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Tax & Legal

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

October 2021

Obsah

News in brief, October 2021

Editorial

The parliamentary elections are behind us. Most likely, employers are now curious whether social security payments will drop by two percentage points as promised by the winner SPOLU. Taxpayers are wondering whether the plan of the Pirates and Mayors' political alliance to valorise taxpayer discounts will come to fruition. Among other things, this coalition also promised to reduce tax exemptions.

The current ANO cabinet, which will probably end up in the opposition, promised not to raise taxes, to abolish tax exemptions and increase the mandatory limit for VAT registration to CZK two million. In its campaign, the Freedom and Direct Democracy party (SPD) promoted VAT payments from paid invoices only. Those plans will probably not come true now, although you never know in politics.

Finally, I would like to invite you to our traditional Tax and Legal Forum, where we will present a summary of the most important new developments from the world of tax and law for the coming year. I myself wonder whether some of the pre-election promises will become reality in 2022. We will inform you about registration for the conference in due course.

Looking forward to seeing you on 8 December 2021!

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Implementation of DAC 7 in Czech legislation

DAC 7 introduces a new reporting obligation for operators of platforms – software allowing sellers and users to connect. The Ministry of Finance has prepared a bill to implement the directive, which is currently going through the comment procedure. The new reporting obligation should apply from 1 January 2023.

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The seventh amendment to the EU Directive on Administrative Cooperation in the field of taxation (DAC 7), adopted by the European Council on 22 March 2021, is to be implemented by member states by 31 January 2022. The new rules are to apply from 1 January 2023, with a later effective date (extended by one year) only for Article 12a regulating joint audits. The directive aims to ensure a level playing field for all digital platforms and to prevent unfair competition.

The new reporting obligation will apply to platforms that facilitate carrying out selected activities for consideration. Four areas of reportable activities have been defined:

- provision of immovable property
- provision of means of transport
- provision of personal services
- sales of goods.

Reportable activities concerning immovable property include not only rentals, but also the provision of accommodation and other manners of providing immovable property or its part. A personal service means time- or task-based work performed by an individual (natural person), such as a transportation service provided by a driver; this distinguishes this transportation service from the provision of means of transport.

A platform is defined as software allowing sellers to be connected to other users for the purpose of carrying out a reportable activity for such users. A platform operator may be a legal person or an entity without a legal personality (though not an individual) that contracts with platform users (sellers) to make available to them all or part of the platform allowing them to connect with the users of the reportable activities. Sellers are defined as platform users who carry out or intend to carry out a reportable activity. Some platforms and sellers are excluded from the reporting obligation, subject to meeting stipulated conditions.

Reportable information includes selected information about the platform, its operator, sellers, and effected transactions. The information shall be reported by 31 January of the year following the year being reported; the first-time reporting, for year 2023, shall take place by 31 January 2024.

Operators shall report information on their activities in the entire EU in a single elected EU state. Information thus obtained shall be shared with the member states concerned. This will provide tax administrations across the EU with information on transactions effected through digital platforms and lead to the identification of transactions that might otherwise not be declared in tax returns. Although the reporting obligation itself will only apply to

platform operators, indirectly, it will also affect all who are commercially active on the platforms.

Under the currently proposed wording, if a platform operator breaches their reporting obligations, they may face a fine of up to EUR 60,000 for each case of breach. The total fine may thus be considerably higher, depending on the number of infractions.

Subsidies

National Recovery Plan offers new support opportunities

To revive the Czech economy after the COVID-19 pandemic, the Ministry of Industry and Trade has prepared the National Recovery Plan, a set of reforms and investments aiming to support Czech businesses and to reignite and modernise the Czech economy.

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The National Recovery Plan will be implemented by the Czech Republic from the European Recovery and Resilience Facility. The NRP primarily aims to revive the domestic economy after the negative impacts of the COVID-19 pandemic, accelerate the digital and green transition, and strengthen the productivity, competitiveness and resilience of the economy. In total, around CZK 180 billion will be available for areas such as digitisation, sustainable energy and safe transport, decarbonisation, clean mobility, etc. The NRP consists of the six following pillars:

- digital transformation
- physical infrastructure and green transition research, development, and innovation
- institutions, regulation, and business support in response to COVID-19 education and labour market
- public health and resilience.

