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Editorial

As in the public sphere, negative news have been at the forefront lately, I'm happy to also have something positive for you (and no, I don’t mean any test results). Many of you have been asking whether the Tax and Legal Forum will take place at all this year. I can now confirm that our traditional and largest client event of the year will indeed take place, on Thursday 10 December 2020, as a live, online broadcast.

There will be a discussion with Deputy Minister of Finance Stanislav Kouba, and participants will definitely get the opportunity to ask questions. Please note that the conference will be held in Czech. You or your colleagues will receive an invitation in the coming days, but may already register here.

May you only hear good news this month!

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Tax liberation package extended to retail and provision of services in business premises

The Ministry of Finance adopted another tax liberation package, extending the waiver of road tax and income tax prepayments and VAT-related default interest to entrepreneurs operating in retail and the sale and provision of services that had to close their business premises from 22 October 2020.

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The tax liberation package has the form of a decision of the Minister of Finance, published in Financial Bulletin 25/2020, and only pertains to taxpayers whose major part of income generated in the period from 1 June 2020 to 30 September 2020 derived from retail and the sale and provision of services in business premises, excepting activities that may still be provided after 22 October 2020 in compliance with the government's emergency measures.

To claim the waiver, more than half of the taxpayer's income must derive from the above activities that were banned or curtailed by the government's emergency measures. Taxpayers to which the waiver applies must notify the appropriate tax authority about meeting the conditions for the waiver. According to the liberation package, it is sufficient to notify the tax authority by email; however, for a higher level of certainty, we recommend using data boxes. Taxpayers who fulfil these conditions and have notified the tax authority are entitled to claim a waiver of:

- default interest relating to VAT for the September 2020, October 2020 and November 2020 taxable periods or VAT for the third quarter of 2020 taxable period, if the VAT to which default interest relates is paid no later than on 31 December 2020
- road tax prepayments for the 2020 taxable period payable on 15 April 2020, 15 July 2020, 15 October 2020 and 15 December 2020
- income tax prepayments payable in the period from 15 October 2020 to 15 December 2020.

Waivers concerning road tax and income tax prepayments do not waive the tax itself. Waivers concerning VAT do not cover the late filing of a tax return: both VAT returns and VAT ledger statements still have to be filed within the statutory deadlines. The statement of grounds for the minister's decision points out that to the extent not covered by the decision, taxpayers may still apply for tax deferment or payment in instalments for reasons associated with the spread of SARS-CoV-2. If granted, default interest and interest on the deferred amount arising between 12 March 2020 and 31 December 2020 are automatically waived (see Financial Bulletin 9/2020).

The general waiver of VAT on the gratuitous delivery of selected goods and services for which the duty to declare VAT arose in the period from 1 October 2020 to 31 December 2020 is not subject to any change, i.e. the conditions stipulated in the last tax liberation package remain in application.

Subsidies

Second wave of applications for COVID – Rent support under way

Following the reintroduction of measures restricting retail and the provision of services, the government has come up with a second call to participate in the COVID – Rent programme. Applications may be submitted until 21 January 2021.

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As we have already informed you, the Ministry of Industry and Trade launched a second call to participate in COVID – Rent, a programme providing support for lease expenses. As in the first call, lessees meeting the definition of eligible applicant will be entitled to compensation equal to 50% of rent for the relevant period from 1 July 2020 to 30 September 2020. A key condition for obtaining this support is applicants having been forced to close their premises due to the October government resolutions. Further conditions shall be laid down directly by the call.

As in the first wave of the COVID – Rent programme, it will be possible to draw a maximum subsidy of CZK 10 million for the relevant period. Importantly, subsidy amounts received during the first and second waves are not going to be added up. However, it is still necessary not to exceed the limits stipulated by the European Commission's Temporary Framework and to pay at least 50% of the relevant rent before applying for aid.

A fundamental difference from the first programme wave **is that it is no longer necessary to obtain a rent discount from the lessor**. It will suffice to provide an affidavit from the lessor confirming the existence of a lease relationship.

Where an applicant has applied for support during the first wave, they shall use the login details already created for registration in the system. New applicants must first verify their identity for electronic identification. For more information on registration, please read this article.

All forms and other information necessary to file an application are available at the Ministry of Industry and Trade's website, on the applicant's portal.

