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Editorial

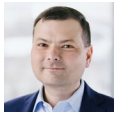
The beginning of this year did not bring as many legislative changes as previous years. The elections certainly played a role in this, effectively blocking the legislative process in the past year and making some remnants of legislation, part of which date back to the times of The Nineties series currently on Czech TV, all the more visible.

The beginning of the year is when tax advisors deal with the lesser taxes, i.d., road and real estate taxes. Both are relics of the nineties, and their status corresponds to this, as anyone who has ever tried to fill in the relevant tax return forms can see. Even I had to take a walk outside to clear my head after completing my real estate tax return. And what is more: while for both taxes the process is extremely administratively demanding, their collected amounts are not at all proportionate to the effort connected with their declaration and subsequent administration.

However opposed the new government may be to raising taxes, it would be a shame to give up on any upward adjustments to tax rates - and this is doubly true for the lesser taxes. While we haven't seen much inflation since the nineties, the current surge calls for at least a valorisation: for instance, in the case of real estate tax, the effect of inflation paradoxically is being compensated only at the level of individual municipalities by increasing their local coefficients. Yet, sooner or later a valorisation (an appropriate increase) will have to be discussed at the national level as well. For many entities, an increase in rates would be acceptable if it were accompanied by a major simplification of the calculation, which is something that we unfortunately do not see much in the Czech tax system. I certainly would not like us to fall into the pit of having to endlessly finetune the mechanism to smooth any rough edges and find the fairest of the fair solutions: translated to the tax advisors' reality, the tax return form will have twice as many boxes and coefficients, and the total yield will remain more or less the same – something will be symbolically taken away from some and even more symbolically given to others, and most taxpayers will have to file a new tax return because of the new rules. Rather than this, it would be better to do nothing.

An even stricter inflation perspective should be applied to road tax. In nearly 30 years, no government has found the courage to even think about adjusting the concept of this tax, let alone valorising its rates, some of which are nominally at the level of 1993. To be fair, the toll system has burdened hauliers with other costs, but this has not been the case for passenger vehicles or delivery vans. Yet, a road tax that factors in current trends could be an important fiscal tool to e.g., support fleet renewal.

Undoubtedly, in the times ahead the government's attention will focus on other areas: such as transfer pricing, which in this issue of the Update my colleague Zdeněk Řehák discusses in a separate article, or measures against international tax planning, which we also mention in this issue. But lesser taxes should not be left aside either: while they may not save the budget, we should not deny them a chance to transform to the 21st century standard and find a new meaning for their existence.



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Taxes

Economic turmoil also affecting transfer prices

Inflation is one of the main economic issues for 2022. The impact of high input prices and disrupted supply chains are other factors businesses must cope with. But there are also other adverse factors. The slowing economy has also revealed new issues in the area of transfer pricing.

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Many companies operating within the Czech economy are part of multinational groups. These companies trade with other companies within the corporate group, using a certain agreed transfer price for mutual supplies and deliveries. Transfer prices are very often set in a simplified manner, applying a price equalling costs and profit markup or a market price reduced by a certain margin.

Late 2021 and early 2022 saw several market events that continue to put intragroup contractual relationships to a significant test. These events include electricity price increases of more than 100% year-on-year and the rise in the REPO rate from 0.75% in August to 3.75% in December, resulting in an increase in market interest rates. Another important factor is a rise in in⊠ation to 6%, while according to the CNB expected in⊠ation may reach 10% in January 2022. This in⊠ation then puts pressure on wage increases, all this amid a persistent structural labour shortage on the market. Problems continue to prevail in supply chains, particularly in the automotive industry. This sector will face further challenges this year, not least in the context of the transition to electro-mobility and the need to prepare for the Green Deal. Finally, the appreciation of the Czech crown against the euro must not be left out of this list.

This market turmoil gives rise to questions CFOs must ask: "Can the price increase in the Czech market be passed on to group customers? Would independent businesses make price adjustments? Retrospectively or prospectively? Does the current transfer price setting still allow for the generation of sufficient cash ⊠ows? Which group company can end up holding the short end of the stick when considering the distribution of functions and risks?

