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Editorial

Russia's weaponization of its energy supplies means that the outcome of the conflict in Ukraine may depend on which is the greater out of two „unwillingnesses" - the unwillingness of Russian soldiers to fight or the unwillingness of Europeans to bear higher energy costs.

While the recent price inflation has certainly been concerning, the measures to be taken by Czech and other EU governments to limit the impact of energy prices should at least avoid worst-case consequences for households and businesses. But of course, government support needs to be funded, and ultimately taxpayers will need to shoulder the burden, whether via the windfall taxes expected to apply to certain industries or more generally via higher borrowing costs which will ultimately need to be covered by the taxation of all of us.

We can only hope that market prices can stabilise through targeted measures to regulate energy demand and to diversify sources of gas supply. And let's keep our fingers crossed for a mild winter.

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Coordination Committee – treatment of donations to Ukraine remains unclear

In response to the war, the government promptly came up with an act on tax measures in connection with the armed conflict in the territory of Ukraine caused by the invasion of the troops of the Russian federation, setting the conditions for the tax support for charitable activities towards Ukraine and its citizens. In practice, the application of the new law has raised numerous questions regarding the tax deductibility of expenses incurred and proof of the provision of donations. These issues were to be clarified by a paper discussed by the Chamber of Tax Advisors and the representatives of the General Financial Directorate at the Coordination Committee held on 14 September 2022. However, the discussion was concluded without a full agreement, and the financial administration sided against taxpayers on many controversial issues.


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Donations made through employers

Numerous employers and professional chambers have been organising fundraisers to which employees may contribute. According to the financial administration, these donations cannot be considered tax exempt income on the part of the employer or the professional chamber and are subject to corporate income tax. However, the financial administration has agreed that in-kind donations subsequently made by the employer/professional chamber are a tax-deductible expense in 2022.

Somewhat controversial is the conclusion that employees cannot deduct the value of the donation made to the employer from their tax base. According to the financial administration, only the employer/professional chamber organising the fundraiser has this right. Employees can only claim the value of their donation as an item deductible from the tax base if they made the donation directly, not through their employer. If the employee proves the tax deduction with a certificate issued by the employer instead of the final recipient, they may face the risk that the tax administrator will challenge the deductibility of the donation.

Public fundraisers

As regards generally known fundraisers intended for the public whose purpose and bank account number are obvious, it is possible to prove the donation recipient by the bank account number. In this case, the financial administration accepts bank statements as supporting documents, while these nonetheless must still show other essentials required for proving a donation.

In-kind donations provided to Ukrainian employees for humanitarian and charitable purposes

According to the financial administration, it is decisive whether these expenses (costs) were incurred to better the employees' working, social, or healthcare conditions, or whether they served to provide them with more rest. As for the provision of basic household equipment, clothing, and hygienic supplies for refugees/employees, according to the financial administration, such incurred expenses (costs) do not concern social conditions and therefore cannot be considered tax deductible. However, on the Ukrainian employees' part, they are considered income not subject to personal income tax.

Wage compensation for Ukrainian employees

The paper also dealt with wage compensation for Ukrainian employees who have received a conscription order and left to fight in Ukraine or for employees volunteering in general. According to the financial administration, for such payroll expenses to be tax deductible by the employer, it is essential that the employee's absence be considered an obstacle to work on the employee's part and that the right to wage compensation during the absence from work arise from a collective bargaining agreement, the employer's internal regulation, or an employment contract.

Employer's financial contribution to employees for new housing

Given the complexity of the issue, a lot of information useful beyond the situation in Ukraine was presented at the Coordination Committee. For example, the financial administration stated that a contribution provided by an employer to an employee for obtaining new housing (where, e.g., the employee had lost their original dwelling due to a natural disaster) was not, in the financial administration's opinion, a tax-deductible expense (cost) on the employer's part, as it was not an employer's expense (cost) incurred to better their employees' working and social conditions, healthcare and increased rest time. However, on the employee's part, it should be possible to apply an exemption from personal income tax.

