Tax & Legal

Legal
Taxes
Case law
In brief

June 2020

Editorial

Coronavirus-related measures are being lifted, beer gardens and restaurants are once again filling up, theatres and cinemas are opening. Together with our face masks, we have also taken off our winter coats and can start looking forward to summer - mostly to be spent locally. Unusual as this may seem to some of us, this may at least partly compensate some tourism operators for their losses during the previous months.

Instead of health protection, official measures are now focusing on resuscitating the economy, as it is short of breath, too. Let’s hope its recovery is swift and the return to business as usual not as far away as some think. Forecasts differ, so let’s keep our fingers crossed that we can get through this phase in good health, both physically and mentally.

And may the legislators help us all – after the hectic time of issuing, amending and withdrawing measures, they are now returning to a standard legislative process. Which direction they are about to take can perhaps be also seen from the case law presented in this issue.

Pavel Gorel
Partner
KPMG Czech Republic

Legal

Antivirus programme with a new coat

The government decided to extend current Regime B of the Antivirus programme and, simultaneously, the chamber of deputies approved long-awaited Regime C, involving the waiver of part of social security premiums and state employment policy contributions mandatorily paid by employers.

Romana Szuťányi
kpmg@kpmg.cz

Barbora Cvinerová
bcvinerova@kpmg.cz

Václav Bělohoubek
kpmg@kpmg.cz

Extended Regime B and new Regime C

Under the Antivirus programme's Regime A and B, employers have been receiving partial compensation for wage compensation paid to employees in connection with some impediments to work. Whereas Regime A applies to situations such as the forced closure or restriction of operations due to emergency or extraordinary measures and quarantine, Regime B deals with related economic problems employers have had to tackle, such as the absence of significant or key personnel, the unavailability of inputs, or the restriction of demand for services or products.

Support provided within these regimes should have ended at the end of May. However, on 25 May, the government extended the period of eligibility of expenses under Regime B until 31 August 2020. It seems that Regime A will be discontinued from the beginning of June. While closed or restricted operations due to emergency or extraordinary measures will be rather an exception owing to the loosening of business and other activities, employers in practice may still be hit by the end of state support for quarantined employees.

At the end of the last week, the chamber of deputies passed long-awaited Regime C of the Antivirus programme. According to the proposed regulation, part of social security premiums and state employment policy contributions mandatorily paid by employers (i.e. 24.8% of the aggregate income of their employees) should be waived for June to August 2020. In practice, the waiver should be performed as follows: with some exceptions stipulated by law, the employer's assessment base for a calendar month to which the waiver applies should not include the assessment bases of employees under employment relationships effective on the last day of the calendar month, up to 1.5 multiple of the average wage of each employee.

Employers entitled to the waiver of premiums should be those who on the last day of the calendar month employ 50 or less employees that contribute to the sickness insurance scheme. Another precondition is that employees under employment relationship who contribute to the sickness insurance scheme on the last day of the calendar month account for at least 90% of the employees on the last day of March 2020 and the aggregate of assessment bases of these employees amounts to at least 90% of the aggregate of assessment bases of employees for March 2020.
Moreover, to become entitled to the waiver of premiums, employers must pay the premiums their employees are obliged to pay on time and may not simultaneously draw on any other funds from the Antivirus programme in a particular month.

The entitlement to the waiver of premiums does not apply to employers from the public sector, certain health service providers and employers who were not tax residents of the CR, EU or EEA on 1 June 2020.

The fulfilment of the conditions for the entitlement to waive premiums are assessed separately for each individual calendar month. According to the Ministry of Labour and Social Affairs, it is not necessary to apply for the waiver; employers only need to notify the Czech Social Security Administration of the reduction in the assessment base via their monthly statements, and pay the appropriately reduced premiums.

Determination of super-gross wage still uncertain

The question regarding tax implications associated with the waiver of part of employer-paid social security premiums and state employment policy contributions remains unanswered. At present, the tax base for the calculation of a prepayment of income tax on employment comprises gross income accounted by the employer for an employee for a particular calendar month plus related social security and health insurance premiums paid by the employer (i.e. super-gross wage). If part of the employer's social security premiums and state employment policy contributions is waived, how will the super-gross wage of an employee for a particular month be determined?

Under the existing legal regulation, it can be deduced that if social security premiums and state employment policy contributions paid the employer amount to zero, the employee's tax base will only equal the gross monthly income accounted by the employer for the employee. However, the same question, inquiring about the methodological interpretation of this change and its implications for the determination of the super-gross wage, has been raised with the Ministry of Finance.

According to its unofficial opinion, the waiver of part of the employer's social security premiums and state employment policy contributions should not affect the determination of the super-gross wage and, consequently, prepayments of income tax on employment should not be reduced. Once the Ministry of Finance or the General Financial Directorate issue an official standpoint, we will let you know.

Whereas Regime B has already been extended, the final version of Regime C is yet uncertain, as the appropriate law is yet to be passed by the senate in a state of legislative emergency and signed by the president.

Taxes

Anti-crisis tax package: reduction of VAT and road tax

The chamber of deputies passed an anti-crisis tax package involving, apart from the long-discussed tax loss carry-back, a reduction of the VAT rate on selected services as well as a reduction of certain road tax rates. The bill is now to be discussed by the senate.