In our practice, we are increasingly witnessing situations that require attention and strategic consideration for the future. As an example, consider a company that expanded its production and ⊠nanced this investment with debt in the past. If the interest on this loan was, e.g., set as a floating rate linked to PRIBOR, then this was a design that worked perfectly in an environment with low reference rates. But will the operating profit generated be sufficient to meet the debt service requirements under the current circumstances? And we should not only think about debt; export-oriented companies in the position of contract manufacturers, e.g., will have to consider which of the contracting parties will bear the effect of the appreciation of the Czech crown. And rest assured, the tax authority has a clear view on this question, especially when the inspection takes place after a gap of two to three years. Discussions with the tax authority in this respect are usually quite vigorous and based on the tax authority's assumption that the development of the exchange rate had been clear. Simply, you should have had a very good crystal ball!

The above also materialises during the preparation of the financial statements and when deciding what to write in

the notes to the financial statements or in the annual report. With the passage of time the tax administrators will want to replenish the state treasury and businesses should be well prepared for discussions with them. Do you keep meeting minutes, emails and other supporting information that documents the considerations you made (usually with limited information regarding future developments)? Do you have justifications for the conclusions reached and details of who made the relevant decisions at your disposal? Is such documentation sufficiently robust?

If you're asking yourself these questions, we will be happy to offer our independent view on your specific situation and assess how strong your hand is in this matter.

Coordination Committee: How to determine VAT treatment of superficies payments upon establishment of superficiary right of building

The Coordination Committee of the General Financial Directorate and the Chamber of Tax Advisors concluded that the VAT treatment of superficies payments paid on a recurring (e.g., monthly) basis, does not change over time.

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Discussion Paper No. 589/24/11/2021 deals with the situation where the builder pays superficies payments for the establishment of the superficiary right of building on a recurring (e.g., monthly) basis. The superficies payment amount may be fixed or may vary over time depending on various criteria. This raises the question of when superficies payments are subject to VAT and whether the tax treatment may change over time.

The GFD agreed with the proposed conclusion that superficies payments may represent partial payments if the builder and the property owner (landowner) agree on this in a contract. This means that the superficies payments are not taxed at once, at the time the superficiary right of building is established, but are taxed gradually, always on the date specified in the contract.

Under the VAT Act, the superficiary right of building is considered as goods - immovable property that may be exempt from VAT in certain circumstances. The tax treatment will depend on whether the relevant building is already standing on the land and whether the building meets the conditions for VAT exemption. If these conditions are not met, the superficiary right of building shall be subject to the standard or first reduced VAT rate (for buildings intended for social housing).

The GFD also confirmed that the VAT treatment for individual superficies payments shall not change over time. The tax treatment will be determined according to the status of the land or building at the time the superficiary right of building is recorded in the real estate register. If the conditions for VAT exemption are not met at the time of registration of the right, the standard or reduced VAT rate shall apply to all superficies payments.

Changes in VAT rate on supply of medical devices

The amendment to the VAT Act in effect from 1 January 2022 narrows the scope of medical devices subject to the reduced VAT rate. If you buy or sell medical devices, we recommend you check whether this amendment also applies to your goods.

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The change in the application of the VAT rate on the supply of medical devices derives from an amendment to the Public Health Insurance Act.

From 1 January 2022, the first reduced VAT rate (15%) shall apply only to medical devices that:

- are for the exclusive personal use of the sick, for the treatment of illness, or to alleviate its consequences
- fall under customs nomenclature code 01-96
- belong to Schedule 4 to the Public Health Insurance Act or to Table 1 of Section C of Schedule 3 to the Public Health Insurance Act
- are not non-categorised medical devices, cellulose cotton wool, or plasters other than non-hypoallergenic plasters.

The first reduced rate can also be applied when meeting the specific characteristics given in Schedule 3 to the VAT Act in relation to a specific code of the combined customs nomenclature (a change of wording especially for medical devices falling under codes 01-96 intended for a specific patient, codes 90, 48, 64, 66, 84, 85, 87, 90 and 91).

The reduced VAT rate shall also apply to accessories for medical devices listed in Schedule 3 to the VAT Act.
If you are not sure which rate to apply, ask the tax authorities for a binding assessment.

Finally, we draw attention to the repairs (and now also modifications) of medical devices subject to the first reduced VAT rate: these have been moved from Schedule 2 to Section 47 of the VAT Act. Therefore, if the supply of a product is now subject to the standard VAT rate, the repair or modification of the related item will also be subject to the standard VAT rate (and vice versa).