The concept of humanitarian and charitable purpose in general

The financial administration stated that for income from a donation to be tax exempt due to its humanitarian or charitable purpose, it is not relevant who the recipient of the supply is, but it is essential that the charitable/humanitarian purpose be met for that recipient. This shall be interpreted according to its common meaning: humanitarian aid during a war includes aid aimed at ensuring the necessities for life (food, water, sanitation, medicines, shelter, medical care, etc.) and after a conflict, eliminating the consequences of war and restoring basic infrastructure. Humanitarian aid and charity in general have already been interpreted by the financial administration in connection with the tornadoes in the Břeclav and Hodonín regions: it means aid provided typically in humanitarian crises, such as natural disasters and wars.

Provision of in-kind donations to Ukraine from VAT perspective

The Coordination Committee also dealt with taxpayers purchasing goods in the Czech Republic, exercising the right to deduct input tax, then exporting (transporting) the goods by their own means or through a contracted carrier to Ukraine, and then donating them in Ukraine. In the opinion of the presenters of the relevant paper, from the VAT perspective, these are not exports of goods, as the basic condition for the supply of goods is not met – there is no transfer of the right to dispose of the goods as their owner. The subsequent donation of the goods in Ukraine then constitutes a transaction with the place of supply outside the Czech Republic, where Czech output VAT is not applied. However, the financial administration disagreed with this view: in their opinion, taxpayers are obliged to pay Czech output VAT in such cases.

Extraordinary measures to mitigate high energy prices

The EU Council has approved the Regulation on an Emergency Intervention to Address High Energy Prices. In addition to a binding target to reduce electricity consumption during peak times by at least 5%, it introduces two new resources for national budgets: a cap on market revenues for selected electricity producers of EUR 180 per MWh and a solidarity contribution to be paid by companies operating in the fossil sector.

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The regulation establishes a mandatory cap on market revenues for electricity producers at a maximum of EUR 180 per MWh. This cap applies to market revenues generated from the sale of electricity produced from, e.g., renewable energy sources, nuclear power, crude oil, lignite, and other sources specifically listed in the regulation that benefit from low production costs compared to electricity produced from gas. The mandatory cap should apply to revenues from the sale of electricity effected from 1 December 2022 to 30 June 2023. Revenues above the cap level will belong to the state and will serve to mitigate the impact of high energy prices on end consumers.

Temporary solidarity contribution: To whom it applies and how it is calculated

The extreme growth in energy price caused by the current market situation benefits not only electricity producers but also companies and permanent establishments operating in the fossil fuel sector. If they generate at least 75% of their turnover from the extraction, mining or refining of oil, or from the production of coke products, they will be subject to a compulsory temporary solidarity contribution.

The temporary solidarity contribution will be calculated on the portion of the tax base for the 2022 and/or 2023 taxable periods that exceeds the average annual tax base determined for the four taxable periods beginning on 1 January 2018 plus 20%. The solidarity contribution shall be assessed at a minimum of 33% of this base and shall be applied over and above the corporate income tax. The proceeds shall also be used to mitigate the impact of high energy prices on end consumers.

The final version of the regulation will be published in the EU Bulletin. The rules for determining the solidarity contribution are likely to be incorporated in the Windfall Tax Act being prepared by the Ministry of Finance.

Excise duties: EMCS system extended

An amendment to the Excise Duty Act implementing Council Directive (EU) 2020/262 enters into effect partly in October 2022 and fully from 13 February 2023. The directive aims to enhance harmonisation across member states, clarify the terms used, and extend the obligations regarding the EMCS system.

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A significant change is the extension of the Excise Movement and Control System (EMCS), a computerised system for monitoring the movement of excise goods within the EU, which will now also include the movement of selected products between member states under a duty suspension arrangement. At the same time, EMCS will be interconnected with the Czech Customs Administration's system for the import and export of selected products. This will ensure more rigorous supervision and eliminate tax evasion.

