Tax & Legal

Taxes
Subsidies
Tips and tricks
Legal
World news
Case law
In brief

January 2023

Editorial

I hope your Christmas holidays were peaceful and relaxing. Now in January, we should again focus on changes in the market and related legislative measures.

Volatile energy prices, persistently high inflation and its impacts on business, constantly growing prices of inputs, and the need to continuously monitor supply chains are the main topics in business today. Some areas can only be influenced to a limited extent, but the development of energy prices and their structure are on the mind of every company, entrepreneur, and household. Starting from January, the government introduced a cap on electricity and gas prices for large enterprises as well. If you want to draw the support in January, you must provide your suppliers with the respective declaration by 15 January. More detailed information can be found in this Update.

The Accounting Act is bound to bring fundamental changes for multinational and other groups and companies. While its effectiveness is expected from 2024, I recommend you familiarise yourself with the main changes well in advance.

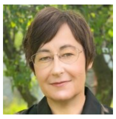
With everyone talking about how difficult a year 2023 will be, I wish you the strength and good fortune to navigate its possible pitfalls with ease and in good health.

Pavel Rochowanski
Partner
KPMG Czech Republic

What's new in tax for employees in 2023?

With the new year come changes in employee taxation as well as social security and health insurance. The maximum assessment base for social security contributions has increased and the limit from which wages are taxed at 23% has been raised. Many employers will be keen on the possibility to apply a discount on insurance premiums for selected 'vulnerable' employees in part-time employment. And after almost twenty years, the income threshold for the obligation to file a personal income tax return has been significantly increased.

Iva Krákorová
ikrakorova@kpmg.cz



Mária Marhefková
mmarhefkova@kpmg.cz

Increase in maximum annual assessment base

The maximum annual assessment base for social security contributions has increased to **CZK 1,935,552**. This change will also affect personal income tax: employees' income exceeding this amount will be taxed at a **23% rate** (for monthly wages, the threshold for the application of the 23% rate is **CZK 161,296**). To income under this limit, the **15% tax rate** will continue to apply.

Increase in minimum wage

From January 2023, the minimum wage has been increased from **CZK 16,200** to **CZK 17,300** and the minimum guaranteed hourly wage has risen to **CZK 103.80**. Consequently, the minimum monthly assessment base for health insurance for employees has also been increased. This also results in an increase in the tax credit for placing a child into pre-school facilities and the income threshold for the entitlement to the payment of a tax bonus for a child.

Obligation to file personal income tax returns

The income threshold at which an individual is obliged to file an income tax return will increase from the current **CZK 15,000** to **CZK 50,000** per year. The new threshold will first apply to tax returns to be filed in 2024.

At the same time, employees will be able to earn more taxable income from sources other than employment for the 2023 taxable period without having to file an income tax return. This limit has increased from **CZK 6,000** to **CZK 20,000** per year. Employees will also be able to ask their employer to carry out a year-end settlement of tax on wages for them if they meet further statutory requirements.

Income threshold for sickness insurance

The employees' income qualifying for sickness insurance has increased to **CZK 4,000** per month from January. For agreements to perform work, income up to this threshold will thus not be subject to social and health insurance contributions. At the same time, provided that other conditions set out in the Income Tax Act are met, income up to this limit will be subject to withholding tax (for agreements to complete a job, the limit for the application of withholding tax of **CZK 10,000** remains unchanged).

Discount on insurance premiums for selected employees in part-time employment

From 1 February 2023, employers will be able to benefit from a **5% discount** on social security contributions for selected employees (e.g., under 21, over 55 and other) working part-time. Instead of the standard **24.8%** of the assessment base, employers will pay only **19.8%**. More details about this change can be found in the August 2022 Tax and Legal Update.

New Accounting Act has clear outlines

The law promises to reduce the administrative burden and move accounting towards international standards. Together with implementing decrees, accounting standards, and a law amending related legislation including the Income Tax Act, the act should come into effect on 1 January 2024. Its draft has already gone through an external comment procedure, but the text of the accompanying regulations has not yet been made public.

Filip Svoboda
fsvoboda@kpmg.cz

Jana Doškářová
jdoskarova@kpmg.cz

Main objectives

One of the objectives of the new regulation is to align the national concept with the globally accepted accounting frameworks so as not to conflict with the requirements of EU law. One example is a change in finance leases where their accounting treatment shall be similar to the acquisition of assets by purchase. The new regulation should reduce the administrative burden while enhancing the quality and transparency of financial statements. The law primarily puts emphasis on financial reporting rather than on how individual accounting transactions are kept and accounted for.

