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News in brief, February 2021

Editorial

The pandemic has accelerated the ongoing change of our work and consumption habits, pushing us ever further into the digital sphere. This affects the world of tax especially in a cross border context. Cross-border home-office working creates risks of permanent establishments and dual residence of companies as well as in personal taxation.

Digitalisation and globalisation have led to important tax changes, with new taxes proposed, both nationally, such as the Czech Digital Service Tax, and regionally, such as the EU‘s digital levy, intended as an EU-own resource to support the EU’s plans to spend money on post-COVID 19 recovery.

The OECD‘s BEPS 2.0 proposals present a profound reshaping of the international tax system, shifting taxing rights mainly towards ‘market’ countries, and introducing measures to ensure groups bear at least a minimum effective tax rate. If the OECD changes are implemented, we can expect a reversal of the recent trend of governments cutting corporate income tax rates. In fact, we are beginning to see that happen already with Joe Biden’s plans to increase the US rate from 21% to 28%, and the UK similarly looking at an increase from 19% to 24%. As the American baseball player Yogi Berra once observed, “the future ain’t what it used to be”.



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Waiver of VAT on COVID-19 vaccines, tests, and respirators

The Minister of Finance has decided to waive VAT on supplies of in-vitro diagnostic medical devices for COVID-19 testing and COVID-19 vaccinations. The decision shall be in effect from 16 December 2020 to 31 December 2022 and has been published in Financial Bulletin No. 35/2020. Moreover, the ministry decided to waive VAT on supplies of respirators and filtering half masks from 3 February 2021 to 3 April 2021.



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Both waiver decisions only apply to output VAT on supplies of goods where the duty to declare tax arises on the date of supply. These involve, e.g., local (national) sales but not acquisitions of goods from another member state or imports of goods where the duty to declare VAT also arises.

The waiver in effect from December 2020 only applies to vaccines against COVID-19 approved by the European Commission or the appropriate member state. For diagnostic devices, only those meeting the requirements prescribed by Directive 98/79/EC of the European Parliament and of the Council or Regulation (EU) 2017/746 and other EU regulations shall be subject to the VAT waiver.

Following the ministry's waiver decision of December 2020, the General Financial Directorate issued information explaining the waiver in more detail, for example, how the relevant tax document issued by the payer for the delivery of specific goods subject to the waiver should look. We recommend stating directly in the tax document that "VAT was waived by the Ministry of Finance", i.e. the tax document should for now no longer include information on the VAT rate and amount.

The decision in effect from 3 February 2021 waives VAT on the supplies of filtering half masks and respirators if these are intended by producers for the protection of users. Again, only those meeting the requirements of the above EU directives and other EU regulations shall be subject to the waiver. This means that this waiver does not apply to e.g. various types of masks sewn at home or commercial masks produced from cotton or other materials.

The entitlement to deduct input VAT remains in effect for the above supplies; however, output VAT will not be charged. Subsequently, customers will not be entitled to claim VAT deduction in respect of purchases of testing devices, vaccines or respirators from sellers.

For the sake of completeness, we draw attention to a previous decision of the Minister of Finance waiving VAT on gratuitous supplies of certain goods or gratuitous provisions of services for selected entities. However, this waiver was only in effect from 1 October 2020 to 31 December 2020 and its extension had not been approved at the date of this article's closing.

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If you are not certain of how to proceed with the waiver of VAT, how to issue the appropriate documentation, or how to declare such supplies of goods, please do not hesitate to contact us. We will be happy to help you.

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Subsidies

Third call to apply for COVID – Rent support

The COVID - Rent programme, partly compensating for rent-related expenses for selected retail outlets and facilities providing services, will open for the third time. The third call directly follows the previous call. Moreover, the deadline for submitting applications within the second call has been extended until 4 February 2021. The third call has been open since 5 February 2021 and will continue until 8 April 2021.