The transitory provisions for the application of the act are standard, i.e., tax liabilities arising before the effective date of the amendment (according to the date of the taxable supply) shall be governed by the wording of the act effective before the effective date of this amendment. The new wording of the act shall apply to goods supplied after 1 January 2022.

Tips and tricks

How to present evidence in tax proceedings, or: less is sometimes more

Many of you have no doubt encountered a request for evidence during a tax inspection. However, being overzealous in providing evidence may not always pay off. What specific evidence a taxpayer is required to produce at each stage of a tax inspection is closely related to the issue of the distribution of the burden of proof, which we discussed in our previous issue of the Tax and Legal Update.

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The transfer of the burden of proof and the taxpayer's specific obligations in submitting evidence are not regulated in detail in the general tax regulations. However, the specifics are all the more often the subject matter of review by administrative courts, with the Supreme Administrative Court producing extensive case law on this issue. The general rule is that everyone has the burden of proving the facts they assert in their tax return, most often by submitting tax documents, bank statements, accounting records, photographs, and witness statements, while the choice of the specific evidence always depends on the asserted facts.

Although the tax administrator is obliged to ascertain all relevant facts to determine the tax liability while not being limited to the taxpayer's proposals, the tax procedure itself is not governed by the inquisitorial principle. Therefore, the tax authority will not purposely seek evidence in your favour and prove the correctness of the claim made in the tax return. The tax authority's duties therefore normally end with a call to prove the facts.

If you manage to present comprehensive evidence to support your assertions, it is then up to the tax authority to credibly challenge this evidence as part of the transfer of the burden of proof, e.g., by requesting further evidence. However, generally, the provision of evidence in its first phase should primarily involve the provision of documents. Only after the tax authority has sufficiently challenged these should witness statements and photographic documentation come into play.

The tax administrator is not entitled to request documents on all transactions, but only those that are being challenged in a specific way, i.e., the request must be quite specific. Only evidence directly relating to the disputed facts should then be submitted, all the while carefully considering the scope of such evidence. Anything you say can be used against you, which we know from American films, also applies in tax proceedings. Any evidence you present to the tax authorities may prove problematic for you at later stages of the tax inspection. Moreover, tax proceedings are a long process, and it is not wise to play all the cards you have up your sleeve at the very beginning. It is often only during the tax inspection that you come to know what the tax authority's intentions are and on what grounds the tax liability is additionally assessed, and you should react accordingly.

However, it is definitely not appropriate not to respond to the tax authority's request at all. Even though less may indeed be more in this case, doing nothing is not the right choice: if you do not respond, there is a risk of failure in the tax inspection and, in the most extreme case, even of an additional assessment of tax by the tax administrator using whatever information and materials available.

Svarc system under scrutiny: watch out for risky relationship structures

The ‘Svarc system’, where work is performed under a contract governed by commercial law but is in fact a dependent work, is still a widespread phenomenon in the Czech Republic. Legally, dependent work can only be performed in an employment relationship governed by labour law. Sanctions are most often imposed in cases concerning low-skilled jobs, as here, the Svarc system is most easily detected and proven. However, the State Labour Inspection Office in its newsletter warns against the use of the Svarc system not just for blue-collar workers but also for qualified professions.

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The Labour Inspection Office mentions concrete instances of the Svarc system detected: a dispatcher carrying out work under a contract for transportation services, and a transport department head carrying out work under a mandate contract. In both cases, the office found the characteristics of dependent work and concluded that the commercial-law contracts were simulated legal acts in which the acting parties only imitated certain legal acts, while the true purpose was to conceal factual employment relationships.

The office thus concluded that the concealed employer enabled the performance of illegal work, and in the subsequent administrative proceedings fined them almost half a million Czech crowns. A decisive aspect in determining the legal qualification was namely the integration of these workers into the company’s organisational structure: specifically, the dispatcher cooperated on a regular and daily basis with other departments of the employer whose requests for transportation she handled; the worker in the position of head of the transport department organised, directed, and supervised the work of his subordinate employees, although he was not formally an employee himself.

In our experience, the above-described setup is rather common. However, the integration of external collaborators in the employer’s organisational (hierarchical) structure (where external collaborators routinely assign or receive tasks to and from individual employees) is quite risky: a standard commercial relationship is characterised by an independent performance of a particular activity where the entrepreneur is responsible solely for the result. Yet, employees are often not even aware that certain persons integrated in their employer’s organisational structure are not actually employees at all.