Legal

Changes in occupational health services during state of emergency

The government has adopted an emergency measure on periodic and other health checks. As in the spring, the measure introduces the possibility to use (in specified cases) affidavits instead of initial health checks, or not to perform periodic health checks. The measure has been in effect since 19 October and shall remain so over the duration of the state of emergency.

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One of the main changes brought by the emergency measure is the replacement of initial occupational health checks of new employees with affidavits. The government stipulates that an affidavit should be viewed as an assessment of the medical fitness of a person applying for employment under the Specific Health Services Act, for persons:

- whose employment relationship has originated from the date of publishing the measure until the end of the state of emergency;
- whose contracted type of work is classified in the first or second category as per the Public Health Protection Act, with exceptions; and
- who have not yet undergone an initial medical examination.

The same shall apply to persons whose employment has originated from the date of publishing the measure until the end of the state of emergency and who carry out epidemiologically significant activities; for these persons, the affidavit replaces a health card issued under the Public Health Protection Act.

The affidavit shall be valid for a maximum of 90 days from the day following the end of the state of emergency. The template of the affidavit, which forms an appendix to the emergency measure, is easily available e.g. on the website of the Ministry of Health or of the State Labour Inspection Office.

At the same time, the government has granted an exemption from periodic medical checks under the Decree on Occupational Health Services and Certain Types of Assessment Care. Periodic medical examinations do not need to be carried out during the state of emergency.
Medical assessments that expire during the state of emergency shall remain valid for 90 or 30 days after the end of the state of emergency, depending on whether the medical assessment indicated that the person is medically fit, or medically fit subject to a condition.

At the same time, the measure stipulates how occupational health service providers should proceed after the end of the state of emergency. With the measure, the government intends to make things easier for primary medical care providers. In our experience, employers will be relieved, too: as in the spring, primary medical care providers are extremely busy at the moment and can´t provide initial or periodic medical checks, which in turn complicates hiring.

Subsidies

Investment incentives: Possibility to extend the deadline for meeting general terms and conditions to up to five years

In record time, the chamber of deputies and the senate have passed a draft government amendment to the Act on Investment Incentives allowing support recipients affected by the coronavirus pandemic to apply for the extension of the deadline for meeting general terms and conditions.

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The Ministry of Industry and Trade is introducing a measure that may help investors suffering from the effects of the coronavirus pandemic. In particular, this involves the possibility to apply for the extension of the deadline for meeting general terms and conditions by two years: the deadline may therefore be extended from the existing three to five years.

For investment incentive recipients, the fulfilment of general terms and conditions within three years of the date the decision on granting investment incentives was issued is a key criterion to start drawing investment incentives. If this deadline is not met, the recipient's entitlement to investment incentives ceases to exist. The possibility to extend the deadline is therefore a welcome help. A similar option was available to investors in the 2008 and 2009 crises.

In practice, an investment incentive recipient will have to apply for the extension of the deadline **no later than 30 days before the expiry of the statutory deadline of three years from the date of issuing the decision on granting investment incentives.** This means that if an amendment enters into effect, e.g., in early December, companies having received decisions on granting investment incentives in 2018 and earlier may use the above option. At the same time, however, this also means that if the three-year limit has already expired, it will not be possible to additionally apply for its extension.

Applications for extensions will not be approved automatically. Applicants will have to prove that they have been unable to meet the selected statutory conditions within the original statutory deadline as a result of the COVID-19 outbreak. It will be up to each individual applicant to sufficiently prove this.

The amendment was promulgated in the Collection of Laws on 2 November 2020 and enters into effect on the date following its promulgation.

Practical pitfalls of quick fixes

An amendment to the VAT Act implementing long-awaited changes to the intracommunity supply of goods (quick fixes) entered into effect on 1 September 2020. We may already comment on the first practical implications for taxpayers and on solutions to problems that have been discussed earlier.

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Proving the transport of goods to another EU member state has been a frequent issue discussed since the very beginning. In accordance with the relevant article of the regulation, it is sufficient to submit a required combination of documents issued by at least two different parties that are independent from each other and from the vendor and the acquirer. The term 'independent' has now been clarified: independent are parties who are not related to one another through capital or in any other manner. Where the relation through capital is concerned, an independent party shall be a party who holds a less than 40% share in the registered capital or voting rights of another party.