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As in the second call, applicants shall be entitled to compensation equal to 50% of rent paid for the relevant period from 1 September 2020 to 31 December 2020, with a maximum subsidy of CZK 10 million per each individual call per applicant.

Applicants entitled to support are facilities that were forced to close their operations due to the government's resolution of 23 December 2020. A key change is the extension of support to facilities that were not closed due to the government resolution (as they were granted an exception) but nonetheless reported a 66% decrease in sales for the fourth quarter of 2020 compared with the fourth quarter of 2019 as a result of the COVID-19-related measures. Applicants may include, e.g., flower shops.

The third call introduces simplifications upon the completion of applications: in particular, lessors' affidavits confirming the existence of lease relationships will no longer have to include officially verified signatures. Also, t**he lessor and the lessee being related parties shall no longer be an obstacle**; the only condition is that the applicant and the lessor are not an identical individual.

Considering our experience with previous calls, we recommend filing an application sufficiently in advance to avoid any technical problems due to possible system failures during the last days before the filing deadline.

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OECD on loss situation due to COVID

Lower levels of demand. Disruptions to supply chains. Increases in exceptional, nonrecurring operational costs. These are the key factors which have led to a loss situation faced by many companies of multinational groups during the COVID-19 pandemic, irrespective of whether they are a limited risk or a fully fledged entity. What is the OECD's view regarding how entities should approach transfer pricing in light of these circumstances?



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The OECD issued its guidance on the COVID-19 pandemic and its transfer pricing implications. The document inter alia provides a multi-angle view on how loss-making entities should treat their losses. For taxpayers in the limited risk entity position, it is positive that the guidance refers to the approach of the OECD Guidelines, which state that: "simple or low risk functions in particular are not expected to generate losses for a long period of time". The guidance therefore holds open the possibility that simple or low risk functions may incur losses in the short run. To support this position, the guidance suggests that a robust comparability analysis should be performed to accurately delineate the transaction and assess whether the loss may be assigned to a given party.

The OECD also emphasises that the allocation of COVID-19-related losses should be linked to the actual allocation of functions and risks from current commercial or financial relations. The analysis should include a review of the pre-COVID-19 and post-COVID-19 functional and risk profile.

With regard to the allocation of exceptional and nonrecurring operational costs, the OECD states that such costs should be excluded from the net profit indicator. It is suggested that the exclusion of such exceptional costs must be done consistently at the level of the tested party and comparables to ensure a reliable outcome, noting that the availability of this information may be limited. In this respect, the guidance notes that an analysis of whether the given costs are actually of an exceptional or nonrecurring nature should be made. For example, many enterprises have implemented teleworking arrangements as a result of COVID-19, but these arrangements may become permanent and thus should not be considered exceptional, but as costs of usual operations.

Lastly, the guidance also explores whether it may happen in certain situations arising from the COVID-19 pandemic that the impacts of the pandemic will be borne by all contracting parties based on force majeure clauses included in a contract on an intra-group transaction. It concludes that while this possibility exists, it cannot be automatically assumed that just because an intercompany contract contains a force majeure clause, the pandemic will provide sufficient grounds to invoke it. Again, proper analysis is recommended to support that independent parties would proceed in a similar manner under similar circumstances.

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Amendment to VAT Act for 2021: Simplification not only for e-shops?

Are you offering your goods via e-shops? Shipping low-value consignments directly to end users also from countries outside the EU? Organising training seminars, concerts, trade fairs or sports events across the EU? Be on the alert and prepare yourself for changes introduced by an amendment to the VAT Act with planned effect from 1 July 2021.



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We already informed you about planned changes and updates to VAT in our June issue of the Tax and Legal Update. In this and the following issues of our monthly newsletter, we will provide you with more details about these significant changes, as they affect not only e-commerce.