Another novelty is the regulation concerning goods released for free circulation for tax purposes in one member state, but at the same time transported to another member state. The amendment stipulates a notification obligation for the persons receiving selected products, i.e., the registered consignees. This solution is mainly used by small and medium-sized enterprises, which are likely to welcome rules being set for this type of shipments.

The amendment brings many more changes, including new provisions dealing with an exemption for the partial loss of selected products or the possibility of introducing a tax representative of the consignor in distance selling. The legislators also tried to clarify certain terms to make it easier for taxpayers to understand the issues.

How quickly shall tax authorities refund overpayments or excess deductions?

Not only taxpayers but also tax administrators must comply with deadlines. What deadlines apply to the tax authority when refunding taxpayers? What can taxpayers do if the tax authority fails to meet the relevant deadline? Below we present an overview of important deadlines.

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Deadline for refunding refundable overpayments: The taxpayer may request the tax administrator to refund an overpayment. The tax administrator shall grant the request if the overpayment amounts to at least CZK 200 at the time of filing the request or shall reach this amount within the next 60 days. Conversely, the request shall not be granted if a tax liability arises in the taxpayer's personal tax account within one month or if the refundable overpayment has arisen because of the payment of a tax that has not been finally assessed or an alternative due date has not passed.

The tax administrator has 30 days from the date of receipt of the request to refund the overpayment. However, if a taxpayer applies for a refund of an overpayment of income tax when filing an income tax return before the filing deadline, the 30-day period shall not start to run until the day following the last day of the period for filing the tax return.

Deadline for refunding an excess VAT deduction: Unlike a refundable overpayment, the taxpayer does not have to request the tax authority to refund the overpayment resulting from the assessment of a VAT deduction. The tax authority is obliged to refund it without being requested, within 15 days from the date of notification of the order to pay tax or additional order to pay tax, or within 30 days where the result of the tax assessment or additional assessment is not subject to notification.

Deadline for refunding overpayments in specific cases: If a refundable overpayment arises as a result of cancellation, modification, expiry or annulment of a decision assessing tax or a securing order, or as a result of an unjustified recovery process, the tax administrator is again obliged to refund the overpayment without being requested, within 15 days of the effective date of the decision giving rise to the overpayment.

Taxpayers must also pay attention to deadlines in these cases. If the taxpayer does not apply for a refund within 6 years from the end of the year in which the overpayment arose, the overpayment ceases to exist and becomes the state budget’s revenue. Whereas if the taxpayer is not interested in the refund of an overpayment that the tax administrator is obliged to return without a request, then the taxpayer may request the tax administrator not to do so.

If the tax administrator does not return the overpayment within the above time limits, the taxpayer is entitled to interest on the refundable overpayment, currently amounting to the CNB repo rate plus 8%, i.e., 15% per annum.

Transport 2030 programme to support research and innovation in transportation

The government has approved a programme to support applied research and innovation in transport. The estimated budget of CZK 1.95 billion will be distributed via four calls over eight years.

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Building on existing support, the programme is intended for businesses of all sizes. Through outputs from projects receiving support, the programme aims to develop the transport sector and all types of transport with regard to the needs of society to improve the technological and knowledge development of the Czech Republic.

The programme's specific objectives:

- sustainable, accessible, and safe transport
- automation, digitisation, and technologically advanced transport
- low-emission and environmental-friendly transport.

The programme will be implemented by the Technology Agency of the CR. The specific topics of calls and priority support areas will be determined based on the current needs of the transport sector, to be decided by the Ministry of Transport. Projects carried out in Prague will also be eligible for support.

The planned budget of CZK 1.95 billion will be distributed via four planned calls, with support starting in 2024, 2025, 2026, and 2027. The first call for support in 2024 will be announced next year. It is expected that at least 30 projects will receive support under each call, with maximum aid of CZK 50 million per project. Projects are expected to be carried out over a period of 36 months, with a maximum duration of 48 months. Also, projects may not take longer than the programme itself. The aid intensity will depend on the size of an enterprise and the category of supported activity.