The professional public has recently discussed another issue, in particular one of the conditions for exempting intracommunity supplies of goods from VAT, which is **the correct** declaration of transactions in EC Sales Lists. Some believe that to be able to claim the exemption, transactions must be declared in EC Sales Lists for the period in which the transactions were carried out, i.e. the period to which they relate under the VAT Act. But this interpretation is in conflict with Section 104 of the VAT Act allowing the reporting of transactions in periods of taxation other than the period to which they relate. The financial administration has not opined on the matter yet. However, we believe that considering the EC's explanatory notes, it is justifiable to report transactions in EC Sales Lists for a period of taxation other than the period to which they relate.

One of other issues discussed are minor and natural losses in consignment (call-off) warehouses. The original explanatory note on consignment warehouses states that every time when goods are destroyed, lost or disposed of, the taxpayer ceases to meet the conditions for applying the simplification for call-off stock arrangements, and a duty to register for VAT arises. In response, all EU member states filed a joint motion to introduce a tolerance limit of 5% for these minor losses. This tolerance limit for minor losses in both the value and volume of goods has also been affirmed by the General Financial Directorate's Information on the Amendment to the VAT Act in effect from 1 September 2020.

Moreover, the GFD's information also states that if taxpayers are unable to submit the required combination of documents proving the transfer of goods to another member state, they may also do so by other means of proof. The GFD also draws attention to the change in declaring VAT-exempt supplies to another member state in VAT returns, newly in relation to the moment the goods were delivered. The deliveries are then declared either on the date a tax document is issued or until the 15th day of the month following the month in which the goods were delivered, whichever the earlier. The reporting of transfers of goods from another member state is done similarly.

We will continue to monitor the situation and will keep you informed about any developments in this area.

Subsidies

Calls to OP EIC attract interest; other calls are to be announced

Below we provide an overview of open calls within the Operational Programme Enterprise and Innovations for Competitiveness (OP EIC) and their current status. A new call within the Infrastructure Services programme has been announced and other calls are yet to be opened.

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Programmes that are currently open within the OP EIC are the Application, Innovation and Potential programmes (for more details on these programmes, please see this article). The acceptance of applications is under way. The number of submitted applications in the second half of October was as follows:

- Application – 22 applications filed, 10% of the planned allocation used up
- Innovation – 15 applications filed, 27% of the planned allocation used up
- Potential – 7 applications filed, 7% of the planned allocation used up.

It is clear from the above that despite a number of restrictive conditions that apply to large businesses, the subsidy programmes have been attracting interest. The largest inflow of applications is generally expected right before the end of the deadline. We recommend filing applications as soon as possible, especially within the Innovation programme, which is a continuous call.

Call VIII. within the Infrastructure Services programme was announced, focusing on enhancing the intensity of joint research, development and innovation activities between business entities and the public sector. This should involve their cooperation when realising new technologies and competitive products and services. Activities that will receive support include operating or expanding an existing innovative infrastructure or building a new infrastructure.

Eligible costs shall be costs incurred for fixed assets/capital expenses and selected operating expenses. Applications will be accepted from 30 November 2020 to 1 April 2021. The level of support will be 50–75% of eligible costs, with the subsidy amount ranging between CZK 1 million and CZK 150 million. The level of support and the subsidy amount will depend on the type of activity, the type of recipient and the type of support regime (GBER or de minimis). The call is also partly intended for large businesses.

Within the favoured **Energy Savings programme,** a new call will be announced, in particular **Call VI.**, targeting also large businesses. The call will be announced on and applications will be accepted from 24 November. More detailed information will be available once the call is announced. Planned funds for allocation are CZK 2 billion.

The last planned call is a call to participate in the **ICT and Shared Services – Digital Enterprise programme.** More detailed information regarding this programme should be available once the call is announced. However, right now it is not yet certain whether the call will indeed be announced, depending on the amount of unallocated funds.

Should you be interested, we will provide you with more detailed information on the programmes or assess the adequacy of the above programmes and other specific criteria for your planned activities.

Brexit: What will happen to social security and health insurance in 2021?

The end of 2020 will also bring the end of the transition period under the Agreement on the Withdrawal of the UK from the EU. During the transition period between 1 February 2020 and 31 December 2020, the United Kingdom is being treated as if it were still part of the EU from a social security and health insurance perspective. But if no agreement on the structure of the future long-term EU-UK relationships is concluded, this area will be significantly affected.