Václav Baňka
vbanka@kpmg.cz

Petra Němcová
pnemcova@kpmg.cz

Tax loss carry-back is discussed in separate article. **A reduction from a 15% VAT rate to 10%** shall apply to accommodation services, entrance fees for cultural and sports events and to sports centres (including ski lift passes), saunas and other similar facilities.

As financial assistance to businesses operating in agriculture, the government proposes to **shorten the deadline for a refund of overpaid excise duties on 'green diesel oil'**. Overpayments should be refunded within 40 days of the last day of the deadline for filing a tax return or within 15 days of the day of issuing a payment assessment or an additional payment assessment where the tax administrator commenced a procedure to remove doubt or a tax inspection.

For **road tax**, the government proposes to reduce rates applicable to cars with a maximum permitted weight higher than 3.5 tons by 25%. The new rates should already become effective for the 2020 taxable period, including the determination of prepayment amounts.

In response to the coronavirus pandemic, the government also proposes to extend the definition of an extraordinary event to allow municipalities to **exempt certain real property from real estate tax**.

The tax package also covers the **Act on International Cooperation in Tax Administration**: it proposes the possibility to postpone, by a governmental decree, the deadline for meeting obligations associated with the automatic exchange of information with another member state, in line with the European Commission's proposal to postpone deadlines for reporting selected cross-border arrangements (DAC 6) and for exchanging information about financial accounts (DAC 2). The current legal regulation does not allow any postponement of deadlines.

The anti-crisis governmental tax package will be discussed by parliament in a state of legislative emergency and should become effective on the date it is promulgated in the Collection of Laws.

Changes to tax loss carry-back

The chamber of deputies has passed an anti-crisis tax package that, among other things, introduces the option to carry back tax losses. The originally proposed concept has been further extended: for instance, it should be possible to claim a 2020 loss (as estimated by the taxpayer) already in the 2019 tax return.

Veronika Karásková
vkaraskova@kpmg.cz
+420 775 322 062

Jiří Mičánek
kpmg@kpmg.cz

The government has proposed extending the option to deduct tax losses from the tax base also retrospectively, for two years ('tax loss carry-back'). Unlike in the previous wording, the bill now assumes that the existing manner of counting taxable periods will be applied, meaning that tax losses may be utilised in two preceding periods, while the possibility to deduct the tax loss in five future taxable periods shall remain. Shorter taxable periods are not to be included in the calculation, while it will still be possible to utilise tax losses in such periods.

Under the bill's transitional provisions, taxpayers may deduct an estimated tax loss, solely in the period immediately preceding the taxable period for which the loss may be first carried back. This means that taxpayers with a calendar-year taxable period may deduct the expected loss for 2020 in their tax return or additional tax return for 2019. Once the tax loss is actually determined, i.e. upon filing the tax return for 2020, the standard procedure under the amended act shall be followed, i.e. the tax base for two preceding taxable periods may be reduced by the tax loss actually assessed. Deducting the tax loss before it has been assessed is therefore a one-off instrument, targeting the current coronavirus crisis.

Using this option also involves a certain risk: if the taxpayer overestimates the tax loss, they would have to file an additional tax return, settle the tax underpayment and pay related default interest under the Tax Procedure Code. If they underestimate the loss, they could still file an additional tax return and claim the difference, as they would end up with a tax overpayment.

Taxpayers should therefore carefully consider whether to deduct a tax loss before its assessment, and in what amount. Should the tax loss be overestimated, sanctions in the form of default interest may not be inconsiderable. Nevertheless, it will still be possible to apply for a waiver of such default interest following the common procedure regulated by the Tax Procedure Code.

Another change from the originally proposed wording limits the amount that may be carried back to CZK 30 million; the same limit shall also apply to the first taxable period in which an estimated tax loss may be utilised. Tax losses carried forward, on the other hand, remain unlimited.

Waiver of the right to claim loss

The bill also introduces the possibility to waive the loss carry-forward. The waiver has to be made within the deadline for filing the tax return for the period in which the tax loss has been assessed. The waiver applies to all subsequent periods in which the loss may be deducted, and covers the whole amount of the tax loss; this means that it is not possible to waive just a portion of a tax loss, and taxpayers will also lose the possibility to deduct any additionally assessed loss in the event of a tax inspection. The waiver does not affect the right to carry back tax losses.

The purpose of the waiver is to limit the deadline for assessing tax: since the tax loss can no longer be deducted from the tax base, the deadline for assessing tax for the period when the tax loss was assessed or for subsequent periods shall not be extended.

Refund of overpayment

The new wording of the proposed amendment no longer includes the special transitional provision that allowed taxpayers with a deadline for filing the tax return of six months after the end of the taxable period to reduce the deadline to three months, giving them faster access to refundable overpayments for the previous period. The transitional period was intended to only apply to taxable periods ended from 30 June 2020 to 29 June 2021.

This means that taxpayers subject to a statutory audit or filing their tax return through an authorised tax advisor will only be entitled to a refund of their overpayments after the expiry of six months from the end of the period in which the tax loss was assessed, as is the standard procedure.

Legislative process and effective date

While the original wording of the bill proposed the effective date as the first day of the month following the promulgation, under the current wording the amendment shall enter into effect on the day following its promulgation. The bill is now to be debated in the senate.