The National Recovery Plan has already been approved by the government and the European Commission, and the first calls for subsidies are now expected to be announced. **Calls for the installation of photovoltaic power plants, water saving in enterprises, and circular economies in enterprises are expected to be announced during October**; **calls to participate in projects focusing on electromobility, digital high-capacity networks and digital enterprises** towards the end of this year.

All the above calls should also be available to large enterprises. Moreover, projects can also be implemented in the territory of the capital city of Prague, except for projects under the Digital Enterprise call.

We will keep you informed about the announcement of the individual calls.

Tips and tricks

Need more time to respond to tax authorities? Apply for deadline extension

Imagine a tax administrator's notice arrives in your data box. The deadline is insufficient, and you are rightly concerned that you will not be able to prepare your standpoint and collect the necessary documents in time. The Tax Procedure Code takes these situations into account and allows you to extend the deadline. How does the extension of deadlines set by the tax authority work in practice?

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If the deadline set by the tax administrator for proving certain facts or providing selected supporting documentation is insufficient, taxpayers can apply for an extension, and should do so without delay. The tax administrator is legally obliged to extend the deadline by no less than the period which remains, on the day when the application is filed, from the time limit the extension of which is requested. In practice, this means that if the taxpayer submits the extension application on the day they receive the tax administrator's notice, it will effectively extend the deadline to twice the original deadline.

Taxpayers are legally entitled to an extension of the deadline if it is their first request for an extension in the particular case. The period of extension the taxpayer may apply for is not limited by the above rule: the taxpayer may apply for an extension longer than the statutory one, but such an extension is not legally claimable and the result is entirely dependent on the tax administrator’s discretion. Similarly, the tax administrator may grant a repeated request for an extension, even though such an extension is no longer legally claimable.

However, deadlines may only be extended where they have been set by the tax administrator; those prescribed directly by the Tax Procedure Code or another tax law (such as the deadline for filing a tax return or the deadline for filing an appeal) may not be extended. The statutory deadline may only be extended where permitted by law.

There is no special form for this type of request. It is sufficient if it is clear who is making the request, to whom it is being submitted, and what the subject of the request is, i.e. until when the taxpayer is requesting an extension of the original deadline. Attention should be paid to a proper justification / statement of grounds of the application, in particular when requesting an extension beyond the statutory entitlement or when requesting an extension repeatedly.

The tax administrator may respond to the application by issuing a decision to extend the deadline. In practice, however, it often happens that the tax administrator does not decide on the request at all. Under the Tax Procedure Code, if the tax administrator does not issue a decision within 30 days of receiving the request, it means that the request has been granted. So, silence here means consent. It is nonetheless advisable to contact the tax administrator informally and confirm their position to avoid any further uncertainty.

An application for an extension of the deadline thus represents an effective and welcome procedural tool that can be used by taxpayers to satisfy the tax administrator's requirements properly and in time, without violating their duties. Please note that if a taxpayer decides to apply for an extension of the deadline in the course of proceedings before tax administrator, the tax administrator may not consider this request an obstruction and deny it, not even where an extension of the deadline would result in the expiry of the statutory deadline for assessing tax. But more on that another time.

Cookies and marketing calls only with prior consent

From 1 January 2022, an amendment to the Electronic Communications Act will allow obtaining and processing cookies only with provable user consent. The requirement to obtain consent will not apply to technical cookies. Similarly, it will be possible to contact the public by phone for marketing purposes only with the prior consent of the persons concerned.

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Cookies

Czech legislation on cookies (short text files that the visited websites save in the end device and that are then sent back to the websites when visited again, making it possible to keep track of the users' visits and behaviour on the web) is currently based on the opt-out principle, i.e. cookies can be obtained and processed without user consent until the user refuses this. This approach, however, is (and has been for several years) contrary to EU directives, which are based on the opposite, i.e. the opt-in principle, which allows cookies to be obtained and processed only with the user's explicit consent.