Therefore, if you have been cooperating with self-employed individuals based on commercial-law contracts, we recommend reviewing these relationships from a labour-law perspective, especially with regard to the risk that such collaboration may be viewed as the Svarc system. Should this be the case, the concealed employer could face a penalty of up to ten million Czech crowns, an additional assessment of tax and social and health insurance contributions, as well as a temporary ban on employing foreigners. For most serious cases of large-scale structures set up to reduce tax liability, there is even a threat of criminal sanctions against the company and its managers.

Ombudsman: how to improve treatment of EU workers

EU legislation aims to ensure that in member states, domestic workers and those from other EU countries are treated equally. A level-playing field is essential for free movement in the EU internal market. However, a recent survey by the Czech ombudsman showed that the Czech Republic has some gaps in providing equal conditions, especially when it comes to less qualified foreign workers.

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More than 1,000 respondents participated in the survey. Around a third of them felt disadvantaged compared to domestic workers because of their nationality or citizenship, mainly pertaining to remuneration, job allocation and job search, even though unequal treatment on the grounds of nationality or citizenship is prohibited. For EU workers, the likelihood of being discriminated increases for less qualified positions, for agency employees, and workers with poorer knowledge of the Czech language.

Based on the findings, the ombudsman issued several recommendations aimed at strengthening the foreign workers' rights mainly by increasing their awareness and the enforceability of their rights. Entities that may contribute to the successful implementation of these recommendations include ministries, the State Labour Inspection Office, municipalities, and regions.

In the recommendations, the ombudsman emphasises the need to publish comprehensible and up-to-date information on employee rights and obligations, in Czech and foreign languages, especially in English. In our practice, we often encounter situations where we cannot refer a foreigner to a reliable source of information that would clarify the issue. The ombudsman also proposes to strengthen the language skills of staff dealing with the foreigners' agenda, such as officers of the Department of Asylum and Migration, the foreigners' police, labour offices, as well as staff in the transport administration area. Although Czech is the official language, involved staff should be capable of conducting basic communication (for example an explanation of what documents must be submitted with the application, etc.) in a foreign language.

The ombudsman also calls for cooperation between the Czech Ministry of Labour and Social Affairs and the embassies of the EU countries in informing foreign workers – especially in the countries from which most foreign workers come to the Czech Republic. Embassy or consulate staff should be able to direct foreigners to offices in the Czech Republic or information sources where they can obtain relevant information. To further improve the situation, it is also necessary to continuously update institutional websites in a foreign language and especially the sections relevant to foreign workers: such as the competences of the office, filing requirements, and contact persons.

Importantly, the ombudsman also calls on the State Labour Inspection Office to continue its checks of illegal and

agency employment of foreigners who are EU citizens and recommends that the office focus on a new area as well: the equal treatment of EU workers. Checks of equal treatment are now a hot topic even in areas unrelated to foreign affairs (such as remuneration). The office has not yet published its annual plan of inspections for 2022; however, it is possible they will expand their inspection activity in this respect, based on the ombudsman's recommendations.

SAC on rules for mutual representation of states in issuing Schengen visas

The Czech Republic does not have diplomatic representation in all countries whose citizens are subject to visa requirements. The same applies to other Schengen member states. While this does not mean that citizens of those states cannot travel to the Czech Republic or other Schengen member states, they must nonetheless be prepared that the procedures for assessing their visa applications may not be carried out in a standard manner.

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According to the European Visa Code Regulation (the Visa Code), Schengen member states should have consulates in all countries whose nationals are subject to visa requirements, and applicants for visa thus should not have to undertake an unreasonable effort to reach a consulate. However, the code also allows Schengen member states to enter into an agreement on the mutual representation in consular and visa matters with another Schengen member state. Such arrangements thus allow applicants to file an application for a visa in their country of residence without having to travel to a consulate in another state.

As a rule, such agreements authorise the representing state not only to accept the application, but also to attend to it, and to decide on issuing the visa. If the application is rejected and the applicant files an appeal against such a decision, the appeal procedure shall then be conducted by the administrative authorities of the state whose consulate had accepted the visa application and decided on it. The appeal procedure shall then be governed by the law of that representing state. Although it might seem that the interpretation of the Visa Code is quite clear in this respect, it is not always the case.