Eight-day deadline to register/deregister employees reinstated

On 27 May 2020, a bill reducing penalties for the late payment of social security premiums and state employment policy contributions by employers in connection with the emergency measures adopted during the COVID-19 pandemic was promulgated in the Collection of Laws. As part of the bill, the legislators also passed an amending proposal prepared by the Ministry of Labour and Social Affairs, whereby the deadline within which employers must register or deregister their employees with the Czech Social Security Administration was substantially shortened.

Lenka Nováková
lnovakova@kpmg.cz

The current deadline is eight calendar days. Under the new rules, however, employers would have had to notify the agency of the day when employees started their employment (also constituting the beginning of their participation in the social security system) no later than on the working day following the first day of employment; the day of employment termination would have had to be notified no later than on the next working day. Had an employer failed to do so within the statutory deadline, they would have faced a penalty of up to CZK 20 000. The change was to enter into effect on 1 September 2020.

The shortening of the statutory deadline was passed in a state of legislative emergency, meaning that it did not go through the regular legislative process or comment procedure, which would have allowed for its rejection. Since the change would have caused considerable complications for employers, the professional public immediately responded with efforts to reverse the change. On 29 May, while debating a bill on a waiver of social security premiums and employment contribution payments by some employers, deputies submitted an amending motion, reversing the shortened deadline to its original length, i.e. eight calendar days.

Let us hope that thanks to this lesson learned the state of legislative emergency will in the future be used solely in situations where such an approach is indeed necessary.

Czech Republic deposits MLI with OECD depositary

On 13 May 2020, the Czech Republic deposited its instruments of ratification for the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) in Paris. So far, the MLI has been signed by 94 and ratified by 47 jurisdictions. The convention will enter into effect for the Czech Republic on 1 September 2020.

Václav Baňka
vbanka@kpmg.cz

Žaneta Pokorná
zpokorna@kpmg.cz

The above multilateral convention, also referred to as a multilateral instrument (MLI), is an outcome of the BEPS initiative and aims to implement, collectively and swiftly, new measures to prevent the shifting of profits to countries with low or zero taxation. Adoption of the MLI automatically amends the wording of the relevant tax treaties.

The Czech Republic will only join the convention to the extent of the minimum standard: the rule to prevent treaty abuse (principal purpose test, PPT) and the rule to allow for effective resolution of disputes by mutual agreement (dispute resolution). The substance of the principal purpose test is to prevent the application of tax treaties in situations that originated primarily for the purpose of obtaining a treaty benefit and that have no other substance. The dispute resolution rule should speed up the process of resolving tax disputes by mutual agreement between competent authorities of the individual contracting states. Cases must be presented within three years from the first notification of an action resulting in taxation not in accordance with the provisions of a tax treaty. The time limit for resolving the case by mutual agreement procedure is two years from a case's initial date, unless the jurisdictions have agreed otherwise. The possibility to resolve disputes by mutual agreement procedure under the MLI should apply to cases submitted to the competent authorities of a contracting state after the MLI has entered into effect for both states.

The convention covers 52 of the total 88 valid double tax treaties entered into by the Czech Republic. The 52 states include those that, like the Czech Republic, have signed the MLI or are negotiating joining the convention and incorporating the changes ensuing therefrom: e.g., Slovakia, Austria, Germany, Belgium, Poland and Switzerland. Except for Germany, all our neighbouring states have already ratified the MLI. A list of signatories and parties to the MLI is available on the OECD's website.

The moment from which the measures adopted by the MLI shall be applied within specific treaties will depend on the date when the MLI enters into effect for such treaties. As regards treaties with states for whom the MLI entered into effect at the same time as for the Czech Republic or before, the new measures concerning withholding tax shall apply from 1 January 2021, i.e. from the calendar year following the date the MLI entered into effect for both states; for other taxes, after six calendar months (or less, if mutually agreed) from the last of the dates on which the convention entered into effect for each of the contracting jurisdictions covered by the treaty, i.e. for taxable periods beginning after 28 February 2021.

Effect of COVID-19 on transfer pricing of intra-group loans

The current pandemic puts pressure on firms to keep positive cash flows and cash balances. Multinational groups are thus facing the issue of financing their companies. In the most affected industries, access to bank loans has worsened, leading to an increase in intra-group loans to cover operating expenses amid falling revenues and growing inventories due to absences of sales. In terms of transfer pricing, interest on intra-group loans should be at arm's length and reflect the concrete conditions of the given financial transaction.

Petr Bruštík
pbrustik@kpmg.cz

Hana Kopecká
hkopecka@kpmg.cz

Duc Van Nguyen
kpmg@kpmg.cz

Multinational groups use intra-group loans to finance their entities and move cash to companies that need it most. When concluding loans, businesses should not just consider restrictions of tax-deductibility of interest (such as the ATAD Directive), but also the recently issued OECD Guidance on Financial Transactions, which will form a part of the OECD Transfer Pricing Guidelines.