The current amendment to the Electronic Communications Act introduces the opt-in principle for cookies. Under the amendment, it will no longer suffice for e-shop and website operators to just inform the user of the processing of cookies and give them the possibility to refuse it. Now, they will have to obtain provable consent from the users as to the extent and purpose of processing cookies. Consent will not have to be obtained for technical cookies. In the context of the GDPR (in particular the obligation to inform pursuant to Art. 13 and Art. 14, and the requirement of voluntary and informed consent) operators' obligation to inform users of processing cookies should continue to apply, even though it has been left out from the wording of the amendment, probably due to redundancy.

The requirement of consent to the processing of cookies will not be fulfilled if e-shop or website operators obtain the consent using 'cookie walls', i.e. a setup that prevents access to the website or use of certain functions without consenting to cookies. The reason is that consent thus obtained (a rather common practice) cannot be considered voluntary. Similarly, the GDPR requirement that consent must be given by a specific indication of the individual's wishes shall not have been met if the box indicating the consent has already been pre-filled by the website or e-shop. Instead, any processing of cookies based on consent thus obtained will be contrary to the law.

Telemarketing

The amendment will also have a fundamental effect on call centre operators. Under the new rules, if the user of a particular phone number does not explicitly give consent to telemarketing, it means that they do not wish to be contacted by the call centre for marketing purposes. If this provision is breached, entrepreneurs may be facing a penalty up to the higher of CZK 50 million and 10% of their net turnover for the last completed accounting period.

The amendment will already enter into effect on 1 January 2022. We therefore recommend that you verify as soon as possible what types of cookies you process, to what extent, and whether you properly inform the user of their processing. If you process non-technical cookies without asking for user consent to the processing, you should

reset the way the cookies are processed so that they are obtained and processed only with the consent of the users of your website. The approach to telemarketing calls will also have to be reviewed. In view of the above, we also recommend carrying out an overall review of the personal data protection policy to ensure it complies with the requirements of the amendment to the Electronic Communications Act, and those of the GDPR.

Germany: New transfer pricing guidelines

Transfer pricing is a hot issue at a time when all finance ministries are searching for funds to cover their exorbitant budget deficits. The German Ministry of Finance has issued new transfer pricing guidelines (Verwaltungsgrundsätze Verrechnungspreise). Certain topics intersect with Czech guidelines and judicial practice.

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Below, we comment on selected new German guidelines in relation to the Czech environment:

- The definition of related parties has been extended to cover unrelated parties showing signs of a common business interest. This concept has already been outlined in the Czech Income Tax Act (a relation established predominantly for the purpose of reducing a tax base or increasing a tax loss) and has been the subject of numerous judicial decisions on marketing expenses.
- Under the new guidelines, the German tax authorities should focus not only on price assessment (i.e. quantitative aspects) but also on whether the agreed conditions of a transaction are in line with the arm's length conditions (i.e. qualitative aspects). The question is whether this approach will also be applied to permanent establishments. Here we can expect to see an increase in disputes over what arm's length conditions are.
- An interesting approach has been proposed for loss-making routine entities, i.e. contract manufactures or distributors. Here, a test of cumulative profits over a five-year period is recommended. The test can be applied prospectively or retrospectively, depending on the circumstances of the case.

The guidelines are comprehensive and address also other specific issues such as intangible assets or ☒nancial transactions. Given the importance of our western neighbour, it is to be expected that some of the new ideas and approaches contained in the guidelines will sooner or later make their way into our environment.

SAC yet again stands up for taxpayers

The Supreme Administrative Court (SAC) has confirmed that a payment to an unpublished bank account does not in itself give rise to the taxable supply recipient's liability for unpaid VAT. It is always necessary to also prove that the taxpayer knew or could have known that the tax would not be properly paid.