Recently, this issue appeared before the Supreme Administrative Court (SAC). In the dispute in question, an applicant for a Schengen visa filed the application with the Embassy of the Czech Republic in Islamabad, the reason for the application was a planned 14-day visit to Slovakia, which does not have its own embassy in Pakistan. In accordance with the Visa Code, the application was attended to by the Czech administrative authorities, which rejected it due to ambiguities. The case then proceeded to the Municipal Court in Prague, which reversed the administrative authorities' decision because, in the court's opinion, the embassy was not authorised to assess the reasons for rejecting the visa application and should have referred the matter to the relevant Slovak authority. The SAC disagreed with this view, referring to the Visa Code, the agreement between the Czech Republic and Slovakia, and the case law of the Court of Justice of the EU, and confirmed that the representing state is competent to issue the decision and to subsequently (judicially) review it. The SAC also answered in the affirmative the question whether such an approach was compatible with the fundamental right to effective judicial protection.

If an applicant decides to file a visa application with the consulate of a representing state and there is a bilateral agreement, they must be prepared that the application itself and any subsequent legal remedies will be dealt with by the authorities of that representing state, not of the state to which they intend to travel.

Finally, please note that applications for long-term visas cannot be filed with consulates of representing states: applicants for a long-term visa must always apply at the consulate of the state to which they wish to travel, even if this means having to travel outside their home state.

Commission clamps down on shell companies

The European Commission released its first proposal for a directive aiming to prevent the misuse of shell entities for tax purposes. Companies without sufficient economic substance will be denied benefits ensuing from double taxation treaties and EU directives.

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The directive defines companies with an increased risk of not having sufficient economic substance. These are companies that meet the following prerequisites:

- More than 75% of the company's turnover for the two previous years is passive income (dividends, interest, etc.) or more than 75% of the value of its assets is real estate or private property.
- At the same time, the company generates most of its revenues from cross-border transactions or, the other way round, pays most of its income to abroad.
- At the same time, the company's management and administration have been outsourced.

Companies meeting all the three above prerequisites will have to self-assess whether they have sufficient economic substance and present their conclusions together with appropriate evidence in their income tax returns. In the assessment, companies should apply the following indicators of substance:

- The company has premises for its activities (either owned or leased for its exclusive use).
- The company has an active bank account in the EU.
- The manager of the company or a sufficient number of employees are physically present at the company's headquarters during the performance of their main activity.

If a company does not meet one or more of the indicators of substance and does not prove that it has commercial reasons for its existence, it will be considered a shell entity for tax purposes. Tax administrations will share data on shell companies as part of an EU-wide exchange of information.

Shell companies will not be issued a tax residence certificate by the tax administration and will be denied the benefits of double taxation treaties and EU directives. For instance, if an EU resident pays a dividend, interest or royalty through a shell company to a third country, a double taxation treaty between the state whose resident made the payment through the shell company and the state which received the payment from the shell company should be applied.
According to the current proposal, the directive should apply to EU-based shell companies from 2024. We expect the European Commission to propose further measures for shell companies outside the EU.

Reform of reduced VAT rates in EU

The current EU rules on VAT rates for goods and services were set almost 30 years ago and need to be modernised to correspond to developments in EU legislation. In 2018, the European Commission therefore proposed a reform of VAT rates, and an agreement was reached by the EU member states' finance ministers at the end of 2021.

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The proposed changes concern an update of Annex III to the VAT Directive, which sets out a list of goods and services on which the reduced rate can be applied. Goods and services serving to protect public health and goods and services that are environmentally friendly or facilitate digitisation are proposed to be added to the list.

Once the new measure enters into force, it will also be possible for member states to exempt selected goods and services for essential consumption from VAT, or to introduce a super-reduced rate of up to five percent on these items. In the Czech Republic, such a rate could be applied, among other things, to electricity and gas supplies.

Exceptions from the application of reduced rates on goods and services that are not in line with the EU's climate change targets are to be cancelled by the end of 2030.

Historic exceptions granted only to some member states are to be applicable in all member states to meet the principle of equal treatment / level playing field. However, all existing derogations will have to be abolished by the end of 2032, unless justified as serving the common good.