OECD Guidance on Financial Transactions

The guidance contains a comprehensive description of setting and assessing transfer prices for financial transactions. At the same time, it provides guidance to the tax authorities on how to proceed in tax inspections, namely where the economic substance of the financial transaction is not properly supported. Under the current circumstances, when providing a loan to a related party, at the very beginning of the transaction, it is crucial to take into account what loan amount the debtor would have obtained from an unrelated creditor, solely based on their own financial health: excessive debt financing might be viewed as form of a capital contribution, and a portion of interest on the intra-group loans would thus not be tax-deductible.

Arm's-length interest rate

Because of the availability of market data, the comparable uncontrolled price method is the preferred method to determine an arm's length interest rate or interest. It is usually based on the debtor's credit rating and the yield (to maturity) of comparable publicly traded instruments, usually bonds. However, the current volatility of the financial market makes predictions difficult. On one hand, the central banks' reference rates are decreasing and bank guarantees are being provided by states; on the other hand, yields on marketable bonds are growing considerably. This indicates that the financial markets also reflect the increased risk margins arising from the current situation in their interest rates. Future developments are therefore hard to estimate. However, we recommend monitoring the current market situation and reflecting it when setting interest rates on newly negotiated intra-group loans, and when renegotiating/repricing the existing ones.

Arm’s-length terms and conditions

The uncertainty on the financial markets also affects the terms and conditions of the loans being negotiated. Generally, maturities are getting shorter for newly issued bonds, and more short-term and less long-term financing is expected in the market. What’s more, multinational groups are postponing the instalments or extending the maturities of their existing loans. Hence, it is important to watch whether new conditions are still compatible with conditions that may be expected for unrelated parties.

We recommend supporting intra-group financial transactions with transfer pricing documentation that complies with the OECD’s new guidance and is supported by a comparability (benchmarking) analysis based on current data. It should also contain a consideration as to whether the total amount of intra-group loans may still be considered reasonable for the given sector.

Residence of foreigners after the state of emergency

During the state of emergency, the Asylum and Migration Policy Section of the Ministry of Internal Affairs, in charge of the foreign nationals agenda, limited its activity to essential matters concerning the residence of foreigners. How is it operating now?


Barbora Cvinerová
bcvinerova@kpmg.cz


Markéta Čurdová
kpmg@kpmg.cz

The office has not yet resumed its standard operation. An official instruction by the Ministry of Internal Affairs has set a two-month transitional period for the office, from 18 May to 16 July 2020. In this period, some changes introduced during the state of emergency will remain valid, mainly to limit the frequency of foreigners' personal visits to the office, and to ensure the safety of both officers and clients.

The office continues to prefer remote contact, i.e. all acts where a foreigner's personal presence is not necessary shall be made by mail or through a data box. It is currently not possible to make an appointment for acts by foreigners resident in the Czech Republic where this used to be common practice: mainly the filing of applications (e.g. for a long-term residence, permanent residence, and a temporary residence of a family member – EU citizen), reporting of changes, reporting of a loss or theft of a passport, etc. Since these acts usually carry the duty to appear in person and submit originals of passport or registry documents, this rule had to be modified: the condition to appear in person has been suspended, and the originals of documents only have to be submitted for inspection once the application has been granted - when biometric data from the applicant is collected or residency permits are picked up.

Foreign nationals may visit the office in person no earlier than on the 15th day after their arrival in the Czech Republic. Acts that the foreigners would otherwise have to undertake earlier under the law will not be deemed missed. Personal visits must be by appointment; only a few defined matters may be arranged without an appointment.

Another important change is a more tolerant approach as regards the deadlines for filing applications and submitting documents. The state of emergency is being viewed as an impediment independent of the foreigner's will, therefore if, during the state of emergency, an application for granting or extending a residency permit had not been filed within the statutory deadline, it should still be accepted; the office has also been more lenient as regards the timely meeting of reporting duties. If applications are filed late after the end of the state of emergency, the applicant must state a relevant reason for such a delay and upon request support it adequately.

The office is also more accommodating to foreigners as regards the now longer-than-usual deadlines for removing deficiencies in applications; this change reflects the foreigners' more difficult access to state authorities and institutions to obtain the required documents. Should they be unable to produce a required document within a deadline, foreigners may also still apply for an extension prior to the deadline's expiration.

Employee protection against employer's insolvency reinstated

The protection of employees against their employer's insolvency is not new in the Czech system of law. However, with the adoption of 'Lex Covid' in connection with the coronavirus pandemic, it had been temporarily taken away: employees lost the possibility to file for their employer's insolvency, a prerequisite for claiming due wages from the Labour Office. The legislators have now adopted an act to remedy this.


Romana Szuťányi
kpmg@kpmg.cz


Václav Bělohoubek
kpmg@kpmg.cz

Under Act No. 118/2000, on the protection of employees in the event of their employer's insolvency, employees may apply for their due wages to be paid to them by the Labour Office. To be able to do so, two conditions have to have been met simultaneously: the employer has to have failed to pay wages to the employee in a due and timely manner; and the employee has to have filed an insolvency petition against the employer (or a moratorium before initiating insolvency proceedings has to have been declared for the employer).