Extended applicability of international accounting standards

The new law extends the obligation or possibility to use international accounting standards. These should be mandatory for corporations whose investment securities are traded on an EU regulated market as well as for most financial institutions including investment funds. International accounting standards could then voluntarily be used by taxable entities subject to the Specialised Tax Authority or by entities that expect to be included in the consolidated financial statements prepared in accordance with international accounting standards. In connection with this, it will be important from a tax perspective to see whether an expected change in the Income Tax Act allowing the use of the financial statements prepared in accordance with international accounting standards to determine the tax base will be implemented.

Functional currency concept, changes applicable to audits, and simplifications for non-profit organisations and foreign companies

As a new concept, the law introduces the application of the functional currency, i.e., the currency in which the entity carries out the majority of its activities. The currency used for accounting may be the Czech crown or a foreign currency if it is the functional currency and if the entity has opted for it. This change would therefore eliminate foreign exchange differences relating to the functional currency.

Changes to the criteria for mandatory audits are also being considered. The new rules should apply to large entities, medium-sized entities, and parent entities fulfilling the consolidation obligation. An alternative proposal is to increase current limits (total assets of CZK 65 million, annual net turnover of CZK 130 million, average number of employees of 50 per accounting period).

The new law should considerably simplify the administration of non-profit organisations, natural persons, and branches of foreign entities: these should not be treated as accounting units. Consequently, under this law they will not be required to keep accounting records.

The new law also implements an EU directive that imposes an obligation on selected companies to publish an income tax report.

Effectiveness from 2024

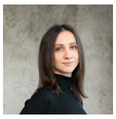
Considering the ongoing legislative process and the extensive number of comments (e.g., from the Czech Chamber of Tax Advisors, the Czech Chamber of Commerce or the CNB), we can expect numerous changes and amendments. The final draft submitted to the deputies may therefore undergo significant changes. It will also be important to monitor subsequent changes in secondary regulations and related laws, expected to be published in the first months of 2023.

Although the set of these regulations is not expected to take effect in most cases until 2024, given the significance of the planned changes, we recommend assessing their impact now.

GFD publishes Q&As on DAC7

The document providing methodological guidance through questions and answers summarises the obligations of digital platform operators arising from the new reporting obligation relating to sellers and sales made through these platforms.


Václav Baňka
vbanka@kpmg.cz


Martina Čamajová
mcamajova@kpmg.cz

Definition of platforms and operators, operator obligations

For the purposes of DAC 7, a platform is software that allows a seller to connect with another user (typically an end customer) to perform a reportable activity for that user. In particular, this involves websites and mobile applications. However, a platform does not include software that was solely designed, e.g., for payment processing or for the promotion of a certain activity (e.g., in the form of a 'notice board' with direct contact to the seller) where the connection between the seller and the user occurs directly and not through the platform.

The actual reporting obligation lies with platform operators who are entities concluding contracts for access to at least part of the platform with sellers. Operators are obliged to report information on sellers and their sales made through their platform. Certain types of operators and sellers are exempt from the reporting obligation by law. The first report, for 2023, will be due by 31 January 2024.

Activities subject to reporting obligation:

- provision of immovable property, e.g., based on a lease, usufructuary lease or accommodation agreement (e.g., residential immovable property, immovable property for business purposes, parking spaces, flats, etc.)
- provision of means of transport, i.e., means of transport without the use of a driver (e.g., cars, motorcycles, etc.)
- personal services provided by a natural person at the request of a platform user, both online and otherwise sale of goods, i.e., movable or immovable property, animals.

Established and non-established platform operators

The reporting obligation in the Czech Republic is mainly imposed on established platform operators, i.e., those who are tax residents or have their permanent establishment here. A platform operator who becomes a Czech reporting platform operator by 17 March 2023 at the latest shall file a notification by 3 April 2023.

A non-established platform operator is one that facilitates the reportable activity in the Czech Republic from abroad and is neither established nor registered in another EU member state. The registration obligation in the Czech Republic for such an operator arises on the date on which the reporting platform operator commences their activities.

DAC7 Authenticated Zone / DAC7 Application

On the MOJE daně portal, the GFD has prepared an environment from which platform operators may file notifications, register, submit reports, and fulfil other obligations. Access to the application is automatic through the Notification of a Czech Reporting Platform Operator or the submission of an Application for Registration of a Non-Established Platform Operator.