The mini-one-stop-shop regime is currently used only for a limited scope of supplies involving electronically-rendered services, telecommunication services, and radio and TV broadcast services. The amendment significantly extends its scope also to other services provided to end users (e.g. tickets for cultural events and trade fairs, services associated with real property or the lease of means of transport), and to distance sales of goods and imports of low-value consignments.

This means, inter alia, that, e.g., e-shop operators will not have to register for VAT in all member states to which they dispatch their goods. Instead, they will have the option to collect VAT payable in one member state (the member state of consumption) via a mini-one-stop-shop, which is an electronic system that payers can access from the member state of their establishment to declare and settle their VAT liabilities relating to supplies subject to VAT in other member states.

The mini-one-stop-shop will operate under the following schemes: the union scheme, the non-union scheme and an import-one-stop-shop (IOSS), a new scheme for imports. Conditions for using the individual schemes may not seem easy to understand at first glance. For example, entities not established in the EU may in fact register for all the above schemes depending on the type of supply.

Entities having no establishment in the EU may use the union scheme to collect VAT on distance sales of goods within the EU, whereas the non-union scheme may be used by them for all services provided to European end users. Once they decide on a scheme, they must apply it consistently to all services thus provided. For example, service providers will not have to register for VAT at the place where the sports, cultural or other educational events for end users take place (e.g. trade fairs, exhibitions or concerts). This may significantly simplify their administrative arrangements.

A more detailed analysis of new VAT regulations for e-commerce can be found in the European Commission's Explanatory Notes. Their Czech translation is also available.

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When does entitlement to VAT deduction arise on provision of export insurance?

The Coordination Committee of the General Financial Directorate and the Chamber of Tax Advisors have discussed the entitlement to VAT deduction on insurance provided in connection with the export of goods to a third country. A few situations that may occur have been outlined, as well as their solutions.



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Insurance services are generally exempt from VAT without the entitlement to deduction. However, it is possible to claim VAT deduction in respect of insurance and certain financial services where the place of supply is located in a third (non-EU) country or where the supply directly relates to the export of goods. The paper submitted to the Coordination Committee discusses situations in which the VAT Act allows to claim the entitlement to VAT deduction on insurance services directly related to the export of goods to a third country.

Insurance provided by an insurance company to a Czech manufacturer (e.g., against the recipient's failure to pay for the goods received or against a risk of loss or destruction of goods) who is simultaneously an exporter of goods to a third country is exempt from VAT with an entitlement to VAT deduction. In other words, the insurance company may deduct VAT on received taxable supplies associated with the provided insurance if the insurance service is directly provided to the exporter of goods.

If the insurance company were to settle an insurance claim directly for the Czech exporter of goods, this supply is also exempt from VAT with the entitlement to VAT deduction if the claim settlement can be directly allocated to the export insurance. Under these conditions, the claim settlement is subject to the same tax regime as the insurance itself. The insurance company is therefore entitled to deduct VAT on the received taxable supply that is then used to settle the claim.

In contrast, where insurance is provided to a person other than the exporter, the entitlement to VAT deduction may not generally be claimed. These mainly involve situations where the insured and the policyholder is a person other than the exporter (e.g. a bank).

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Subsidies

OP EIC: deadlines prolonged and funds for allocation increased

The deadlines for submitting applications to participate in certain programmes under the Operational Programme Enterprise and Innovations for Competitiveness (OP EIC) have been extended. Moreover, funds for allocation within the Innovation programme have been raised.



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We informed you about calls to participate in programmes currently open under OP EIC in this article. The number of applications filed in the first half of January was as follows:

- Application – 527 applications; funds for allocation exhausted
- Innovation – 58 applications; 78% of funds for allocation exhausted
- Energy Savings– 182 applications; 70% of funds for allocation exhausted

Under the **Application programme's** call no. VIII, the deadline for submitting applications was extended again, until 1 February 2021. A potential increase of the funds for allocation is currently being discussed.