From the end of April, this became far more complicated for employees through the adoption of Lex Covid: under this rule aiming to protect debtors, insolvency petitions filed by creditors between 24 April and 31 August 2020 were to be disregarded. The legislators thus made it impossible for employees to effectively file for their employer's insolvency and thus to 'activate' their insolvency. In practice, this led to situations where while the employer was in fact insolvent and did not pay wages to employees, the employees still could not access support from the Labour Office as the conditions stipulated by the Act on Employee Protection were not formally met (for the purposes of the act, the employer was not yet in insolvency).

This deficiency was removed on 19 May 2020 by Act No. 248/2020, on certain measures to mitigate the impact of the coronavirus SARS CoV-2 pandemic as regards the protection of employees in the event of their employer's insolvency. The act stipulates that, for the purposes of Act No. 118/2000, if an employer fails to settle wages due to employees, they shall be considered in insolvency from the date the Labour Office receives a resolution from the insolvency court disregarding an insolvency petition filed by a creditor (an employee) against them.

This means that while an insolvency petition filed between 24 April and 31 August 2020 shall still be disregarded, employees to whom the employer did not pay wages may now again apply to the Labour Office to settle the due wages, based on the insolvency court's resolution to that effect.
Employers will still be obligated to refund the Labour Office the money thus paid, within 15 days from receiving a written request. In this respect, the act also reflects the current circumstances as it stipulates that the Labour Office shall not make this request before 1 December 2020.

Under the current economic circumstances caused by the coronavirus pandemic, it is certainly appropriate to return to employees an adequate protection against their employer's insolvency, which had been taken away from them. Employers should proceed prudently in this respect: by failing to settle their wage obligations to their employees, they run the risk that employees may file an insolvency petition against them, and then terminate their employment with immediate effect only to be entitled to wage compensation corresponding to the length of their notice period (even if the employer is in fact not insolvent). Employers should therefore carefully consider their options to save wage expenses while not risking the complications outlined above.

Detailed guidance on consent under GDPR

At the beginning of May 2020, the European Data Protection Board (formerly the Article 29 Working Party) issued new guidelines on obtaining and proving consent with personal data processing from data subjects, supplementing the existing Article 29 Working Party opinions on consent, which remain relevant to the extent that they are consistent with the General Data Protection Regulation (GDPR).

Ladislav Karas
lkaras@kpmg.cz

Kateřina Randlová
kpmg@kpmg.cz

Consent is one of the six possible legal bases for personal data processing. Under the GDPR, consent is understood to be a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement to the processing of personal data relating to them.

The EDPB emphasises that consent that is really freely given may not be conditional on the provision of access to contractual performance. Consent that cannot be treated as freely given is, e.g., a mobile app for photo editing requiring for its proper functioning that users activate their GPS tracking device and give their consent with personal data processing for marketing purposes. GPS tracking and personal data processing for marketing purposes are not essential functions for the operation of the given application. Similarly, consent may not be included in general terms and conditions whose wording cannot generally be affected by the customer in any way.

Personal data processing is possible only based on a data subject's unambiguous expression of will indicating that the data subject agrees with processing to a given extent. Such an expression of will can be demonstrated by ticking the 'I agree' box or by swiping a bar on a touch screen if it is clear that the motion in question signifies agreement to a specific request. The EDPB also draws attention to the fact that e.g. the scrolling down through a website cannot be considered as giving consent, since such an activity would be hard to distinguish from a user's regular activities. Furthermore, in such a case, it would be difficult to provide a way for the user to withdraw consent in a manner that is as easy as granting it, which is one of the requirements stipulated by the GDPR.

The EDPB also points out that consent must be properly informed, i.e. the data subject must be aware of the scope and the purpose for which processing will be carried out as well as of the manner in which the subject may withdraw their consent. GDPR does not prescribe a specific form to fulfil this information duty, so it may involve oral or written notifications, or audio or audio-visual messages. Personal data controllers must ensure that the provided information be comprehensible for an average individual and not just lawyers. The EDPB explicitly states that the information should be free of any legal jargon.

The EDPB also dealt with the imbalance of powers in personal data processing. It does not recommend processing personal data based on consent e.g. in the context of labour-law/employment relationships, as employers can hardly prove that consent has been given by employees freely and without fear that their refusal may have repercussions. The EDPB summarises that processing based on consent is not unfeasible in such cases, but is very problematic and should thus occur only in exceptional cases.

The guidance also discusses other specific cases, such as when it is necessary to obtain explicit consent, the issue of processing of the personal data of minors, or processing for research purposes.

Refunding undisputed retained excess VAT deduction confirmed by CJEU

In a case involving a Czech entity, the Court of Justice of the EU (CJEU) confirmed that EU law does not preclude refunding an undisputed portion of a retained excess VAT deduction, under certain conditions. This should also be reflected by an advance for a refund of an excess deduction, to be introduced by the amendment to the Tax Procedure Code following the recent Constitutional Court judgement.


Jana Fuksová
jfuksova@kpmg.cz


Filip Morcinek
fmorcinek@kpmg.cz

The issue of refunding an undisputed portion of excess VAT deduction went through turbulent developments: starting at the Regional Court in Ostrava, through the Supreme Administrative Court (SAC), and ending with the Constitutional Court. The Constitutional Court concluded that retaining an undisputed portion of an excess deduction was an unconstitutional infringement on ownership rights. In the court's opinion, the absence of regulation providing for the possibility to issue a partial payment order does not prevent such an order from being issued. Legislators have responded to this by preparing an amendment to the Tax Procedure Code introducing an advance for a refund of an excess tax deduction. Because of a prejudicial question referred by the SAC in the Agrobet case (C-446/18), namely whether refunding an excess tax deduction shall be conditional upon closing all proceedings regarding any taxable supplies in the taxable period, the issue was finally also dealt with by the CJEU.