Practical examples

Cases in which platform operators are not subject to the reporting obligation:

- Operation of an e-shop offering products to end consumers on behalf of the e-shop operator only. Sale of own products on behalf of and for the account of the e-shop operator without the involvement of a third party.
- Advertising sites only allowing promotion, e.g., in the form of a notice board, without the platform operator providing any additional functionality. This is, e.g., the lease of real property or the presentation of the seller's reportable activity where the advertisement offers a connection with the seller solely by direct contact, i.e., telephone or e-mail contact directly to the seller.

Cases in which platform operators are subject to the reporting obligation:

- On their website, the platform operator has on offer the seller's reportable activity, including contact details for that seller and prices for the reportable activity, and the platform operator facilitates the conclusion of a contract through the platform, e.g., by placing an order. The reporting obligation arises even if the consideration is not collected through the platform and the final amount is different compared to the amount listed on the platform operator's website. This only affects the scope of the information to be reported.
- Operation of an electronic marketplace where sellers and their customers enter into a contractual relationship through the platform, including marketplaces operated within e-shops.

Questions and answers on DAC7. An amendment to the Act on International Cooperation in the Field of Taxation No. 164/2013 Coll., regulating the reporting obligation of platform operators, was promulgated in the Collection of Laws under no. 373/2022.

Gas and electricity price caps for large businesses from January: support conditions and limits

2023 will see electricity and gas prices capped also for large businesses regardless of whether they are low-voltage, high-voltage, or very high-voltage electricity consumers. If you wish to take advantage of support for high electricity and gas prices already for January, you must provide your suppliers with a relevant customer declaration by 15 January 2023. However, gas price capping cannot be used if gas is used to generate electricity.


Ivana Stibůrková
istiburkova@kpmg.cz


Silvie Beranová
sberanova@kpmg.cz

Pursuant to Government Decree No. 298/2022 Coll., the set prices will apply to electricity and gas supplies made in the period from **1 January 2023 to 31 December 2023**.

To be able to apply the capped price for the supply of electricity or gas, it is necessary to provide a **customer declaration** according to the template and submit it to the supplier. Where a company declares that it also generates electricity from gas, it is obliged to complete an additional annex. The declaration must be delivered to the supplier no later than the end of the month preceding the month for which the capped prices are to be applied. Therefore, to benefit from the capped prices for February 2023, the customer declaration must be delivered to the supplier by the end of January. An exception applies for the capping of prices for January 2023: the customer declaration must be delivered to the supplier by **15 January 2023**.

Capped prices of electricity and gas supplies shall be determined as follows:

- CZK **5,000/MWh** excl. VAT for **electricity**
- CZK **2,500/MWh** excl. VAT for **gas**.

The maximum price applies to the supply of electricity to low-voltage points of consumption, and the supply of electricity at 80% of the highest monthly electricity consumption at high-voltage or very-high-voltage points of consumption.

For maximum gas prices, the gas price shall apply to 80% of the highest monthly gas consumption at points of consumption, excluding the supply of gas for electricity generation.

Limits for public aid

The application of capped prices is subject to public aid rules. The difference between the market price and the capped price will be considered an advance on public aid that will have to be verified ex post. Companies will benefit from the capped commodity prices immediately in the relevant month, but the total amount of aid will be limited by the maximum permissible property benefit.

If the property benefit exceeds the permissible level of public aid, the company will have to refund or reimburse the difference according to the amendment to the Energy Act.

Rules for determining the maximum permissible property benefit will be set by government decree, probably during January 2023. According to preliminary information, the principles will derive from the revised Temporary Crisis Framework (TCF) which we discussed in November 2022, and the period for assessing the received benefit will likely be a calendar quarter.

The TCF de⊠nes **eligible costs** for which public aid can be claimed as the increased cost of the purchased energy (electricity and gas), i.e., energy costs for the eligible period (February 2022 - December 2023) exceeding 1.5 times the energy costs for the reference period of 2021.

The TCF also sets a **basic limit on total aid**, which must include not only aid obtained by using the capped prices in 2023 but also aid received from the High Energy Price Compensation programme announced by the Ministry of Industry and Trade in early November 2022 and drawn in the February to October 2022 period.

Total aid may not exceed 50% of eligible costs, up to a maximum of EUR 4 million per company (or group of related companies at the EEA level). However, subject to the additional conditions set out in point 67 of the TCF, **these limits may be overridden if the following conditions are met**:

- total aid does not exceed 40% of the recipient's eligible costs, up to a maximum of EUR 100 million per company
- for energy-intensive businesses, total aid may be increased to a maximum of 65% of the recipient's eligible costs, up to a maximum of EUR 50 million per company while simultaneously reporting EBITDA (excl. public aid) lower by 40% or negative
- for energy-intensive businesses operating in one or more industries or sub-industries listed in Annex I of the TCF, total aid may be increased to a maximum of 80% of eligible costs, up to a maximum of EUR 150 million per company while simultaneously reporting EBITDA (excl. public aid) lower by 40% or negative.