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Case No. 2 Afs 382/2019-33 involved a situation where the tax administrator demanded a taxpayer to pay VAT that was not paid by the supplier. According to the tax administrator, a liability for unpaid VAT had arisen as the taxpayer had made the payment for the received taxable supply to the supplier's Czech bank account that had not been published by the tax administrator in the online VAT register.

The Regional Court in Ostrava took into account earlier judgments in which the SAC denied a supply recipient's liability for VAT not paid by the supplier solely on the grounds that the payment for the taxable supply had been made to a bank account in Slovakia. The SAC then applied these conclusions also to situations where the payment for the taxable supply is made to a Czech bank account not officially published by the tax administrator. The SAC therefore dismissed the tax administrator's cassation complaint.

According to the SAC, the fact that Section 109(2)(c) of the VAT Act was fulfilled cannot in itself be considered the absence of the taxpayer's good faith. For a liability for unpaid VAT to originate, the knowledge test must also have been met, i.e. that the supply recipient knew or could have known at the time of making the payment that VAT would not be properly paid. The fact that the payment was made to an account other than the one published by the tax administrator does not in itself mean that the taxpayer could not have been in good faith that the tax would be properly paid by the supplier.

The SAC emphasised that business practice varies and therefore the tax administrator should, in each individual case, carefully assess the reasons why the payment was made to a bank account other than a published one, and prove the absence of a taxpayer's good faith. Otherwise, a liability would arise without the taxpayer's fault, which is prohibited by CJEU case law. The SAC thus fully agreed with the conclusions of the Regional Court in Ostrava and judged the tax administrator's cassation complaint to be unfounded.

Case law

SAC: exchange of shares upon capital increase from own sources interrupts time test

The Supreme Administrative Court (SAC) has unambiguously concluded that the time test for exempting proceeds from the sale of securities from personal income tax is considered interrupted by an exchange of shares resulting from an increase in the registered capital from equity/own resources. This also applies to ‘stamping’, whereby the nominal value of existing shares is increased. The Court thus ruled despite the argument of common administrative practice.

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In the case in question, a taxpayer owned shares in a company whose general meeting decided to increase the registered capital from its own resources, and to exchange the existing shares for new ones. Two years after the transaction was carried out, the taxpayer sold the shares. The taxpayer first taxed the proceeds from the sale of the shares in the regular tax return, but then reconsidered this approach and filed an additional tax return. In it, the proceeds from the sale were treated as tax exempt: in the taxpayer’s opinion, the ‘time test’ had been met and had not been interrupted by the exchange of shares.

The case then went before the SAC. The SAC confirmed the tax administrator's view that the time test had been interrupted and that the proceeds from the sale of the shares had to be taxed. In the SAC’s opinion, the linguistic interpretation of the relevant provision does not allow for exempting the income. The SAC stated that the law expressly provides for an exception where the time test is not interrupted, i.e. an exchange of shares by the issuer for other shares of the same total nominal value. It can thus be deduced that since the law explicitly links the non-interruption of the time test solely and exclusively to a specific situation (i.e. an exchange of shares of the same total nominal value), the legislators' intentions clearly were that the for all other share exchanges, the time test should be interrupted. Otherwise, according to the SAS, it would not make sense to stipulate a special exception.

The SAC further stated that for the purposes of the interruption of the time test, there is no reason to distinguish between economically essentially identical procedures for increasing the nominal value of shares; therefore ‘stamping,’ whereby the value of the shares changes although shareholders do not formally acquire new shares, should be treated the same. As both of the above also involve an increase in the registered capital, according to the SAC, the condition that shares shall be exchanged by the issuer for shares of the same total nominal value is not met, therefore the time test is interrupted.

The SAC dis not accept the arguments referring to the 2008 conclusion of the Coordination Committee and to tax authorities’ practice. As to the minutes of the Coordination Committee, the SAC emphasised that they can only establish taxpayers’ legitimate expectations if they are sufficiently reasoned, not self-contradictory or against the wording and meaning of the law.