The CJEU concluded that the impossibility to refund an undisputed portion of an excess VAT deduction would be incompatible with the tax neutrality principle. The court also commented on the conditions under which a portion of an excess deduction is deemed undisputed. The court admitted that usually it will only be possible to determine the undisputed portion of an excess deduction during the course of a tax inspection. The tax administrator must ensure, firstly, that their suspicions, should they prove valid, will not affect the portion of the excess deduction that seems undisputed, and, secondly, that they will not extend the scope of the inspection to all or some supplies not originally covered by it. The taxpayer must get the chance to prove that a part of the excess deduction is undisputed, and the tax administrator must get the chance to decide on such portion. The CJEU also opined against 'cherry-picking' individual deductions – an undisputed portion of a deduction is only relevant where an excess deduction is reported for the whole taxable period.

The CJEU's conclusions have set the limits for refunding an undisputed portion of a retained excess deduction, and they will be crucial for the practical application of the new concept – an advance for a tax refund, which is to be introduced by the amendment to the Tax Procedure Code, currently in preparation.

SAC: chaining of tax losses inadmissible

The Supreme Administrative Court (SAC) has dealt with whether it is lawful to repeatedly extend the deadline for assessing tax, which in the event of repeatedly incurred losses, might never end. The SAC held (8 Afs 58/2019-48) that such a 'chaining' of tax losses was inadmissible and vacated the judgment of the Regional Court in Pilsen that had approved of this practice.

Diana Marková
dmarkova@kpmg.cz

Iveta Košťálová
ikostalova@kpmg.cz

In the case in question, a company reported tax losses for the taxable periods of 2008 and 2009. In 2014, the tax administrator initiated the tax inspection of these two taxable periods; subsequently, in 2018, they also initiated a tax inspection of the last period in which the 2008 tax loss could be claimed. The tax administrator was of the opinion that the deadline for tax assessment shall be counted from the period to which the later of the tax losses related. The company considered the tax inspection unlawful, as it had been initiated after the expiry of the deadline for assessing tax for the period being inspected.

The issue thus was whether it was possible to further extend the deadline for assessing tax if, within the five years' deadline for carrying forward the loss, the company reports another tax loss. The court was to decide whether a tax inspection was initiated within the deadline for assessing tax, and whether it is admissible to 'link' or 'chain' tax losses so as to extend such a deadline.

The SAC did not agree with the interpretation applied by the tax administrator and the regional court that had approved of this practice. According to the SAC, such an interpretation is not explicitly supported by law and constitutes a disproportional infringement on the taxpayer's legal certainty. The SAC also held that any extension of the deadline for tax assessment may only be counted from the taxable period in which a tax loss had originated, not taxable periods concerning other tax losses (the deadline for assessing tax has to be assessed on a separate basis for each taxable period). The SAC also held that a tax loss assessed in any future taxable periods is irrelevant for determining the deadline for assessing tax for the previous years.

Unlike the previous regional court's judgement, the cited SAC judgement interprets Section 38r(2) of the Income Tax Act in favour of taxpayers as regards the deadline for assessing tax.

Existence of a subsidiary not necessarily constituting a VAT fixed establishment

The Court of Justice of the EU held that the mere existence of a subsidiary does not constitute a fixed establishment for VAT purposes, and that third parties are not required to examine contractual relationships between a parent and a subsidiary.

Martin Krapinec
mkrapinec@kpmg.cz

Veronika Šlapáková
vslapakova@kpmg.cz
+420 222 123 354

Dong Yang, a Polish company, had a contract with LG Korea, a Korean company, to whom they provided the assembly of printed circuit boards. The materials and components were supplied to Dong Yang by a subsidiary of LG Korea, LG Poland. The assembled products were delivered by Dong Yang back to LG Poland. Dong Yang invoiced the services provided to LG Korea without Polish VAT, assuming that the place of supply was the registered office of the service recipient, i.e. Korea. However, the Polish tax administrator believed that the services should be subject to Polish VAT, since LG Poland was an establishment of LG Korea and the services were provided to that establishment.

The Polish administrative court referred two prejudicial questions to the CJEU. First, it asked whether a parent company established outside the EU has a VAT fixed establishment merely because it has a subsidiary in Poland. The CJEU held that a subsidiary may in fact constitute an establishment of a non-EU parent company (for VAT purposes). However, such an establishment must have a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs. The CJEU further held that to determine the existence of a VAT establishment, it is not possible to consider solely the legal status of the entity concerned, but also to assess the economic and commercial realities. The CJEU thus held that the mere existence of a subsidiary in an EU member state does not constitute a non-EU parent company's fixed establishment.

