related party, usually a parent company, is regarded by the tax authorities as a parent company's orders. This may be, e.g., a parent company ordering a subsidiary to sell goods to that subsidiary's customers at prices lower than arm's-length. In our experience, the tax administrators' interpretation is rather extensive. The Supreme Administrative Court (SAC) has currently ruled on two cassation complaints, further clarifying the issue.

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The first judgment (7 Afs 358/2021-34) concerned a taxpayer producing and supplying timber to related parties and to unrelated customers. The tax authorities applied the taxpayer's arm's length prices also to supplies to unrelated parties (additional assessment as a percentage of costs). The regional court refused to deal with the case, arguing that the tax authority had impermissibly extended the definition of a related party transaction beyond the scope of the Income Tax Act to unrelated parties.

However, in further proceedings, the SAC reversed the regional court's judgement favouring the taxpayer and sided with the tax administrator. According to the SAC, the taxpayer's parent company was the main controlling element: it provided direction, coordination, and management and by the set business model made it impossible for the subsidiary to negotiate contractual terms with their customers. Therefore, the taxpayer did not have full control over their transactions and, although they entered into transactions with unrelated parties, they did so upon the parent company's orders. The parent company should therefore compensate them for the services provided, or damage incurred. The case was thus returned for further proceedings to the regional court, which is bound by the SAC's opinion.

It can therefore be concluded that the mere fact that the taxpayer supplies to and invoices unrelated parties and has no formal relationship with the parent company does not in itself preclude the application of the arm's-length price rule.

In the second judgment (10 Afs 162/2021-50), the SAC dealt with whether a parent company's decision to discontinue an unprofitable production of knitting machines and dispose of the raw material inventories can be subsumed under the provisions on arm's-length prices in the Income Tax Act and the Double Taxation Treaty. The court examined whether the parent company was obliged to compensate the subsidiary for the related damage.

The tax administrator viewed the loss on the disposal of the raw materials carried out following the order to discontinue production as a transaction between related parties that was not carried out at arm's length. According to the tax administrator, in common contractual relations, the person who gave an order to dispose of inventories would compensate the other party for the damage incurred. The company argued that they had decided to discontinue the production themselves, and that the parent company had merely consented to exiting the markets; had the parent company not given the consent, the company would have gone bankrupt and dissolved.

The regional court and then the SAC concluded that this was not a transaction between related parties that would be subject to the transfer pricing provision as the provision applies to contractual obligations. In the present case, however, it was the parent company's decision made as a part of the business management of the subsidiary. The management of a company does not in itself result in the origination, change, or termination of a contractual obligation. Nor did the parent company receive any direct undue profit in this respect.

The decision to discontinue an unprofitable production and dispose of inventories was thus the result of a perfectly legitimate business decision. It is thus not possible to generalise that any loss from any transaction should be compensated.

SAC on proving conscious involvement in tax fraud in chain of supplies

The Supreme Administrative Court (SAC) has dealt with denying the right to deduct VAT to a company on the grounds of it being knowingly involved in VAT fraud. In its judgment, the court summarised the relevant case law for assessing VAT fraud.


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The SAC reiterated that a tax administrator may only deny a VAT deduction if they prove fraud or abuse of right. VAT fraud occurs when one of the participants in a chain fails to pay the tax collected while another one deducts it to obtain an advantage contrary to the purpose of the EU Directive on the common system of VAT. The consequence must be a ‘missing’ tax, which is manifested by the fact that one of the links in the chain failed to meet their tax liability at some point in the past.

According to the SAC, to conclude on the existence of tax fraud, the tax administrator must ascertain such objective circumstances that taken together may constitute a sufficient basis for presuming that the tax missing in a particular case is the result of a targeted effort to obtain an unjustified tax advantage. It is not the tax authorities’ duty to prove in what specific way and by which specific supplier in the chain the fraud was committed, but the facts constituting the tax fraud must be established with certainty. Circumstances that taken together indicate the existence of tax fraud may have their origin in the past (e.g. a business history or past personal ties), at the time of the transaction (non-standard business terms and conditions), and in the period after closing the transaction (e.g., subsequent unavailability of the persons concerned, subsequent irregular cash flows between them).