Under the **Innovation programme's** call no. VIII, the deadline for submitting applications was extended until 30 April 2021 and funds for allocation were increased by CZK 1.5 billion to a total of CZK 3 billion. Businesses that have not yet prepared their projects therefore still have a chance to receive support.

The extension of the deadline for submitting applications for support under the **Energy Savings programme's** call no. VI is currently being considered. The deadline currently in effect is 30 April 2021.

Please do not hesitate to contact us for a free-of-charge consultation. We will be happy to provide you with more detailed information or examine whether the activities your company is planning meet the requirements of the above programmes.

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Compensation for work accidents in light of amendment to Labour Code

Effective 1 January 2021, an amendment to the Labour Code changed the rules of compensation for accidents at work and occupational diseases, introducing a one-time compensation to close persons for non-material damage in the event of particularly serious bodily harm coming to employees, and significantly increasing certain compensations due to survivors in the event an employee's death.



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Particularly serious bodily harm

A one-time compensation for non-material damage in the event of a particularly serious injury to an employee's health is being introduced to the Labour Code as an entirely new concept. So far, this type of compensation has been regulated by the Civil Code, and the amendment to the Labour Code thus eliminates the differences between the two regulations. According to the explanatory report, this compensation shall only be provided on an exceptional basis, in cases involving the most severe injury to health such as comatose conditions, severe brain damage or extensive paralysis: these involve consequences comparable to death, and the sadness, fear, despair and hopelessness felt by the close persons cause them non-material damage. The compensation shall be due to the spouse, partner, child and parent of an employee who has suffered particularly serious bodily harm, or other persons in a family or similar relationship who experience the employee's harm as their own.

The Labour Code does not specify the amount of such compensation: it should always be determined taking into account the circumstances of the case, while the intensity and quality of the relationship between the employee and the close persons shall be of decisive importance. Should the employee die as a result of particularly serious bodily harm, the compensation already granted shall be taken into account by the court when determining the amount of the one-off compensation for non-material damage due to the survivors.

Death of an employee

The amendment also changes the terminology and significantly increases the amount of one-time compensation to survivors. The term "one-time compensation to survivors" used so far is replaced by "one-time compensation for non-material damage to survivors". This compensation will continue to be payable to the deceased's spouse, partner, child and parent. However, under the new rules, the compensation shall also be payable to other persons in a family or similar relationship who feel the employee's harm as their own. The deceased employees' children shall be entitled to compensation regardless of whether they are economically dependent or independent. This change is explained by the fact that children's mental hardship arising from the death of a parent shall not be linked to and conditional upon their minority and dependency, but rather to their life-long relationship with the parent. The same applies to the parents' relationship with their children.

The previous regulation set the amount of compensation at a minimum of CZK 240,000. Under the new rules, the compensation shall be at least 20 times the average wage in the national economy for the first to third quarters of

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the calendar year preceding the calendar year in which the right to the compensation arose. The average wage in the national economy for the first to third quarters of 2020 for the purposes of the Labour Code was CZK 34,611. This means that in 2021, the compensation for non-material damage to survivors will be at least CZK 692,300. This amount shall apply to the spouse, partner, child or parent. As regards other survivors, the compensation shall cover the damage suffered and proven.
The last change concerns the compensation of reasonable costs associated with a funeral, namely the reimbursement of the costs of head- or gravestones in the event of an employee's death as a result of a work accident or occupational disease.

Before the amendment, compensation was provided in the amount of a minimum of CZK 20,000. Under the amendment, compensation has been set at at least one and a half times the average wage in the national economy for the first to third quarters of the calendar year preceding the calendar year in which the right to such compensation arose. This means that in 2021, compensation will be at least CZK 52,000. The compensation also includes burial charges, cemetery fees, expenses for the modification/treatment of the head- or gravestone, travel expenses and one third of the usual expenses for mourning clothes for close relatives. As under the old rules, reasonable expenses associated with funerals shall be reduced by the funeral allowance granted under a special legal regulation.