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In the transition period after the UK's withdrawal from the EU, the EU coordination regulations remain in application (including A1 Forms confirming a worker's participation in a social security scheme of a particular state) when determining the social security and health insurance schemes the posted worker is subject to and the benefits distributed from such schemes.

If an agreement on the structure of future UK-EU relations is not entered into by the end of this year, the second part of the Withdrawal Agreement will be activated from 1 January 2021, stipulating, among other things, that the EU coordination regulations will newly only apply to those EU and UK citizens who were part of a certain cross-border relationship between the UK and the EU before 1 January 2021 and will only apply during this relationship without any interruption or change. It is expected that the European Commission will provide more detailed information on how individual member states and relevant social security institutions should interpret "without any interruption" and "without any change".

The European Commission has recently disclosed guidelines on how to proceed after the end of the transition period between the EU and UK as regards workers posted in the framework of the provision of services under the Posting of Workers Directive. These guidelines may also significantly restrict social security and health insurance premiums after 1 January 2021. However, Czech social security and health insurance institutions have declared that they are currently not planning to proceed in accordance with these guidelines; a similar approach is expected to be applied by other EU member states as well.

For workers posted from the CR to the UK and vice versa before 1 January 2021, no changes to social security and health insurance shall occur in the new year. Over the posting period, all forms issued before the end of 2020 should remain valid, including A1 Forms confirming the worker's participation in an insurance scheme of a particular state and all other relevant forms (e.g. S1 Forms confirming a worker's entitlement to full medical care at the state of residence).

The situation of those to whom the above rules will no longer apply from 1 January 2021 will always have to be assessed on an individual basis, taking into account both Czech and UK insurance legislations. Since the CR does

not currently have a bilateral social security agreement with the UK, it may happen (similarly as before the accession of the CR to the EU) that employers will have to pay social security and health insurance for the posted workers in both states or that the posted workers will not be insured in either state. However, the UK and the EU currently make every effort to enter into a bilateral agreement at the EU level, which should be legally binding for all member states.

The wording and scope of this agreement are currently being discussed. If the agreement is concluded before the year-end and enters into effect on 1 January 2021, the second part of the above Withdrawal Agreement will not be activated and cross-border relations between the EU and the UK relating to social security insurance will be governed by the new agreement.

DORA to enhance cyber resilience of financial institutions

The European Commission has released a proposal for the Digital Operational Resilience Act (DORA), laying down the requirements for the information and communication technology (ICT) security of financial institutions. Banks, stock exchanges, clearing centres or FinTech companies will have to observe strict standards.

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The proposed regulation is to be part of the wider Digital Finance Package, which also includes a general strategy, legislative proposals on crypto-assets, and updated strategies for modern and secure retail payments. The package aims to eliminate the current fragmentation of the digital single market by adopting a European framework to boost digital innovation, support data-driven finance, and take account of the related risks, including enhancing financial systems' resilience.

The new regulation aims to respond to the financial sector's ever-increasing dependency on digital processes and its subsequently growing ICT risks. Financial institutions such as banks, stock exchanges, clearing centres and FinTech companies will have to observe stringent standards. Strict supervision will also apply to ICT providers (incl. BigTech companies) providing cloud computing services to the mentioned financial institutions.

DORA is to cover the following areas:

- setting and unifying the requirements for the cyber resilience of the financial institutions' IT systems and for the reporting of ICT-related incidents
- mandatory testing of financial institutions for ICT security and cyber resilience; a certain level of testing compulsory for all, a higher level (such as penetration tests) only for financial institutions identified as significant
- oversight over the outsourcing of ICT services by financial institutions, including a more detailed regulation of contractual arrangements concluded between financial institutions and ICT providers
- oversight of critical third-party providers of ICT services to financial institutions by a central EU authority.

The regulation distinguishes and regulates a total of 20 types of financial institutions. On the other hand, payment systems, payment card systems, some operating systems, and participants pursuant to the SFD (Settlement Finality Directive) are excluded from its scope.

Record-breaking spam penalty

In August of this year, the Office for Personal Data Protection (the Office) imposed the highest fine to date for the repeated unsolicited sending of commercial communications (spam). The company selling second hand cars paid CZK 6 million.