To conclude: in practice, the time test is not interrupted by an exchange of shares solely if the total value of the newly issued shares is the same as the total nominal value of the original shares (i.e. regardless of whether the number of the newly issued shares is the same or different from the number of the original shares). An example of such a situation can be a demerger or merger of shares. In contrast, where the exchange of shares relates to a change in the amount of the registered capital or, more precisely, the total nominal value of the shares, the non-interruption of the time test for tax exemption cannot be applied.

Case law

Beneficial owner of interest and silent partnership

The Supreme Administrative Court dealt with beneficial ownership of interest in the context of the existence of a silent partnership agreement.

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In the case in question, a Czech taxpayer paid interest to a company based in the Netherlands. The interest was paid under a loan agreement concluded between the entities. The Czech payer of interest assessed the situation as meeting the conditions for the application of the double taxation treaty concluded between the Czech Republic and the Netherlands.

However, in the course of tax proceedings, the tax administrator obtained (from the Police of the Czech Republic) a silent partnership agreement allegedly concluded between the Netherlands-based company and a third company based on the Isle of Man as a silent partner. In the tax administrator's opinion, the right to the interest thus did not only belong to the Netherlands-based company, but to its silent partner, the legal owner of the income. According to the tax administrator, profits were allocated to both partners: in this case, 99% to the Isle of Man company, and only 1% to the Netherlands-based company. At the same time, the silent partner's profits were not subject to Dutch income tax.

According to the tax administrator, the Isle of Man-based company was the beneficial owner, even though the interest was paid to the Netherlands-based company under a loan agreement. The SAC judgement does not provide any detailed statement of the grounds for this conclusion; it merely states that the SAC opinion is consistent with that of the tax administrator and the regional court.

The SAC judgment also dealt with many other procedural issues, e.g. a tax inspection and its closing, international request for information, etc.

SAC: right to deduct input VAT always to be proved by the taxpayer

In a case involving an entity providing both taxable health services and services exempted from tax without the right to deduct, the Supreme Administrative Court (SAC) dealt with proving the link between the right to deduct and a specific output supply (2 Afs 232/2020-70).The SAC also touched on acquisitions of turnkey tangible fixed assets, departing from the standpoint of the General Financial Directorate (GFD).

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The Kolín Hospital mainly provides health services exempt from VAT without the right to deduct, but also some taxable supplies subject to output VAT. The hospital deducted VAT in a reduced amount in relation to individual hospital centres that generated both VAT-exempt and taxable supplies.

The tax administrator rejected the right to deduct for medical supplies, movable property and other operational – technical costs on the grounds that, in their opinion, the hospital failed to prove a direct link between these purchases and specific taxable outputs; meaning that the hospital failed to prove that the costs were not used solely for supplies tax exempt without the right to deduct.

The hospital argued that it was not technically possible to determine, e.g. for a pack of needles, which particular needle was used for VAT-exempt supplies and which one for taxable supplies. In other words, the tax administrator was making it impossible for the hospital to deduct VAT for supplies where it could not be proven to what extent they were used for a specific output supply.

In view of the considerable degree of uncertainty, preliminary questions were formulated to obtain guidance in the matter. However, the SAC considered the questions submitted to be unfounded, and confirmed that in the case in question, the burden of proof as to the right to deduct lies with the taxpayer.

The judgment also dealt with the acquisition of turnkey fixed assets. According to the GFD’s information on changes to the rules for claiming the right to deduct VAT from 1 April 2011, assets that have been built or created for a taxpayer by another entity where the taxpayer was not involved in their creation (as is the case of a turn-key construction by one supplier) shall not be considered internally produced by the taxpayer. Here, the SAC surprisingly departed from the GFD's view and concluded that acquired turnkey tangible fixed assets may be considered having been internally produced.

Transfer pricing: otherwise related persons and arm's length price

The Supreme Administrative Court (SAC) has recently closed several cases dealing with the assessment of otherwise related persons - a concept from the area of transfer prices between group companies.