Moreover, in the above cases, EBITDA (including total aid) for the eligible period may not exceed **70% of EBITDA** reported in the reference period and originally negative EBITDA may not raise above 0 in the eligible period.

Recommendation: First, evaluate criteria and conditions for support!

Although the general price capping appears to be a simple mechanism, it will be nonetheless crucial to **evaluate and continuously monitor the complex combination of conditions, limits, and methodologies** set by both the government decree and the Temporary Crisis Framework, be it the limits for public aid or the conditions for the fulfilment of the eligible costs de⊠nition outlined above.

Businesses as well related entities should thus first assess the criteria and conditions for public aid. At the same time, they should **assess the economic viability of using the capped prices compared to the current price setting for**

commodities to be purchased in 2023. And if they want to purchase energy at capped prices already for January, they must provide their declarations to suppliers by 15 January 2023.

Horizon Europe programme for innovation development in enterprises

Horizon Europe is the research and innovation framework programme running from 2021 to 2027. It is the most important instrument for supporting research and innovation in Europe and worldwide. Successful projects will be entitled to the reimbursement of all eligible costs.

Karin Stříbrská
kpmg@kpmg.cz

Ladislava Urbanová
lurbanova@kpmg.cz

The programme builds on the EU's policy priorities focusing on the European Green Deal, Europe Fit for the Digital Age, and An Economy that Works for People. The **budget of EUR 95.517 billion** reflects the importance of research and innovation for the EU and follows its successful predecessor Horizon 2020.

The programme is divided into three pillars:

1. Excellent Science
2. Global Challenges and European Industrial Competitiveness
3. Innovative Europe

Most of the budget will go to global challenges in the second pillar to support systemic changes in society and the economy. This pillar is divided into six thematic clusters covering areas such as industry and digitisation, protection of biodiversity, energy and transport, agriculture, and health.

In the area of industry and digitisation, support will be provided in particular for the circular economy, artificial intelligence and robotics, advanced manufacturing technologies, big data and low-carbon technologies. Electri⊠cation of production processes will also be included.

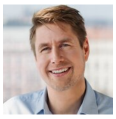
Another objective of the programme is to increase the participation and success rate of SMEs in research and innovation projects. The instruments targeting SMEs are mainly contained in the third pillar, offering support to companies not only in the form of grants and ⊠nancial instruments but also through training and mentoring.

Natural and legal persons or international organisations will be entitled to apply for support. Individual calls may not be open to all types of applicants. If the project is not for a single beneficiary, it must be carried out through an international consortium consisting of at least three entities, each of which must be established in a different EU member state or another country associated with Horizon Europe.

The applicant should first identify a suitable call and a common theme to address and then form a consortium. The next step is to prepare a joint application. Calls are announced on a rolling basis, so we recommend keeping up to date with developments on the programme website.

Overturning financial administration decisions

The Appellate Financial Directorate has rejected your appeal and you disagree with the decision. Can you defend yourself further? Is it at all worth continuing the dispute with the financial administration? Today, we will focus on these and other issues.



Viktor Dušek
vdusek@kpmg.cz

David Mlíkovský
dmlikovsky@kpmg.cz

When the Appellate Financial Directorate rejects your appeal against an additional tax assessment, you still may be able to reverse the result. As a taxpayer, you can contest the financial administration's decision in court. To file such a lawsuit, the Code of Administrative Procedure stipulates a deadline of two months from the time when the decision on the appeal was delivered to you as a taxpayer.

When deciding whether to file the lawsuit, you should consider a number of factors, such as the likelihood of success, taking into account also the previous judicial decision-making practice, the financial and time demands of the litigation, the gravity of the additionally assessed tax, and whether you need to defend the tax treatment or sometimes the entire business model for future use.

Courts grant every third claim; however, you may have to wait more than two years for a result.

The statistics show that in 2021, a total of **757 lawsuits** were filed against the financial administration authorities' decisions, of which **258 were granted**. Compared to other European countries, the number of disputes won is rather high, hence your chances are certainly not small.