Eligible expenses under this programme are understood to be:

- personnel expenses of researchers, technicians, and other support staff to the extent necessary for the purposes of the project
- the cost of tools and equipment to the extent and for the duration of their use for the purposes of the project
- the cost of contract research, technical expertise, and patents
- additional indirect and other operating expenses.

Upcoming legislative changes to agreements outside employment contracts

The Ministry of Labour and Social Affairs has submitted a long-awaited bill to amend the Labour Code, which is to implement two EU directives in Czech law. Among other things, the new regulation will affect the working conditions of employees working under agreements to complete a job or to perform work. Employers should be on the alert, as the amendment brings major changes.


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One of the novelties is the employers' obligation to **schedule the work for their employees working under the agreements**, and the obligation to **inform them of this schedule in advance**, no later than one week before the start of the scheduled period unless another period has been agreed with the employee. This means that the agreements will no longer operate fully on the principle of on-call work.

Another important change is that employees working under the agreements will be entitled to **paid vacations**. Their amount will be determined in the same way as for employment contracts, i.e., based on the agreed-upon scope of work and the total number of hours worked by the employee. If a maximum scope of work is agreed, the weekly working hours for the purposes of calculating vacation will correspond to this scope. For agreements to complete a job, 10 hours per week will always be considered the weekly working hours for calculating vacation.

Because of the employer's obligation to schedule work for these employees, all **provisions on obstacles to work** will now also apply to them. This means that the employer will have to provide wage compensation, e.g., for visits to a physician; of course, the employee's obligation to attend to their personal matters as much as possible outside working hours also applies here.

Employees working under the agreements will also be subject to the **provisions regulating the minimum time of rest between shifts or extra pay** for work on public holidays, at night, on weekends, and in an unfavourable working environment. For agreements to perform work, the amendment reduces the period for which compliance with the maximum permissible scope of work is assessed to 26 weeks. Only a collective agreement may stipulate a longer period that may nonetheless not exceed 52 weeks.

The Labour Code also newly allows **concluding certain employment contracts electronically**. This applies both to agreements outside employment contracts, and to employment contracts and agreements amending or terminating those relationships. The employee will have the right to withdraw from such concluded contracts / agreements in writing within 7 days, except for agreements on the termination of employment or on the termination of a relationship arising from an agreement on work outside employment.

Since the bill amending the Labour Code has only just entered the legislative process, its final wording may still change significantly. Considering the need to transpose two EU directives for which the deadline has already passed, we expect that all efforts will be made to adopt it as soon as possible.

Amendment to Labour Code introduces new home office rules

The Ministry of Labour and Social Affairs has published an eagerly awaited draft amendment to the Labour Code introducing several new changes, the most significant one being the comprehensive regulation of home office. A more detailed regulation of remote work is something that employers had been lacking, which was particularly evident during the COVID-19 pandemic. But the proposed changes are far from entirely positive.

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The current wording of the Labour Code regulates only the work of homeworkers, i.e., workers working entirely from home for long periods of time and scheduling their own working hours. The regulation of home office as we know it today, i.e., alternating work from the employer's workplace with work from home during working hours determined by the employer, is completely absent. The amendment builds on earlier efforts by the ministry to regulate this area and aims to align Czech legislation with relevant EU regulations.

The amendment introduces the right of employees to ask their employer to allow them to work remotely. If the employer grants the request, an agreement must be concluded. If not, the employer must provide the grounds for the refusal, in writing. For pregnant employees and those caring for children under 15 years of age or other dependants, their employer's position is more complicated: in principle, the employer must grant the request for home office unless serious operational reasons or the nature of the performed work prevent remote work. The employer must again provide the reasons for denying the request in writing. The amendment thus goes beyond the EU directive that establishes the right to home office only for parents of children under 8 years of age.

An agreement on remote work will have to be entered into in writing and will have to include: the place(s) of performance of remote work, the method of communication between the employee and the employer, the method of assigning and monitoring the work, the scope of remote work and the detailed conditions for the scheduling of working hours, the method of compensation for costs incurred, the period for which the agreement on remote work is concluded, and the manner in which the employer ensures occupational safety and health, including its monitoring, and the employer's permission to enter the place of work to clarify the cause and circumstances of any work accident.