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Changes to Qualified Employee relocation programme

As of 1 January 2021, both the minimum wage and the lowest guaranteed wage level have increased. This affects, among other things, one of the programmes for the economic migration of foreigners – the Qualified Employee programme. And this is not the only change to the programme effective from the new year.



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The Qualified Employee programme is one of three current government programmes to support economic migration. It significantly simplifies procedures for foreign workers coming to the Czech Republic and obtaining necessary work and residence permits. Applicants covered by the programme are guaranteed the option to submit their applications at a Czech Republic embassy abroad, at a specific date – which is not always standard, especially during the pandemic.

The Qualified Employee programme is intended for less qualified workers from Belarus, Montenegro, the Philippines, India, Kazakhstan, Moldova, Mongolia, Serbia, and Ukraine. An employer must conclude an employment contract with the foreigner for at least one year. Since this programme is intended for less qualified foreigners, the employer must undertake that for the entire duration of the employment, the foreigner will receive a wage or salary of at least 1.2 times the guaranteed wage for the relevant work as per applicable legislation. To have a foreigner included in the programme, these conditions must be observed.

From 1 January 2021, the minimum monthly wage is CZK 15,200, the lowest level of guaranteed wage ranges from CZK 15,200 to CZK 30,400 per month. In this respect, the minimum level of wage for individual groups of applicants included in the Qualified Employee programme has also increased: for standard 40-hour work, it now ranges from CZK 18,240 to CZK 36,480 per month depending on the category of work in which the foreigner is included. Also, from the beginning of the year, the minimum level of wage must be indicated in the vacancies report in the central register of vacancies to be staffed by employment card holders.

With the increase in the wage levels, fees for the inclusion in the Qualified Employee programme for employers and employees have also increased from the beginning of the year. The fee for the inclusion in the programme is CZK 3,000 for the first applicant, while CZK 200 is charged for each additional applicant stated in the application. For the inclusion of another applicant within the annual validity of the first inclusion, the fee is CZK 1,500; same as for the inclusion of the first applicant in the programme, CZK 200 is charged for each additional applicant. In practical terms: for the first five applicants, an employer shall pay a fee of CZK 3,800; if after six months the employer decides to include another five employees, the fee shall be CZK 2,300.

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One step closer to interconnecting commercial registers within EU

The harmonisation of EU law regarding the use of digital tools and processes in corporate law has taken on a concrete form: an amendment to the Act on Public Registers, implementing a part of the changes prescribed by the EU directive into Czech law, entered into effect on 1 January 2021. The amendment will mainly simplify the exchange of information regarding cross-border transformations of joint-stock companies and limited liability companies or branches of foreign companies.



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The amendment to the Act on Public Registers responds to Directive (EU) 2019/1151 of the European Parliament and of the Council as regards the use of digital tools and processes in company law, aiming to strengthen cooperation among member states' registers through the register interconnection system to ultimately enhance the effectiveness of administration and establishment of corporations within the EU. Methods of exchanging information among registers and the clarification of information that is being exchanged and other tools applicable in practice are determined in Commission Implementing Regulation (EU) 2020/2244 in effect from 18 January 2021.

The amendment should help connect more closely the Czech commercial register with commercial registers of other member states through a central electronic platform. In spring 2018, the Czech commercial register became part of BRIS – the Business Registers Interconnection System, interconnecting the commercial registers of EU countries, Iceland, Lichtenstein, and Norway. It is currently possible to search BRIS for entities in the above countries and obtain basic information about specific companies free-of-charge (e.g. name, identification number, registered office, type/legal form, state of registration); other information is available depending on the regime of the state in which a company is registered.