The course and possible length of the court proceedings depend on the complexity of the case and on the court dealing with your case. The annual report of the Czech judiciary for 2021 shows that court proceedings took the longest at the Municipal Court in Prague, where the average length was 643 days. On the other hand, the Regional Court in Ostrava dealt with claims the fastest, taking an average of 281 days.

If the court concludes that a claim is justified, it will annul the contested decision and return the whole case to the financial administration for further proceedings. The financial administration will then issue a new decision which must reflect the court's conclusions. If the lawsuit is unfounded, the court dismisses it. As a taxpayer, you can then still file a cassation complaint with the Supreme Administrative Court.

Disputes with the financial administration may even earn you money

Defending yourself against the tax administrator's decision in court is therefore definitely worth considering. Moreover, few people know that the taxpayer can also benefit financially from the dispute. If, at the very end, it turns out that the additional tax assessment was contrary to the law, you as a taxpayer are entitled to interest on the incorrectly determined tax, based on the CNB repo rate. Currently, this amounts to **15% p.a.**

Notification obligation when employing foreigners also applies to foreign companies

One of the administrative tasks connected with employing foreigners is the employer's notification obligation towards the Czech Labour Office. Even Czech employers are often not aware of this obligation, or do not know how to deal with the information requirements and deadlines set by the law. However, the notification obligation arising from Czech legislation also applies to employers established abroad, and the situation is rather more challenging for them. For the failure to comply with the obligation or for late notification, they face a fine of up to CZK 100,000.

Barbora Cvinerová
bcvinerova@kpmg.cz

Vojtěch Kotora
vkotora@kpmg.cz

An employer's obligation to notify authorities of the commencement and termination of the employment of foreigners and of any changes in the data of foreign employees is stipulated by the Employment Act. Employers shall meet this requirement by reporting a relatively wide range of required information to the relevant regional branch of the Czech Labour Office. The law also lays down deadlines which are rather strict, especially as regards the commencement of employment — this must be reported no later than on the day of commencement; for other events, the deadline is ten days.

Apart from the employment of foreigners with a company in the Czech Republic, the Employment Act also regulates the posting of workers from abroad. If a foreigner is posted to the Czech Republic, their employer must also comply with the notification obligations in the Czech Republic.

The posting company shall notify authorities of the foreigner's posting no later than on the day of its commencement

Although for most postings there is a receiving Czech company, it is important to emphasise that **the notification obligation lies with the foreigner's employer abroad** — the posting company. This change was brought about by a legal amendment in 2020. The posting company must notify the relevant regional branch of the Czech Labour Office no later than on the day of the commencement of the posting and remember to report any changes to or the early termination of the posting on time. The notification obligation also applies to cases where there is no Czech company to which the foreign worker is posted, e.g., where the foreigner is posted to the Czech Republic to carry out market research.

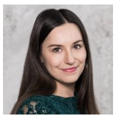
A company established outside the territory of the Czech Republic is in a rather more difficult position, as the notification forms are only available in Czech. However, legislation allows to use an authorised representative for notification.

Finally, please note that the notification obligation applies to all foreigners working in or posted to the territory of the Czech Republic, regardless of which foreign country they come from. In this respect, the Employment Act does not distinguish between foreigners from EU member states and from third countries.

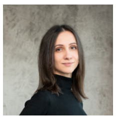
EU directive ensuring minimum taxation level enters into effect

The EU member states have finally agreed on the introduction of a minimum effective tax rate: the directive on ensuring a global minimum level of taxation for multinational groups and large national groups entered into effect on 23 December 2022. It must be implemented by the member states by the end of 2023.

Luděk Vacík
kpmg@kpmg.cz



Iveta Košťálová
ikostalova@kpmg.cz



Martina Čamajová
mcamajova@kpmg.cz

Throughout 2022, we kept you informed about the EU's intention to introduce a minimum global effective corporate income tax deriving from the OECD's international tax reform (Pillar 2; more details available here).

The directive's aim is that profits of large multinational and domestic groups or companies should be taxed at least at a 15% effective tax rate in each state in which the companies operate. The rules apply to EU-based companies that are part of groups with consolidated revenues of at least EUR 750 million for at least two of the four previous periods. If a company's effective tax rate in one state does not reach the required 15%, this will give rise to a top-up tax.

The directive contains two interconnected rules ensuring a minimum level of taxation: the Income Inclusion Rule and the Undertaxed Payment Rule. These determine where the tax will be topped-up, in what amount, and by whom. The Income Inclusion Rule aims to ensure that the tax is topped-up at the parent company if profits are not sufficiently taxed at individual subsidiaries. If it is not possible to top-up the tax using this rule (e.g., if the parent company is established outside the EU), the Undertaxed Payment Rule shall be applied at the subsidiary level.