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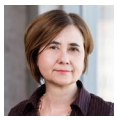
Referring to previous case law, in its judgment 2 Afs 148/2020-37 the SAC emphasised that in the application of the Income Tax Act provisions on otherwise related persons, the mere existence of a chain is crucial, and it is not necessary to examine the subjective aspect of the matter; it is thus sufficient that the taxpayer benefits from the chain by claiming the amount (in this case for advertising) as a tax-deductible expense.

The SAC further dealt with the definition of an arm's length price. Referring to previous case law, the SAC stressed that this is the price applied between independent entities or, if no such data exists or is not available, a hypothetical estimate based on logical and rational considerations and economic experience. A price in a transaction that is comparable to the transaction under review shall be used; if the transaction under review exhibits different parameters than the transaction from which the price is taken, the arm's length price must be adjusted accordingly.

The SAC also agreed with the arm's length price to be determined as a price invoiced to other advertising agencies or end clients for the same or a similar supply; in this case, a range shall be determined and the price most advantageous for the taxpayer shall be used, which is in line with relevant case law. The SAC also agreed that the cost for which a golf tournament can be held says nothing about the arm's length price of advertising at such a golf tournament.

News in brief, October 2021

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



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DOMESTIC NEWS IN BRIEF

- The Ministry of Finance has prepared changes to tax filings made via prescribed forms regarding:
  - income tax (e.g. inclusion of a long-term investment account and a tax credit for discontinued enforcement proceedings, extension of the table for claiming tax losses, update of instructions, examples and calculations, and introduction of a new attachment entitled Request to File Financial Statements in the Collection of Deeds as a result of an amendment to the Accounting Act)
  - real estate tax
  - road tax
  - customs authority competencies.
- A government decree on the general assessment base amount for 2020, the recalculation coefficient for adjusting the general assessment base for 2020, the reduction limits for determining the calculation base for 2022 and the basic amount of pension for 2022, and on increasing pensions in 2022 has been published in the Collection of Laws.
- An amendment to the VAT Act relating to e-commerce has been published in the Collection of Laws under No. 355/2021 Coll., in effect from 1 October 2021. Changes mainly concern sellers of goods effecting cross-border sales of goods to end consumers (e.g. e-shops), digital platforms or importers of goods from third countries.
- An amendment to the Act on Banks, which among others includes an amendment to the Act on Income Tax relating to the exemption of interest income from Eurobonds flowing to non-residents, has been published in the Collection of Laws under No. 353/2021 Coll.
- The CNB Banking Board has increased the two-week repo rate by 75 basis points to 1.50% while also increasing the Lombard rate to 2.50% and the discount rate to 0.50%. The new interest rates are effective from 1 October 2021.
- The representatives of the General Financial Directorate and the Slovak financial administration have signed a contract on joint procedures upon the exchange of information, continuing the established trend of the Czech ☒nancial administration strengthening its relations with the ☒nancial administrations of neighbouring countries.

FOREIGN NEWS IN BRIEF

- The Council of the EU has approved the draft wording of the directive on public country-by-country reporting. Reports of income tax payments by individual companies will have to be disclosed by corporate groups with a controlling company established inside or outside the EU with a consolidated turnover exceeding EUR 750 million. First reports will likely have to be submitted for the taxable period started on 1 January 2025.
- The European Commission has called on the Czech Republic to clarify the implementation of the rules on hybrid mismatches (ATAD 2). Hybrid mismatches may result in the non-taxation of income or the double deduction of expenses due to the difference in the legal qualification in two jurisdictions. If any issues are

not sufficiently clarified, proceedings leading to the fulfilment of the implementation duty will continue.
- Proposals for the Polish tax reform (the Polish Deal) include a proposition to introduce a minimum tax for large businesses that report tax losses or a profitability ratio below or equal to 1%. The tax rate would be 10% of the taxable base, which would be the sum of 4% of the value of revenues increased by selected items derived e.g. from interest or services for the benefit of related entities.
- A regular meeting of the EU member states' finance ministers has taken place in Luxembourg. The main point of discussion was a change to the regulation of insurance undertakings.

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