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It is illegal for advertisers to harass anyone by sending them unsolicited commercial communications by electronic means without their consent or other legitimate reasons. Under the Act on Certain Information Society Services (the Anti-Spam Act), electronic contacts (e.g. email addresses) may be used for the purpose of disseminating commercial communications by electronic means solely to users who have given prior consent.

An exception to this rule is the use of electronic contacts of the advertiser's customers. If an advertiser has obtained the electronic contact lawfully in connection with the sale of their own products or services, they may use such contacts, to a reasonable extent, for the purpose of sending commercial communications about their own products or services (unless the customer has expressed dissent to this).

The company in question repeatedly distributed commercial communications by electronic means to addressees who neither gave their consent nor were the company’s customers. By doing so, the company breached the above rules and thus committed an offence.

In its rather extensive decision, the Office pointed out several important facts. One of them was that consent must comply with stipulated legal requirements (requirements for consent to the processing of personal data), and its granting must be unambiguously supported. The burden of proof lies solely with the personal data controller, i.e. the disseminator of the commercial communications (the company).

The company sought to support the (purportedly) obtained consent simply by referring to the procedures for obtaining and recording it. However, the Office did not accept this as a sufficient proof of consent having been granted by the specific addressees of the commercial communication.

The Office also justified the unprecedented high fine by pointing out that the misconduct had taken place within a large-scale advertising campaign (involving almost half a million email addresses) and had been systematic and comprehensive (the number of commercial communications sent without a legal title was in the thousands).

Finally, the Office commented on the company's objections regarding the distributor of the communications. If an entrepreneur decides to distribute commercial communications through another entity, they do so at their own risk, since it is primarily their duty to ensure the legality of such an act.

It is clear from the decision that the Office will not overlook any unauthorised sending of commercial communications and is prepared to severely sanction such practices. It is recommendable that advertisers carefully consider which addressees a specific commercial communication is sent to and whether there is a legal title for sending it. At the same time, they should not underestimate the specific form of obtained consent, and its proper record keeping.

International rules for taxation of digital economy progress next stage

In mid-October, the OECD released for public comments its revised rules for the taxation of the digital economy. The final version of the rules including draft legislation is planned to be issued in mid-2021. The rules are still based on a two-pillar principle: the first pillar gives states the right to tax income generated in their territory even without the physical presence of the person generating the income; the second pillar ensures a minimum level of overall taxation.

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The new rules are contained in *Blueprint for Pillar One* and *Blueprint for Pillar Two*. The main principles agreed upon in these documents have the support of the world's largest economies expressed at the G20 level. Still, a number of technical issues need to be resolved and agreed on.

The rules will apply to enterprises engaged in automated digital services (such as internet advertising, internet search engines, social networks, sale of data) and to consumer facing businesses with total gross revenues for the MNE (multinational enterprise) group exceeding EUR 750 million per year. The change from the current rules is primarily the right to tax income (profit) in states where the enterprise is not physically present, or only present to a minimum extent, but where income or profit is generated. To these states, i.e. source states, a portion of the total consolidated profits of the MNE will be allocated, based on an agreed-upon allocation formula (Amount A). The new rules also stipulate Amount B, which shall belong to the source state if the enterprise carries out certain marketing or distribution activities in that state through a permanent establishment or a subsidiary. To minimise disputes between individual states, a uniform mechanism should determine the profits relating to such activities. The rules should also stipulate procedures for determining the tax base including loss carry-forwards, and the elimination of double taxation.

The second pillar contains rules for the fair taxation of MNE groups, for instance if some states select not to use the taxation options under the first pillar. However, the plan for the second pillar has been released for comments without consent having been reached on its principles, and may therefore still undergo substantial changes.

Case law

SAC defines difference between contract and foreign employees

The Supreme Administrative Court (SAC) has clarified the definition of a contract employee and a foreign employee as set out in the Sickness Insurance Act. The distinction between these two categories of employees working in the Czech Republic is important for social security contributions.

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In both foreign employee and contract employee cases, the employer is an entity established in a non-treaty state (meaning all states except for EU and EEA member states, Switzerland and states with which the Czech Republic has concluded a social security agreement). Yet, only contract employees are subject to compulsory social security contributions in the Czech Republic pursuant to sickness insurance legislation; the contributions have to be paid by the Czech company (the contract employer) to which the contract employees have been posted. Foreign employees, i.e. those who are active in our territory for the benefit of a foreign employer from a non-treaty state, are excluded from compulsory sickness insurance in the Czech Republic.