The directive must be implemented by the end of 2023

Member states must implement the rules contained in the directive into their national legislations by the end of 2023, with effect for taxable periods commencing after 31 December 2023. The Income Inclusion Rule shall apply from 2024 and the Undertaxed Payment Rule from 2025.

We expect the Ministry of Finance to prepare a legislative proposal implementing this directive into Czech law in the first half of this year.

Since the consolidated revenue criteria are determined based on historical data, it is possible to preliminarily determine in advance whether a particular corporate group will be subject to the minimum effective tax rules. We are ready to help you in this area.

EU tightens rules for placing coffee, palm oil, or beef on the market

The EU is preparing a regulation imposing stricter rules for making certain commodities and products available on the EU market and exporting them from the EU market. The new regulation shall apply, for instance, to coffee, soy, palm oil, cattle, or timber. What new obligations will companies face when importing and exporting these commodities and products?

Tomáš Kočař
tkocar@kpmg.cz

Karolína Kubíčková
kkubickova@kpmg.cz

The European Parliament and the Council of the EU have reached a political agreement on the regulation of commodities and products connected with deforestation and forest degradation. The regulation imposes strict requirements on certain commodities and secondary products about to be placed on or exported from the EU market, including the traceability of origin, a risk assessment system for country benchmarking, and registration in a new EU register.

What new obligations will exporters and importers have?

Strict due diligence rules will apply to all companies that place coffee, cocoa, soy, palm oil, cattle, timber, rubber, or derived secondary products (e.g., beef, chocolate, furniture) on the EU market or export them from the EU. In particular, these companies will have to collect accurate geographical information on the agricultural land on which the primary commodities were grown and based on such information:

- ensure that they were not produced on land deforested or degraded after 31 December 2020
- ensure that they were produced in accordance with the legislation of the country of production.

At the same time, companies will have to register a due diligence statement that the commodities or products comply with the stipulated conditions in a new EU information system. They will also be required to provide basic information for monitoring purposes (e.g., geo-localisation coordinates of the agricultural business or place where the primary commodities have been grown). Only after meeting all stipulated requirements will the commodities and their derived products be allowed to be placed on the EU market (or exported from the EU).

Obligations according to different levels of risk

Companies' obligations will vary depending on the level of deforestation and forest degradation risk assigned to the respective country or region of origin (high, standard, or low risk). Obligations will also vary depending on whether a company places relevant commodities or products on the EU market, supplies them to the EU market within a supply chain, or exports them from the EU. Lesser requirements will be placed on small and medium-sized enterprises.

Next steps

The draft regulation is currently in its first reading and awaiting formal approval. Once approved and entered into force, the companies concerned will have 18 months to familiarise themselves with and implement the rules. SMEs will be given more time to adapt to the changes. Companies that fail to comply with the strict requirements will not be allowed to place the commodities and products on the EU market (or export them) and their national authorities may fine them for breaching the regulation.

Case law

Court agrees: bonds issued under commission agency agreement not to be included in thin capitalisation test

The court agreed with our tax litigation team in a dispute concerning thin capitalisation rules. When applying the test, the economic substance of the credit relationship should be taken as a basis – the bonds issued for unrelated investors under a commission agency agreement should not be included in the test.

Jana Fuksová
jfuksova@kpmg.cz

Filip Morcinek
fmorcinek@kpmg.cz

Under a commission agency agreement, the principals instructed a related party — a commission agent — to arrange a bond issue in the commission agent's own name, but for and on the account of the principals, and to ensure, in technical terms, the distribution of the proceeds of the bond issue and the repayment of the bonds to investors until the bonds' maturity. **The legal question at dispute concerned the application of the thin capitalisation test to the interest paid on the bonds thus issued**.

From the beginning of the dispute, the tax authorities disagreed that in economic terms the parties to the credit relationship in respect of the bonds were the individual principals and the investors in the bonds and not the commission agent through whom the issue itself took place. The tax authorities thus believed that it was necessary to apply **a thin capitalisation test**, as the funds provided by a related party — the commission agent — to the individual principals were in their view a credit financial instrument provided between related parties.