The updated rules will now be discussed by the European Parliament, with a view to consulting on the final text by March 2022 at the latest. Once formally adopted by member states, the rules will enter into force 20 days after their publication in the Official Journal of the European Union.

Case law

SAC imposes strict requirements for proving internet advertising

The Supreme Administrative Court continues in its strict trend with respect to the provision of evidence that advertising, in this case advertising on the internet, has taken place. According to the court, a screenshot or the administrator account from which the internet advertising was arranged are the only ways to record and prove advertising that takes place exclusively online. A confirmation of advertising provided by an advertising agency is not sufficient in this respect.

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In the event of doubt, the taxpayer is obliged to prove the advertising expenses posted in the accounting records and subsequently claimed in the tax return. The SAC has recently set high requirements for proving advertising expenses, both in terms of their deductibility for income tax purposes and the right to deduct VAT. In its pre-Christmas judgment (10 Afs 74/2020-50), the SAC assessed whether the taxpayer had proved that the advertising on the internet had taken place to the extent declared and that the expenses relating to this advertising could be claimed as deductible. This involved proving that the advertising in the Google AdWords system (now Google Ads), arranged for the taxpayer by an agency, had occurred. The SAC agreed with the tax authority that in the case before the court, the taxpayer had failed to prove the delivery and receipt of the advertisement.

During the tax proceedings, the taxpayer submitted several means of evidence. To prove the receipt of an advertisement, the court considers it necessary to provide documentation not only in form of statements containing records of the number of searches and the number of times the website was opened, but also in form of screenshots capturing the advertisement directly in the Google search engine. According to the SAC, 'if the advertising is provided exclusively online, there is no other way of capturing it than by means of a screenshot.' In this case, however, the taxpayer submitted screenshots that were neither distinct from each other nor dated, and thus were insufficient to prove the tax deductibility of relevant advertising expenses.

The SAC believes that there is also another way to prove the receipt of an advertisement, which is the administrator account in the Google AdWords system from which the advertisement was to be served. Since the taxpayer in the case at issue did not arrange the advertising in Google AdWords directly but through an intermediary, they did not have access to the administrator account themselves and were therefore unable to identify it with sufficient certainty. They asked the tax administrator to verify the facts by accessing the administrator account, which both the tax administrator and subsequently the regional court refused to do. The SAC concluded that the tax administrator cannot be asked to search for and examine insufficiently identified means of evidence themselves.

For a possible tax inspection, it is therefore important to have not only relevant accounting documentation but also documentation of sufficient quality proving that the advertising has taken place, whether these are dated screenshots showing the advertising at different times or otherwise temporally identifiable records.

Case law

CJEU: Excessively high price no reason to refuse right to VAT deduction

In case C-334/20 Amper Metal, the Court of Justice of the European Union has ruled on whether a service recipient is entitled to deduct VAT if the price paid for advertising services is significantly higher than the price usually paid for such services.

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In 2014, Amper Metal Kft., a Hungarian company, purchased advertising services consisting of placing advertising stickers with the company's logo on racing cars. The company deducted VAT on the supplies received. The Hungarian tax authorities disagreed with this practice and assessed additional tax. In their opinion, the advertising services received did not in any way increase the company's sales, and therefore were not sufficiently linked to the (output) taxable supplies carried out. At the same time, the tax administrator argued that the advertising services were excessively expensive and not beneficial to the company.

The CJEU first pointed out that a transaction's taxable amount must include everything that a supplier obtains from a customer as consideration for the supply provided. It is therefore a price agreed between two independent companies, not an objective price determined by the market or the tax administrator. The right to deduct thus can be claimed on the agreed-upon consideration and not on an objective, usual price. The usual price may only be used as the taxable amount if the supply is provided between related or close persons, which was not the case here. The mere fact that the price for the services received is higher than the usual price is not a sufficient reason to refuse the right to deduct.

Furthermore, the CJEU emphasised that the right to deduct can be exercised by the supply recipient only if the received (input) taxable supply is directly linked to the provided (output) taxable supply – e.g., if it is reflected in the price of taxable supplies or if it is part of overhead costs. However, according to the CJEU, the received supply's effect on sales cannot be considered a criterion to determine the link between the received supply and the taxable output. Accordingly, the mere fact that the received service does not increase sales is not a sufficient reason to refuse the right to deduct.