In the case in question (9 Ads 104/2018 of 21 October 2020) the SAC dealt with the obligation to pay social security contributions for the employees of a foreign employer established in Jersey (a non-treaty state); the employees provided management services to a Czech company in the territory of the Czech Republic on the basis of contracts for the provision of services.

The employees had originally worked in managerial positions at the Czech company on the basis of employment relationships concluded under the Czech Labour Code. Their employment contracts with the Czech company were then terminated, only to be formally re-concluded with a company having its registered office in a non-treaty state (Jersey). In this way, the employees could be considered foreign employees. As a result, they ceased to be subject to compulsory social security contributions. However, their job positions and actual job descriptions remained unchanged: they continued to work for the Czech company as they did before the termination of their original employment contracts.

Following an inspection at the Czech company, the District Social Security Administration (DSSA) decided in an administrative procedure that these employees did not meet the definition of foreign employees but were in fact contract employees, as they worked for the benefit of the Czech company and were therefore subject to compulsory social security contributions in the Czech Republic. The contributions were to be paid by the Czech company, which, in DSSA's assessment, met the definition of a contract employer. Coming to the same conclusions as both the administrative authority and the regional court, the SAC dismissed the cassation complaint filed by the Czech company.

The SAC stated that although for both categories of employees the employment relationship is with a foreign employer from a non-treaty state, the difference is that for a foreign employee there is no Czech entity (besides the foreign employer) to which the employee would have a close inner link (economic, organisational).

In contrast, a contract employee has a certain link with a Czech entity, although there is no formal employment relationship. This entity is then a contract employer.

In the light of the above SAC conclusions, if employees whose legal employer is in a non-treaty country are working at your company, we recommend checking the factual nature of the respective arrangement from the perspective of the obligation to pay social security contributions in the Czech Republic.

Case law

SAC sanctions CZK 1 mil fine for 'Svarc' system

In its June 2020 judgement, the Supreme Administrative Court (SAC) dealt yet again with the 'Svarc' system. The court held that a CZK 1 mil fine for allowing illegal work had been rightly imposed by the Labour Inspection Office. The decision should be a warning in particular to entrepreneurs cooperating with individuals/self-employed persons as contractors.

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The 'Svarc' system means that an entrepreneur ensures some of their activities through individuals who act as independent contractors (on the basis of a business relationship), but the performance of these activities demonstrates the characteristics of dependent work. According to the Labour Code, dependent work is work performed within a relationship in which the employer is superior and the employee is subordinate, in the employer's name, according to the employer's instructions, and personally by the employee for the employer. The law prohibits the performance of dependent work outside an employment relationship.

In the present case, a company provided for its client, a manufacturer of automotive components, an activity consisting of sorting of defective and non-defective components. This activity was carried out through several self-employed persons.

These 'service providers' could not influence the time, place or manner of work, or the remuneration for it. Their work tools, including ordinary ones, were rented from the company, and they did not even have their own work clothes but rented a company uniform. They attended occupational safety and health training, and in their work followed the company's and its clients' manuals, or the instructions of the company's employees. Most of them had first worked for the company under an agreement to carry out work, and once they learned the work, they obtained a trade licence so that they could work for the company as independent contractors – with the same content of work. Although as service providers they could refuse individual contracts, they rarely did so as the company motivated them through an evaluation system with which it could change their remuneration. They invoiced their services through a uniform system required by the company. Most of these service providers only worked for the one company and were thus financially dependent on it.

One of issues at dispute was the manner of determining the remuneration, which could not be proven conclusively in the proceedings. The company argued that the remuneration was paid based on work done (pieces checked), but the overwhelming evidence was that the remuneration was paid based on hours worked, which is a typical feature of dependent work. However, according to the court, even if the remuneration had been paid on the basis of units checked, it would not have changed the outcome of the overall assessment of the situation.

Based on the facts ascertained, the SAC concluded that the activity carried out by the self-employed persons for the company was not by its substance the provision of services, but the performance of dependent work. According to the court, the case was a textbook example of a sophisticated 'Svarc' system scheme.