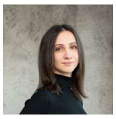
The regional court disagreed with the financial administration's opinion. The court based its conclusion primarily on the material rather than formal aspects of the transaction. The court unequivocally confirmed that when acting for and on the account of principals (indirect representation), **the economic result of such acting shall belong to the principal in whose economic sphere the transaction is actually reflected**. Therefore, the tax consequences should also be reflected there. The court confirmed that from a tax perspective it is important what the real substance of the transaction is and on whose account it has been carried out. At the same time, according to the regional court, there was no doubt that the purpose and result of concluding the commission agency agreement and issuing and underwriting the bonds was to obtain external funding for the principals and not to provide credit to the principals by the related party commission agent. As this involved obtaining external funding from third parties rather than providing a credit financial instrument within a group, a thin capitalisation test should not be applied to interest paid on the bonds issued.

The regional court's conclusions were convincing enough for the financial administration to withdraw their cassation complaint, leading to the closing of the proceedings.

CJEU on the right to deduct VAT if supplier pretends to be another person

The Court of Justice of the European Union (CJEU) recently ruled that taxpayers involved in tax fraud shall be denied the right to deduct VAT in full, even if the loss of tax revenue (tax evasion) is lower.

Tomáš Havel
thavel@kpmg.cz



Martina Čamajová
mcamajova@kpmg.cz

In a German case, a buyer purchased a second-hand car from a seller (supplier A) who with another person's knowledge pretended to be that person (supplier B). According to the issued invoices, there were two sales: supplier A first sold the car to supplier B for a lower amount, who then sold it to the buyer for a higher amount. The buyer claimed a deduction in the amount of the VAT they had paid. However, the state lost tax in the amount of the difference in VAT between the first and second sales, as suppliers A and B committed tax fraud (only supplier A paid output VAT). The buyer was not knowingly involved in the fraud.

The CJEU previously ruled that it is irrelevant whether a person who is involved in a tax evasion derives a tax or economic advantage from it; what matters is the element of knowledge.

The court also referred to the existing case law and highlighted the requirements of reasonable care by taxable persons: taxpayers should make sure that they are not involved in a tax evasion whenever they receive taxable supplies. The buyer should therefore have checked the identity of their contractual partner as he would thus have become aware of the existence of tax evasion.

The CJEU held that the right to deduct may be denied if the taxpayer could or ought to have known of the existence of tax evasion within the chain of transactions in which they participated. **The right to deduct may be denied in full, notwithstanding the fact that the loss suffered by the state due to the tax evasion may be lower than the deduction at issue**.

The judgment partly breaks through the principle of neutrality of the VAT system. The only consolation may be that according to the CJEU, the referring German court still has to investigate whether the buyer really could and ought to have known about the existence of VAT evasion. It will be interesting to see what position the Czech financial administration will take on the judgment.

SAC on proving identity of customer from another member state

The Supreme Administrative Court (SAC) has referred a preliminary question to the Court of Justice of the EU whether it is possible to deny the right to VAT exemption of supplies of goods to another EU member state if the supply to a specific customer is not proved. The CJEU has yet to assess the case.

Kateřina Klepalová
kklepalova@kpmg.cz

David Dobrovolný
kpmg@kpmg.cz

B2 Energy supplied rapeseed oil to businesses in Poland. B2 Energy declared the related transaction in its VAT return as a supply of goods to another member state and applied the VAT exemption with right to deduct. Following the commencement of a tax inspection for the period of February to May 2015, the tax administrator stated that the company had not proven the supply to the entities designated as the recipients of goods. According to the tax administrator, there was no doubt about the goods having actually been transported to Poland, but the supporting documentation (CMR consignment notes, weighing sheets, etc.) did not fully match the data reported by the company. At the same time, the reported recipients did not declare the acquisition of goods from the CR and the related VAT in their Polish VAT returns. The tax administrator subsequently assessed additional output VAT on these transactions.

The case had already been dealt with by the Supreme Administrative Court, and has now been reopened after additional evidence was added. Referring to the recent judgment of the CJEU in the Kemwater ProChemie case, the court dealt with whether its conclusions can be applied by analogy to the case under consideration. In particular, the court considered whether the VAT exemption should be maintained if no specific recipient is identified, and the facts of the case imply that the goods were supplied to another taxable person (VAT payer). In this respect, the SAC also drew attention to the fact that the goods were apparently supplied to other VAT payers, as these were transactions amounting to tens of thousands of euros.

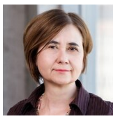
In view of the contradictory domestic case law, the SAC referred to the CJEU the preliminary question as to whether the conclusions of the Kemwater ProChemie judgment could be applied by analogy also for the purpose of maintaining the VAT exemption for supplies of goods to another member state if the specific recipient is unknown. We are waiting for the CJEU's decision.