Both parties will have the right to terminate the agreement, even without giving a reason. For employees who are legally entitled to home office, the agreement may be terminated only for serious operational reasons or if the nature of work no longer allows home office.

What about compensation for home office costs?

The most controversial point of the amendment is the regulation of employee expense compensation. Employers are already obliged to bear all the costs incurred in the performance of the employee’s work, i.e., including increased costs related to home office. However, the lack of coherence between tax and labour legislation results in any lump-sum compensation being treated as taxable income. Employers are thus left with the completely impractical option of providing compensation only for proven expenses. The amendment eliminates this problem but creates another one: it introduces a relatively high minimum lump-sum compensation for increased energy costs of CZK 2.80 for each hour of remote work. Any additional costs incurred by the employee above this amount will also have to be covered by the employer. The entitlement to this compensation cannot be legally waived by the employee.

Uncertainty in occupational safety and health area remains

Another weakness of the amendment is that it does not bring any relief concerning occupational health and safety. The employer remains fully responsible and is newly obliged to determine in an agreement how they will ensure and monitor the compliance with occupational health and safety regulations, without the legislator providing any guidance on the content of such an agreement.

Given the ever-increasing demand for home office, we consider this more detailed regulation as a move in the right direction. However, the proposed wording imposes a significant administrative and financial burden on employers, which may ultimately lead employers to instead restrict this employee-valued benefit. We can only hope that the problematic points of the amendment will be modified during the legislative process.

Labour Code amendment to increase administrative burden related to posting of workers

Another novelty brought by the upcoming amendment to the Labour Code (apart from remote work) is a significant extension of employers' information obligation upon cross-border posting of workers. The changes respond to the EU Directive on Transparent and Predictable Working Conditions (the TPWC Directive).

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Under the current wording of the Labour Code, when posting employees abroad, employers are obliged to inform them only about the expected duration of the posting and the currency in which they will be paid their wage or salary. Under the amendment, the scope of information that will need to be provided to employees will be significantly wider.

The TPWC Directive, whose content should already have been reflected in Czech law this August, requires that employees posted to work in the territory of another state for a period longer than four consecutive weeks must always be informed in advance and in writing of the following:

- the country in which the work is to be carried out
- the currency in which their wage or salary will be paid
- where applicable, the benefits in cash or in kind relating to the work assignment
- whether and under what conditions repatriation is provided for.

If the posting to another EU member state occurs within the framework of a transnational provision of services, employees should, apart from the above, also be informed of the following:

- the remuneration to which they are entitled under the applicable law of the host member state
- where applicable, any allowances specific to the posting
- conditions for the reimbursement of travel, accommodation, and meal expenses
- a link to an official national website set up by the host member state.

The draft amendment only contains the provision of information to the extent required by the TPWC Directive. Given the obligation to reflect the directive's requirements in Czech law, the amendment should pass through the legislative process without major changes.

Employers must prepare for an increased administrative burden as the directive does not allow most of the above information to be provided to the posted worker by reference to the employer's internal regulation. In practice, this means that for each foreign posting exceeding four weeks, each employee will have to be informed in writing and on an individual basis. We recommend including the information as well as other conditions of the posting in the posting agreement or letter.

Upcoming changes to Transformations Act

The first draft of the long-awaited amendment to the Act on Transformations has been published in the electronic library of the legislation in preparation and brings a number of significant changes. The bill implements EU directives amending EU corporate law, primarily harmonising the regulation of cross-border conversions and demergers (divisions), thus complementing the already harmonised regulation of cross-border mergers.

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The bill implements amendments to Directive (EU) 2017/1132, namely Directive (EU) 2019/2121 of the European Parliament and of the Council as regards cross-border conversions, mergers and divisions, and Directive 2019/1151 as regards the use of digital tools and procedures in company law. Although Czech law already allows for all these types of cross-border transformations (mergers, demergers (divisions) and cross-border conversions), the existing regulation must in several aspects be adapted to the directive's requirements. The amendment also considers some changes required by practice.