If the tax administrator proves that tax fraud has occurred, they must further investigate the subjective aspect of the taxpayer's involvement in the fraud. According to established case law, a company's right to deduct cannot be affected by another prior or subsequent transaction in the chain of supplies being affected by facts of which the taxpayer does not and cannot know. It is therefore for the tax authority to sufficiently prove the objective circumstances indicating that the taxpayer knew, or must have known, that the transaction was a part of a fraud committed by their supplier or another entity operating in the supply chain. When assessing the subjective aspect, it must be assessed whether the entity during their economic activity has taken adequate measures that can reasonably be required of them to ensure that their supply is not part of fraud. Where it has been established that the supply was made for a person who knew, or should have known, that they were involved in a transaction that was a part of VAT fraud (and did not take sufficient measures that could reasonably be required of them to ensure that the transaction did not give rise to fraud), **it is legitimate to deny such person’s right to deduct VAT.**

In the case under consideration (7 Afs 331/2021-35), according to the SAC, there were non-standard circumstances and indications which taken together formed a logical and comprehensive set of mutually complementary and interconnected facts, from which it was possible to deduce that the company at least should and could have known that it was involved in fraud. According to the court, non-standard facts in this case were, e.g., suppliers in liquidation, acceptance of supplies by company employees using suppliers' stamps, personnel interconnection, non-standard transactions in bank accounts, and the absence of written contracts.

The SAC thus ruled that the company's right to deduct VAT had been denied legitimately.

In brief

News in Brief, October 2023

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

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DOMESTIC NEWS

- Government Decree No. 286/2023 Coll., on the general assessment base for 2022, the conversion coefficient for adjusting the general assessment base for 2022, the reduction thresholds for determining the calculation base for 2024, the basic pension amount set for 2024, and the amount of the increase for a raised child for 2024, and the increase in pensions in 2024, has been published in the Collection of Laws. The average wage used in 2024 will be CZK 43,967 based on the following data: the general assessment base for 2022 of CZK 40,638 and a conversion coefficient of 1.0819.
- Several regulations on foreigners' residence have been published in the Collection of Laws:
  - Amendment to Act No. 326/1999 Coll., on the Residence of Foreigners, under No. 278/2023 Coll
  - Amendment to Regulation No. 328/2015 Coll., implementing the Asylum Act and the Act on Temporary Protection of Foreigners, under No 289/2023 Coll.
  - Government Decree No. 282/2023 Coll., amending Government Decree No. 31/2016 Coll. on proving knowledge of the Czech language for the purpose of obtaining a permanent residence permit.

- The following regulations have also been published in the Collection of Laws:
  - Act on Preventive Restructuring No. 284/2023 Coll.
  - Amendment to the Insolvency Act and the Act on Insolvency Trustees, under No. 285/2023 Coll.
  - Government Decree No. 272/2023 Coll., amending Government Decree No. 5/2023 Coll. on compensation provided for the supply of electricity and gas at fixed prices.
- The chamber of deputies has adjourned its extraordinary session until 11 October 2023 for the third reading of the consolidation package. The debate is also on the agenda of the ordinary session starting on 10 October 2023.
- A notice of the Ministry of Foreign Affairs regarding the suspension of the implementation of Articles 5 to 22 and Article 24 of the double taxation treaty between the Czech Republic and Russia on the part of Russia has been published in the Collection of Laws and International Treaties. The Ministry of Finance explained that the suspension of the implementation of Articles 5 to 22 and Article 24 of the treaty will necessarily affect the possibility of implementing Articles 23 (elimination of double taxation) and 25 (resolution by agreement) and other provisions of the treaty. The suspension of the implementation of these articles of the treaty has national effects in the Czech Republic from 29 September 2023.

FOREIGN NEWS

- The OECD/G20 Inclusive Framework has published the comments received on the draft rules for setting Amount B under Pillar 1. Amount B provides a simpler and more efficient approach to applying the arm's length principle to core marketing and distribution activities in the country of sale of goods or services.
- Commission Implementing Regulation (EU) 2023/1773, laying down rules for the application of Regulation (EU) 2023/956 of the European Parliament and of the Council as regards reporting obligations for the

purposes of the carbon border adjustment mechanism during the transitional period, was published in the Official Journal of the EU.

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