The company's position was made worse in particular by the fact that the self-employed could not carry out their

activities independently but had to follow the company's manual and instructions, and that they did not have any equipment of their own. Their activities were simply too similar to those of ordinary employees (company uniforms, usual training).
As the Labour Inspection Office has also pointed out in its bulletin, the actual nature of the activity carried out is essential when assessing whether illegal employment is taking place. Even sophisticated contractual documentation cannot prevail over the manner in which cooperation with the service providers actually takes place.

Entrepreneurs cooperating with individual/self-employed contractors should therefore examine the potential risks. The Labour Inspection Office may fine such "employers" up to CZK 10 million for allowing illegal work. Furthermore, additional tax and social security and health insurance may be assessed and, in a worst case scenario, there is even a risk of criminal sanctions.

Case law

CJEU: Right to deduct VAT in full also for expenses benefiting a third party

In the Vos Aannemingen case (C-405/19), the Court of Justice of the European Union (CJEU) dealt with whether it is possible to deduct, in full, input VAT on expenditures that benefited a third party, and when such benefit shall be regarded as ancillary.

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Applicant Vos Aannemingen was engaged in the sale of apartment buildings it had built on land belonging to third parties. The company sold the apartments, and the landowners sold shares in the land corresponding to the apartments. The company covered all advertising and administrative costs as well as the real estate agents' commissions, and claimed full VAT deduction on these transactions. However, the Belgian tax authorities were of the opinion that the company was only entitled to deduct VAT to the extent that it related to the sale of the houses/apartments, not to the sale of land.

The company argued that there was a direct and immediate link between the expenditures and its economic activity. Also, the benefit to a third party was ancillary, as the company incurred the expenditures mainly for the purpose of its own economic activity.

The Court has previously held that where there is a direct and immediate link between the supplies received and the taxable person's economic activity, that person is entitled to deduct VAT even if a third party also benefits from the supplies. The benefit is then regarded as ancillary if the supplies are carried out in the taxable person's own interest. In the case in question, the CJEU found that the benefit to a third party could be regarded as ancillary and therefore could not limit the scope of the company's right to deduct.

As for the scope of the right to deduct, it is also important to consider whether the expenditures are part of the taxable person's general overhead or whether they are attributable to specific output transactions. Should it become apparent that a certain part of the expenditures was incurred solely for the purpose of selling land, the company would not be entitled to deduct VAT on that part of the expenditures.

Neither creditor nor debtor have to be VAT registered at the time of correcting tax base

Is it compatible with the VAT Directive that both creditor and debtor must be taxable persons for VAT purposes both when providing the supply and when correcting/reducing the taxable amount? The Court of Justice of the EU (CJEU) dealt with this question in Polish case C-335/19, also as the debtor has entered winding-up proceedings.

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Polish company E. provided tax advisory services to an entity, which gave rise to a receivable. The debtor failed to settle the receivable and later entered winding-up proceedings. E. believed that they had the right to correct the taxable amount of the receivable. However, the Polish tax administrator disagreed, as the Polish VAT Act stipulates that both the creditor and the debtor must be VAT registered both at the time of providing the supply and at the time of correcting the tax base. At the same time, the debtor must not be in insolvency or winding-up proceedings.

The CJEU held that under the VAT Directive, member states may derogate from the stipulated rules in the event of total or partial non-payment of the price of the supply, while such a derogation's purpose is to take account of the uncertainty as to whether the non-payment is definitive. The CJEU also noted that the derogation shall not completely exclude any possibility of the VAT taxable amount's reduction in the event of non-payment (see C-127/18 A-PACK CZ).

In the CJEU's opinion, the condition that the debtor be registered as a taxable person for VAT purposes on the day of delivery of the goods or provision of the services cannot be justified by the need to take account of the uncertainty whether non-payment is definitive. Whether or not the debtor is subject to VAT on the day of the supply does not in itself allow to conclude that the debt is at risk of not being recovered. The CJEU also referred to the European Commission's written observations stating that goods and services may also be supplied to persons who are not subject to VAT, such as entities exempt from VAT or consumers, without that affecting the creditor's obligation to collect VAT and their right to later adjust the taxable amount.

The additional condition that the debtor be registered as a taxable person for VAT purposes at the time when the taxable amount is being corrected, is not compatible with the VAT Directive, as previously adjudicated in the A-PACK CZ case (C 127/18). The condition that the creditor be VAT registered at the time of the tax base correction cannot be justified by the need to take account of the uncertainty whether non-payment is definitive: whether or not the creditor continues to be a taxable person has no effect on the existence of the debt and the debtor's obligation to pay it, and does not present the risk that the debt may not be recovered.