The main changes include:

- A new form of demergers (divisions) is introduced: a demerger by separation into a new or existing subsidiary, or a combination of these. Unlike in demergers by spin-off (partial divisions), the company being demerged becomes the sole shareholder (member) of the newly formed company, or, in a separation with acquisition, acquires a share in an already existing company.
- Unlike the existing regulation, the bill explicitly provides for the possibility to relocate the registered office (conversion) to or from a non-EU or non-EEA state. This responds to such conversions having already been successfully completed several times, following the regulation contained in the Civil Code.
- Under the current regulation, the decisive date must not precede the date of filing for the registration in the Commercial Register by more than 12 months; under the new regulation, the 12 months will be counted from the date of the registration in the Commercial Register.
- It is explicitly stated that the decisive date of a merger or demerger (division) cannot be set on a date preceding the date of the formation of a participating company or cooperative. On the other hand, combined transformations in which a company or a cooperative participates in several transformations with the same decisive date are explicitly allowed.
- While still required by the Transformations Act, the expert appraiser carrying out the valuation of the assets will no longer need to be appointed by the court but will be selected by the participating company from a list of experts.
- Together with the draft terms of the transformation, companies should deposit in the Collection of Deeds a notice informing their creditors, employees, and partners about their rights. These persons' rights have been extended, allowing them to submit comments on the draft terms of the transformation. The bill also stipulates detailed requirements for the content of the transformation report.
- Under certain conditions, it is possible to waive the right to a report on the cross-border transformation,

which is not allowed under the current rules. This change will make it possible to significantly reduce legal cost when carrying out cross-border transformations.
- For cross-border transformations, a notary will be obliged to examine whether the purpose of the cross-border transformation is not abusive or fraudulent, or aimed at the evasion or circumvention of national or EU law or at committing a criminal offence. In serious doubt, they may turn to state administration authorities for cooperation. The notary may refuse to issue a certificate for the cross-border transformation should they detect any of the above illicit purposes of the cross-border transformation.

The bill is still in the early stages of the legislative process (going through an external comment procedure). It thus seems unlikely that the transposition will be completed within the deadline of 31 January 2023; however, we welcome many of the changes proposed and believe that the harmonised regulation will greatly facilitate the implementation of cross-border transformations.

EC's landmark decision blocks merger of companies below turnover threshold

In a breakthrough decision, the European Commission has prohibited the merger of two US companies, Illumina and Grail, operating in the European biotechnology market. For the first time ever, the Commission did not allow a merger to proceed even though the companies did not meet the economic criteria for notifying a merger.

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Illumina develops genetic technologies, providing its partners with outputs that are essential and unique in nature. GRAIL then uses these outputs to produce cancer detection tests. Last year, the two companies agreed to merge.

Although both companies are major players in their respective fields, their turnover did not meet the criteria for notification contained in the EU Merger Regulation or those laid down in national legislations. The acquisition was therefore not reported to the Commission or any other national competition authority. However, member states are entitled to request the Commission review any merger (even if it does not meet the turnover threshold) affecting trade between member states and threatening to significantly impede on the economic competition in an EU member state.

The Commission upheld the member states' proposal and did not authorise the merger on the grounds that despite the proposed measures (e.g., availability of technology to other undertakings), it could lead to other undertakings being cut off from the technology provided by Illumina to GRAIL. The Commission further noted that when assessing the significance of the undertakings under review, it is not only important to assess their turnover but also their scope of business and the market situation.

For the first time ever, it thus **blocked a merger between two undertakings that did not meet the turnover threshold laid down by the EU Merger Regulation**. In view of the Commission's recent call for the application of the above procedure, it is likely that similar situations will recur.

For the sake of completeness, we mention that for the implementation of a concentration prior to its clearance the Commission may impose a fine of up to 10% of the annual worldwide turnover of the undertakings concerned and, simultaneously, order the reversal of the concentration (e.g., via an obligation to sell the company or to terminate the contract).