The second question concerned the extent to which a supplier of a service is required to examine the contractual relationships of their customer. The CJEU held that neither the VAT Directive nor Implementing Regulation No. 282/11, laying down the criteria for determining a fixed establishment, imply that a supplier of services is required to examine the contractual relationships between a non-EU parent company and its subsidiary in an EU member state. Dong Yang was thus under no duty to examine the contractual relationships between LG Poland and LG Korea, and from the mere existence of LG Poland could not have deduced that LG Korea had a fixed establishment in Poland for VAT purposes.

Who is liable to pay VAT upon imports – the declarant, or the goods' owner?

The Supreme Administrative Court (SAC) held that the customs declarant, i.e. the 'regime holder' is liable to pay tax upon the import of goods from a non-EU country. In the court's opinion, by lodging the customs declaration, such an entity expresses their will for the goods to be released to a certain customs regime, therefore knowingly undertaking to meet the related obligations.

Tomáš Havel
thavel@kpmg.cz

Michaela Sobotková
kpmg@kpmg.cz

In the case in question (2 Afs 133/2018 – 38), WNE-CZ, s.r.o. importing goods from China was stated as the customs declarant and goods recipient in the single administrative document (SAD), and the goods were cleared for free circulation on its behalf. However, some of the goods were imported for WEBERA, s.r.o. On this part of the imported goods, WNE-CZ, s.r.o. did not pay any tax on import, stating that the goods were not intended for its economic activity, and, moreover, were owned by WEBERA, s.r.o.

The SAC first stated that the wording of neither the VAT Act nor of the VAT Directive directly defines who is to be the person on whose behalf the goods are released to a customs regime of free circulation upon import. The court, however, also held that the Czech legislators had identified the person on whose behalf the goods were released for free circulation as the person liable to pay VAT upon the import of the goods so released. It further follows from the VAT Act together with the Customs Code that the person on whose behalf the goods are released to a certain customs regime should be the declarant, since by lodging a customs declaration they express their will for the goods to be released to a certain customs regime, therefore knowingly undertaking to meet the related obligations (such as payment of customs duties).

Finally, the SAC held that the ownership of the goods being imported is irrelevant for determining the taxable person for the purposes of the VAT Act.

Case law

Constitutional Court deals with exchange rates upon acquisition of securities

The Constitutional Court (CC) dealt with a taxpayer's complaint regarding the conversion (to Czech currency) of the acquisition cost of securities whose sale took place in a different taxable period than the acquisition. The CC confirmed the correctness of the interpretation methods applied by the Supreme Administrative Court (SAC).

Mária Marhefková
mmarhefkova@kpmg.cz

Iva Krákorová
ikrakorova@kpmg.cz

The crucial issue was whether a purchase of securities in a foreign currency in a previous taxable period shall be converted to Czech crowns using the fixed exchange rate announced by the General Financial Directorate (GFD) for the year in which securities are being sold, or for the year in which they were acquired.

In decision No. 2 Afs. 4/2019 -38, the SAC agreed with the approach applied by the tax administrator. The SAC stated that while the Income Tax Act gives taxpayers who do not keep accounting books the option to choose from two alternative conversion rates (a fixed exchange rate announced by the GFD for the taxable period and a foreign exchange market rate applied pursuant to the Accounting Act), it does not allow them to choose the manner of determining the point in time of the valuation of expenses (cost) or income (proceeds). To convert the expense or income to Czech currency, it is always necessary to apply the exchange rate valid for the period in which the accounting transaction took place: i.e., for expenses, the exchange rate valid for the period when the purchase took place, and for income, the exchange rate valid for the year in which the sale took place.

The taxpayer (complainant) did not accept the SAC's opinion and filed a constitutional complaint in the matter, demanding the application of the in dubio pro libertate principle, meaning that where there are several possible interpretations of a public law rule, it is necessary to choose the one that does not infringe on an individual's basic rights or freedoms, or does so only as little as possible.

The CC held (IV. ÚS 563/20) that in the case in question there was no room for applying the mentioned principle, as the situation did not involve several comparably conclusive interpretation alternatives. In the CC's opinion, the administrative courts clearly explained the legal regulation in the proceedings, giving the CC no reason to interfere with their interpretation of a sub-constitutional law. At the same time, the CC noted that it was impossible to make a general decision whether it would be more advantageous for the taxpayer (in the meaning of lower tax liability) to apply the annual rate announced for the precedent or the subsequent taxable period. The advantageousness or disadvantageousness depends on the actual values of the exchange rates in the given years; therefore it is impossible to determine which of the interpretations would be the one less infringing on an individual's basic rights. The CC thus dismissed the complaint.

CJEU: interest on retained excess VAT deduction not to equal REPO rate

The Court of Justice of the EU (CJEU) answered a prejudicial question concerning a Hungarian company claiming interest on a retained excess VAT deduction from its local tax administrators. The CJEU held that the calculation and amount of such interest should reflect the costs incurred by the taxpayer to secure the respective amount, for instance by borrowing it, for the time the excess deduction had been retained.

Martin Krapinec
mkrapinec@kpmg.cz

Dominik Kovář
dkovar@kpmg.cz

In this case, Sole-Mizo, a Hungarian company, claimed interest on an excess VAT deduction that had arisen under the Hungarian VAT Act, which was then held by the CJEU as contrary to the VAT Directive. Sole-Mizo requested the Hungarian tax administration pay default interest on the retained VAT deduction in the amount of twice the Hungarian central bank's base rate.