Guidance on gradual revenue recognition for construction work

In a recent judgment, the Supreme Administrative Court (SAC) dealt with the method of accounting for revenues from construction work carried out under a contract for work. Is it possible to recognise revenues based on partial invoices issued upon the customer's approval of the work carried out? Or should the contractor account for work in progress and only recognise revenues once the work is completed and formally delivered (handed over) to the customer, as per the Civil Code? The SAC sided with the taxpayer and agreed with the first option.

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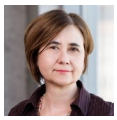
In the case in question, the tax administrator and subsequently the regional court did not accept the approach whereby a taxpayer (contractor) had their customer regularly check a construction's progress and approve the performed work, afterwards invoicing the customer for partial completion of the work. The taxpayer then recognised the invoiced amounts as current-period revenues. The tax administrator and the regional court argued that the contract between the taxpayer and their customer did not stipulate any parts of the work that could be delivered gradually and, since the Civil Code did not provide for any such partial delivery of work, the contractor should have, in their opinion, accounted for work in progress.

The Supreme Administrative Court in its judgment No. 2 Afs 296/2020-65 sided with the taxpayer. According to the SAC, it was necessary to respect that the construction business is very specific in its long- term implementation and size of individual contracts. The court held that neither approach, i.e., the one chosen by the tax administrator nor the one adopted by the taxpayer, is contrary to accounting regulations. However, the court stressed, it is necessary to reflect the factual situation over the formal state. In this context, the SAC also referred to the statutory accounting principle that where several accounting treatments are possible, it is necessary to choose the accounting method that corresponds to the factual situation and thus gives a true and fair view.

The SAC concluded that upon its completion, the invoiced work represented an economic value for the customer as it allowed the further progress of the construction. According to the court, the contractual arrangements regarding the delivery (handover) of the work were relevant from the civil law perspective, but in no way excluded the partial approval and invoicing of work. The SAC stated that the taxpayer's approach was not contrary to the contractual arrangement. To refuse the chosen accounting treatment solely on the grounds of an absence of an explicit contractual provision on the procedure upon partial delivery (handover) of construction work would be unreasonably formalistic, the SAC held.

News in Brief, February 2022

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



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DOMESTIC NEWS IN BRIEF

- Instruction No. GFD-D-52 on decision-making in respect of applications for the waiver of levies for the breach of budgetary discipline and penalties for the late payment of levies for the breach of budgetary discipline submitted pursuant to Act No. 250/2000 Coll., on budgetary rules of territorial budgets, as amended, was published in Financial Bulletin No. 2/2022.
- The following were published in Financial Bulletin No. 3/2022:
    - a list of countries exchanging country-by-country reports pursuant to Section 13 zb (2) of Act No. 164/2013 Coll., on International Cooperation in Tax Administration
    - Instruction No. GFD-D-53 on determination of levies for the breach of budgetary discipline
    - an annex to Instruction No. GFD-D-53 on determination of levies for the breach of budgetary discipline.
- In 2021, EU member states joined the OECD's global two-pillar agreement to reform the system of income taxation of multinational enterprises. At the January ECOFIN meeting, the Czech Republic showed its support for the adoption of Pillar I (changing taxing rights for corporate groups generating profits of over EUR 10 billion) and Pillar II (introducing a minimum global effective tax for corporate groups with a worldwide turnover of more than EUR 750 million) from 2023.

FOREIGN NEWS IN BRIEF

- The updated OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations were published on 20 January 2022. Compared with the 2017 edition, the January 2022 version includes revised guidance on the application of the transactional profit split method and guidance for tax administrations on the application of the approach to hard-to-value intangibles, as well as new transfer pricing guidance on financial transactions approved in 2020. This edition aims to harmonise the individual guidelines issued so far in one coherent and comprehensive document. Changes to already established interpretations have not been indicated or highlighted but cannot be ruled out.
- With effect from January 2022, Slovakia has extended the CFC rules to natural persons who should tax the profit of qualifying controlled persons. The controlled company is understood to be a legal entity over which a natural person, a Slovak tax resident, exercises control or holds a 10% stake in such an entity. Companies resident in non-cooperative jurisdictions will be considered controlled companies automatically; in all other cases, companies with effective taxation below 10% will also be considered controlled companies. The profits of controlled companies will be taxed at the natural person’s level at 25%, or 35% if a controlled company from a non-cooperative jurisdiction is involved.

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