When do structures come into existence or cease to exist in the legal sense? What are the tax implications?

In its recent judgment, the Supreme Administrative Court dealt with the question of when a structure comes into existence or ceases to exist as a thing in the legal sense (7 Afs 132/2022-22), which impacts the deductibility of tax expenses.

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In the case at issue, the company's hayloft burned down and had to be demolished for structural reasons. The reconstruction of the hayloft was financed using compensation received from the insurance company and related costs were treated as tax deductible as costs of repair of tangible fixed assets. However, this treatment was disputed by the tax administrator during a subsequent tax inspection and subsequently also by the SAC, to which the case had been forwarded.

According to the SAC, a structure (as a thing in the legal sense) comes into existence at the moment it is erected at least to a stage from which all further construction work is directed towards the completion of the thing thus determined, in generic and individual terms. For above-ground structures, this occurs when at least the layout of the first floor is already clearly and unmistakably visible. Similarly, an above-ground structure as a thing ceases to exist when the layout of the first floor of the original structure is no longer visible (i.e., usually by destroying the perimeter masonry below the level of the ceiling above the first floor, usually with the simultaneous removal of the masonry of the partitions). Therefore, the decisive factor for assessing the demise of the original structure is what has been removed and not what has been newly built. According to the SAC, there is no doubt that the original structure ceased to exist when the perimeter walls were completely destroyed. Where walls are partially demolished, it is necessary to assess the extent of the interventions made.

In the case in question, the perimeter walls were completely destroyed and, therefore, the SAC upheld the tax administrator's view that the hayloft as a thing in the legal sense had ceased to exist. To make this assessment, the SAC made use of an expert's opinion.

According to the SAC, the company should have treated the tax residual value of the disposed demolished hayloft as a tax-deductible expense and charged the compensation from the insurance company to taxable revenues while charging the amounts incurred for the construction of the new hayloft to expenses gradually through depreciation (i.e., not as one-off repair costs). The SAC considers it irrelevant that the costs in question were incurred by the company in connection with the fire and were covered by the insurance settlement.

Right to deduct where supplier has not paid output VAT

In case C-227/21 HA.EN. the Court of Justice of the European Union (CJEU) dealt with whether a supply recipient has the right to deduct VAT if they knew or should have known that the supplier was not going to pay output VAT because of financial difficulties.


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A Lithuanian building company ran into problems and was unable to repay a loan, which was secured by a mortgage on immovable property. As a result of the insolvency, that immovable property was put up for auction. As no buyer showed interest in the property, the company agreed with creditor HA.EN. to transfer the property to them, whereby a part of HA.EN.'s claims would be extinguished.

The company in financial difficulties issued an invoice to HA.EN., indicating the tax base and VAT. Although the company declared output VAT on that invoice in their tax return, they never paid it. HA.EN. declared the received invoice in their tax return and exercised the related right to deduct VAT.

The Lithuanian tax authorities denied HA.EN. the right to deduct VAT on the grounds that they knew or should have known that their supplier would not pay output VAT because of their financial difficulties; HA.EN. thereby allegedly committed an abuse of rights.

The CJEU previously ruled that whether a supplier paid output VAT has no effect on the supply recipient’s right to deduct VAT. The right to deduct may only be denied if the taxable person has committed tax evasion or abuse of rights. To prove an abuse of rights, two conditions must be met:

- the transactions in question must result in the obtaining of a tax advantage contrary to the purpose of tax legislation, and
- obtaining that tax advantage must be the main purpose of the transactions.

The CJEU held that HA.EN. had not committed an abuse of rights. The CJEU argued namely that the **VAT Directive grants a right to deduct for similar types of transactions, as it allows the reverse charge procedure to be applied**. Furthermore, according to the CJEU, it is not possible to infer solely from the supplier's financial difficulties their unlawful intention not to pay VAT. The supplier was actually selling the immovable property (albeit in a forced sale) to pay their debts. Denying the right to deduct VAT would thus be contrary to the VAT Directive.