The last condition that the debtor not be subject to winding-up proceedings at the time of providing the supply or correcting the tax base, does in fact take account of the uncertainty whether non-payment is definitive. However, should the creditor provide sufficient evidence before the winding up proceedings are closed that the receivable

will remain unrecovered, it should be possible for them to reduce the taxable amount. If the receivable is subsequently recovered, the taxable amount will be increased again. This is compatible with the objectives pursued by the VAT Directive, while being less onerous for the creditors (see also C-246/16 Di Maura).

News in brief, November 2020

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

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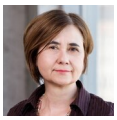

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DOMESTIC NEWS IN BRIEF

- The government approved the initial draft of a new Act on Accounting.
- The government will debate a bill implementing the Digitisation Directive; from 1 January 2021, it should enable the online establishment of companies.
- The chamber of deputies has been debating a bill on the conditions of accommodation sharing. It aims to regulate the distance provision of accommodation sharing through digital platforms in relation to other co-owners of the real property.
- Regulation No. 2020/1503 on European Crowdfunding Service Providers was published in the EU Official Journal; it will be applicable from 10 November 2021.
- Without any changes, the government has extended Regime B of the Antivirus Programme until 31 December 2020. A contribution of 60% (up to CZK 29,000) of paid wage compensation including compulsory contributions per month per employee will therefore continue to be provided to employers. The procedure to be followed by employers or labour offices when applying for the contribution remains unchanged.
- The government has adopted Emergency Measure No. 1113, restricting the free movement of persons and, among other things, ordering employers to let employees work from home wherever possible. The measure should remain in effect until midnight, 20 November 2020.
- The electronic form for the DAC 6 Notification was published on the financial administration's tax portal.
- The Ministry of Finance has published draft forms for the digital services tax: a registration form, and a tax return form. The bill itself is still in the second reading.
- The tax package for 2021, including, among other things, the introduction of a monetary meal allowance, has passed through the second reading in the chamber of deputies. Around 60 amending proposals have been made, including the abolition of the super-gross wage; individual versions differ as to the tax rates that should apply after the abolition of the super-gross wage. The amending proposals will be voted on in the third reading.
- A law postponing the electronic reporting of sales (in Czech EET) until 2022 and a law regulating the provision of a state guarantee under the COVID III programme have been promulgated in the Collection of Laws.
- Following the European Commission's decision, the financial administration has issued a comprehensive overview of the possibilities of exemption from customs duties and value added tax on imports of goods from a third country in connection with the SARS-CoV-2 pandemic.

FOREIGN NEWS IN BRIEF

- The European Commission will prolong all sections of the Temporary Framework for State Aid Measures by six months, i.e. until 30 June 2021, and the section enabling recapitalisation support by three months, i.e. until 30 September 2021. On a temporary basis, the temporary framework will now also enable member states to contribute up to EUR 3 million per undertaking to the fixed costs of companies that due to the coronavirus outbreak are facing a decline in turnover of at least 30% in the eligible period compared to the

same period of 2019.

- The European Commission will prolong the current temporary relief from customs duties and value added tax (VAT) on imports of protective and medical equipment from non-EU countries until the end of April 2021. The commission has further proposed that hospitals and medical practitioners should not have to pay VAT on purchases of vaccines and testing kits used in the fight against coronavirus, if agreed by member states.
- The Economic and Financial Affairs Council of the EU (ECOFIN) has revised the EU list of non-cooperative jurisdictions for tax purposes (the EU blacklist). The EU finance ministers have agreed to add Anguilla and Barbados to the list, and to remove the Cayman Islands and Oman.
- The OECD has published the second monitoring report for the Czech Republic, Denmark, Finland, Korea, Norway, Poland, Singapore and Spain, reviewing the jurisdictions' commitment to implement a minimum standard to improve the resolution of tax-related disputes (MAP). According to the OECD, the peer review monitoring process shows positive changes across all eight jurisdictions.
- France has announced that the digital services tax for 2020 will be due in December 2020. In February 2020, the payment duty for the French digital services tax was suspended, with no late payment interest or penalty for the April and October instalments. The Spanish senate has approved the introduction of a digital services tax at the beginning of October, with expected entry into force on 1 January 2021.

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