Finally, please note that the case deals with a situation from before the ‘quick fixes’, i.e., before the supplier's obligation to declare supplies to another member state including the customer’s VAT ID in the EU Sales List to maintain the VAT exemption. It is thus questionable whether any favourable conclusions of the CJEU could be applied to transactions taking place at a later date.

In brief

News in Brief, January 2023

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


Lenka Fialková
lfialkova@kpmg.cz


Václav Baňka
vbanka@kpmg.cz

DOMESTIC NEWS

- Decree No. 401/2022 Coll. sets foreign meal allowance rates for 2023. The meal allowance for Germany and Austria remains at EUR 45, for France at EUR 50. The rates have been increased for Poland (to EUR 45), Sweden (to EUR 60), and Finland (to EUR 55).
- Compensation for domestic business trips for 2023 is regulated by Decree No. 467/2022 Coll. on changing the rate of basic compensation for the use of road motor vehicles and meal allowances and on determining the average price of fuel for the purpose of providing travel expense compensation.
- GFD Instruction D-60 on determining uniform exchange rates for the 2022 taxable period pursuant to Section 38 of Act No. 586/1992 Coll., on Income Taxes, as amended until 31 December 2022, has been published in Financial Bulletin No. 1/2023.
- GFD Instruction D-59 on a uniform procedure for the application of certain provisions of Act No. 586/1992 Coll., on Income Taxes, has been published in Financial Bulletin No. 19/2022. It replaces GFD Instruction D-22 and takes effect on 1 January 2023. It can be applied for the first time for taxable periods beginning in 2023.
- GFD Instruction D-29 on waiving fines for the failure to file a VAT ledger statement has been published in Financial Bulletin No. 18/2022, including Addendum No. 9.
- The financial administration has published its Overview of Changes and Innovations for 2023, among which are the definitive abolition of the electronic reporting of sales, the extension of the range of databox owners, or the new turnover threshold for mandatory VAT registration.
- The Ministry of Industry and Trade has prepared an overview of changes that will affect entrepreneurs from 1 January 2023. The changes concern seven laws, 22 regulations and 11 government decrees.
- Several legislative novelties from the Ministry of Labour and Social Affairs came into force at the beginning of 2023, concerning, among other things, state social aid, aid in material distress, and pensions. Changes are also being prepared concerning employment. Key changes are an adjustment of the housing allowance, an increase in the minimum wage, and the enhancement of the efficiency of medical assessment services. You can read the details HERE.
- The financial administration has published its information on energy crisis implications for transfer pricing.

FOREIGN NEWS

- The OECD has published several documents on the implementation of Pillar 1 and Pillar 2: under Pillar 1 (changing taxing rights), for comment procedure, a draft part of a multilateral convention that includes commitments by countries to abolish digital taxes and similar measures; under Pillar 2 (minimum effective tax), final versions of the model GloBE rules for implementation into local legislations, a commentary on these rules, conditions for temporary exemptions from the application of the minimum tax (safe harbours) and penalty relief, and illustrative examples. In addition, the draft tax return and disclosures and the draft rules to provide tax certainty and resolve potential disputes are open for public comment. The OECD plans to introduce both pillars from 2024 (see also our article on the adoption of the EU directive on the minimum effective tax).

- The European Commission has published a draft VAT in the Digital Age Directive, containing the following proposals: mandatory e-invoicing for VAT purposes, the transferring of responsibility for collecting VAT on passenger transport and short-term accommodation services to the operators of digital platforms through which the service is provided, and a single VAT registration in the EU.
- The European Commission has published a draft DAC 8 with a proposed effective date from 2026. The directive is intended to extend administrative cooperation in the field of taxation to include the reporting and sharing of information between member states on income derived from the holding and transfer of cryptocurrencies and electronic money. The adoption of the proposal is one of the tax priorities of the Swedish EU Presidency.
- The CJEU has ruled that the obligation for intermediaries subject to legal professional privilege (e.g., tax advisors, solicitors) to notify other intermediaries of their reporting obligations in respect of cross-border arrangements under the EU mandatory disclosure rules (DAC6) is invalid. The CJEU justified the invalidity by reference to the EU Charter of Fundamental Rights, specifically the right to respect for communication between a lawyer and their client. The case under review concerned the legal professional privilege of Belgian lawyers. It is possible that the CJEU's conclusions will be incorporated by the European Commission in the draft directive on administrative cooperation in the field of taxation within the above regulation of cryptocurrencies.

LinkedIn | Twitter | Facebook | Instagram

www.kpmg.cz
Tel.: +420 222 123 111