The Czech Republic has implemented into the VAT Act the obligation to apply the reverse charge mechanism to the sale of immovable property by a debtor in a forced sale under a court decision. However, the above CJEU’s judgement gives taxpayers further points to argue if denied the right to deduct VAT by a tax administrator.

CJEU again on right to deduct VAT in context of holding companies

The Court of Justice of the European Union has ruled on whether a holding company is entitled to deduct VAT on inputs relating to services provided as a shareholder's contribution.

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The case concerned a German parent company engaged in the purchase, management, and sale of real estate and other activities. The company also held a share in two subsidiaries. By an addendum to the memorandum of association, the subsidiaries agreed that the parent company would provide them with a shareholder's contribution, comprising a free-of-charge provision of accounting and management services in favour of the subsidiaries. The subsidiaries largely carried out exempt transactions without the right to deduct.

In its tax returns, the parent company deducted input VAT on its purchases of the services provided to the subsidiaries. The German tax authority then challenged the right to deduct.

The CJEU first confirmed the previous case law: **mixed holding companies that are involved in the operation of their subsidiaries** (e.g., in the form of the provision of various services) carry out an economic activity as taxable persons. According to the CJEU, the right to deduct tax can then also be granted for overhead costs if they are reflected in the price of supplies provided by the holding company.

In the present case, however, the court found that **the services provided by the parent company had been purchased by it to make a shareholder's contribution**. Such contributions generally fall under the holding of shares, which does not constitute an economic activity for VAT purposes. Furthermore, the costs of the services were not reflected by the parent company in the price of the taxable supplies provided to the subsidiaries. The CJEU thus challenged the link between the cost of the services purchased by the parent company and its economic activity and did not recognise the right to deduct VAT on the received services in question.

News in Brief, October 2022

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

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DOMESTIC NEWS

- The financial administration reminds payers of road tax who have paid prepayments for 2022 that the prepayments were abolished by the amendment to the Road Tax Act effective from 1 January 2022.
- An amendment to the Excise Duty Act extending the reduction of excise duty on 1 litre of diesel oil by CZK 1.50 until the end of 2022 has been published in the Collection of Laws under Number 286/2022. The reduction of excise duty on petrol by CZK 1.50 per litre ended on 30 September 2022.
- The chamber of deputies has approved an amendment to the Act on International Cooperation in Tax Administration, which introduces a reporting obligation for operators of digital platforms from 2023 (DAC 7). The bill will now be discussed by the senate.
- The financial administration has published information on the one-off child allowance of CZK 5,000. This is tax-exempt income that will not be included in the limit of CZK 68,000 for a spouse's own income.
- A treaty between the Czech Republic and Qatar on the avoidance of double taxation in the field of income taxes and on the prevention of tax evasion and avoidance has been approved by parliament and signed by the president.
- The Ministry of Foreign Affairs' information on negotiating a treaty between the Czech Republic and the Republic of Senegal on the avoidance of double taxation in the field of income taxes and on the prevention of tax evasion and avoidance has been published in the Collection of International Treaties under No. 32/2002.
- The Ministry of Foreign Affairs' information on the denunciation of the treaty between the Czech Republic and the Netherlands with regard to the Netherlands Antilles in relation to Sint Maarten has been published in the Collection of International Treaties under No 29/2002.

FOREIGN NEWS

- Even though initially expected, the draft directive on minimum tax did not make it onto the agenda of the ECOFIN meeting on 4 October. If member states fail to reach agreement at this or a future meeting, two options remain. The first is so-called enhanced cooperation that will be used if at least nine member states request the procedure and agree that unanimity cannot be reached within a reasonable time. This procedure has been used successfully only twice in the past, but not in tax matters. The second option is the unilateral adoption by member states wishing to comply with the obligations under the OECD Inclusive Framework. France, Germany, Italy, the Netherlands, and Spain have already issued a joint declaration that they will proceed with the implementation of the minimum tax.

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