The Hungarian tax administration only granted the request in part, and paid interest equal to the current REPO rate, stating that they had applied another provision of the law to the case. The CJEU held that it was contrary to EU law to calculate the interest on a retained excess VAT deduction using a rate equal to the given state's central bank's base rate, as it is the rate at which banking intuitions borrow funds in the market, and not available to common consumers in the market.

The CJEU also held that EU law precludes setting interest at the level that would not compensate the devaluation of money in time (inflation effect) for the period from the moment the entitlement to default interest on an excess deduction arose to the moment it was paid.

News in brief, June 2020

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

Lenka Fialková
lfialkova@kpmg.cz

Václav Baňka
vbanka@kpmg.cz

DOMESTIC NEWS IN BRIEF

- In its third reading, the chamber of deputies passed a draft amendment to the Labour Code, implementing job-sharing options, new concept of holidays, and introducing significant changes to delivery rules and the posting of workers. The amendment should become effective in July 2020, but some changes will only be effective from January 2021.
- An amendment to the Act on Property Valuation was published in the Collection of Laws (no. 237/2020), introducing a definition of market value that had so far been missing and ensuring compliance with the current legal order. It also clarifies procedures for the preparation of price maps of building plots of land and introduces the valuation of fast-growing woody plants.
- An amendment to the Act on Consumer Protection was published under no. 238/2020 in the Collection of Laws. Effective from 1 July 2020, it implements the EU directives that aim to strengthen the confidence of consumers through faster, more active and more thorough enforcement of adherence to consumer protection rules, enhance consumer protection legislation harmonisation, and create conditions for effective cooperation in enforcement of adherence to legal regulations among appropriate supervisory bodies.
- Notice of the Ministry of Labour and Social Affairs No. 252/2020 was published in the Collection of Laws, stipulating the amount equal to 50% of the average monthly wage in the national economy for the purpose of setting a minimum subsistence allowance, and the amounts equal to 50% and 25% of the average monthly wage in the national economy for the purpose of setting state social benefits.
- Effective from 11 May 2020, the CNB Bank Board again decreased interest rates: the two-week repo rate to 0.25% and Lombard rate to 1.00%; the discount rate remained at 0.05%, the reduced level set on 27 March 2020. A two-week repo rate of 2.00% shall be used to determine default interest for the first half of 2020.
- The GFD published information on the tax deductibility of expenses incurred for mandatory COVID-19 tests for both employers and the self-employed.
- The chamber of deputies approved a governmental draft amendment to the Act on Compensation Bonus, having rejected the senate's amending proposal requiring a change in the financing of compensation bonuses (i.e. proposing that compensation bonuses be paid out solely from the state budget). According to the Ministry of Finance's original proposal, as in the case of the twenty-five thousand for the self-employed persons, aid will also be paid out from the budgets of regions and municipalities, similarly as tax bonuses relating to income tax on employment pursuant to the Act on Allocation of Taxes to Public Budgets. The compensation bonus will thus also apply to limited liability companies with a maximum of two members.
- On a fast-track basis, the chamber of deputies passed an amendment to the Tax Procedure Code. The amendment should help digitalise the tax administration and change the system of sanctions and interest. It also introduces a new instrument – a waiver of the penalty for a late tax assertion, enables a partial refund of excess VAT deductions in form of an advance, and regulates filings via prescribed forms in the administration of taxes.
- In its first reading, the chamber of deputies approved the abolition of immovable property acquisition tax and related changes to personal income tax. The second and third reading are yet to take place, during which

amending proposals are likely to occur.

- The Ministry of Finance submitted to the government a proposal of tax changes effective from 2021. The tax package contains, among other things, monetary contributions for meals; the cancellation of exemption of interest income generated by non-residents from bonds issued abroad by the taxpayer with their registered office in the CR; an option for local self-governments to determine a local coefficient for individual parts of a municipality; electromobility support; gradual increase in excise duty rates applicable to tobacco products; and the introduction of a greater number of zones/ranges to determine security deposits for distributors of spirits according to the volume of distributed spirits.
- The financial administration again draws attention to the fact that the compensation bonus cannot usually be provided to those self-employed persons who are employed and as a result of such employment participate in the sickness insurance scheme. Employees performing pedagogical activities form an exception, as their participation in sickness insurance due to employment does not constitute an obstacle to being entitled to the compensation bonus.

FOREIGN NEWS IN BRIEF

- The European Commission recently updated a notice to stakeholders regarding the VAT consequences of the withdrawal of the United Kingdom from the European Union. The Withdrawal Agreement introduced a transitional period until 31 December 2020, and the notice discusses scenarios for transactions starting within the transitional period but ending after it, for transactions performed as of the end of the transitional period, and furthermore for transactions relating to Northern Ireland.
- The OECD's Forum on Tax Administration (FTA) in co-operation with the Intra-European Organisation of Tax Administrations (IOTA) and the Inter-American Centre of Tax Administrations (CIAT) outlines how tax administrations can prepare for the potentially prolonged, uncertain and complex recovery period from the COVID-19 crisis. The report highlights that significant benefit can arise from early business restoration planning to help identify the main challenges and opportunities for both tax administrations and taxpayers.

LinkedIn | Twitter | Facebook | Instagram

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