BRIS will help significantly reduce the administrative burden of companies. For example, if any limited liability or joint-stock company is dissolved, this should be followed by an immediate dissolution of its business establishments or registered branches in other member states without any proceedings having to be held. Similarly, as a result of the availability of information through BRIS, selected information about business establishments and registered branches of foreign limited liability and joint-stock companies should also be registered without any proceedings. For cross-border mergers of joint-stock or limited liability companies, the court keeping the register will record a cross-border merger for the company being dissolved solely based on the data made available in BRIS on the cross-border merger registered in a foreign public register.

In the government's legislative plan, another amendment to the Act on Public Registers implementing the remaining provisions of the above directive into Czech law was to be discussed by the government in November 2020. Since the deadline for implementing the directive will expire on 1 August 2021, further changes are expected to occur in the upcoming months.

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Providing financial services from the UK post-Brexit

The end of the Brexit transition period has had a huge impact on UK companies providing any kind of financial services. From 1 January 2021, it is no longer possible to enjoy the benefits of the freedom of establishment and freedom to provide services.



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For many UK financial services institutions, the UK's withdrawal from the EU means changing the way they have been providing their services in EU member states. Starting this year, if they do not obtain a licence for their branch or a newly established company in the relevant EU member state, they can no longer rely on the so-called single European passport and provide services based on the freedom of establishment or freedom to provide services.

Importantly, Brexit will not only affect those financial services providers that obtained their licences in the UK – a number of them obtained their licenses in another EU member state and then established a branch in the UK through which they have been providing financial services in other EU member states. Such arrangements now also need to be changed – the single European passport does not apply to British branches in these cases either.

Nonetheless, the end of the transition period does not necessarily mean the end of all British institutions' activities in EU member states. Yet, to continue providing financial services, they must obtain a licence in one EU member state. This, of course, involves a number of related issues: sufficient staffing, correct risk management system, and the (re)negotiation of contracts with existing clients residing or established in the EU.

Brexit will also affect consumers: for example, funds deposited in accounts with British banks will not be covered by the EU rules on deposit insurance; insurance contracts concluded with British insurance companies providing cross-border insurance in the Czech Republic cannot be amended.

The above is just an outline of the changes that financial institutions and consumers face as a result of the end of the single European passport. We will be happy to assist you in analysing Brexit's impacts and coming up with solutions dealing with its consequences, including their subsequent implementation.

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Brexit: Protocol on UK-EU social security coordination

After endless negotiations between the UK and the EU, a deal was struck at the turn of 2020, avoiding a hard Brexit. Among other things, the EU-UK Trade and Cooperation Agreement makes it possible to continue applying some EU social security rules to workers posted from the EU to the UK and vice versa after 1 January 2021.



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The Trade and Cooperation Agreement concluded between the representatives of the United Kingdom and the European Union includes the Protocol on Social Security Coordination, which to some extent copies the rules of the coordination of social security systems under Regulation (EC) No. 883/2004 of the European Parliament and of the Council. Although the agreement has not yet passed through the ordinary legislative process (the European Parliament should approve it with retrospective effect), the rules it contains should apply provisionally already from 1 January 2021.

The protocol applies not only to migrant citizens of EU member states and the UK, but also to third country nationals covered by social security in the EU or UK. However, unlike the EU regulation, the protocol does not apply to Norway, Iceland, Lichtenstein and Switzerland.

The protocol maintains the 'one country of insurance at a time' principle and the basic rules for determining that country. Standard postings of workers between the EU and the UK up to 24 months and the concurrent performance of activities in several countries are also regulated by the protocol in a manner similar to that if the UK had remained in the EU. Applicable social security regulations will continue to be confirmed by an A1 from. The protocol also maintains a number of benefits, the principle of adding-up of insurance periods for the purpose of retirement pension, and the use of health care.

As regards necessary healthcare during short stays, according to information currently available, it will still be possible to use European health insurance cards in the UK. It will also continue to be possible to receive full healthcare outside the country of insurance based on S1 forms.

So what has changed from 1 January 2021 as regards Brexit? The protocol does not allow to apply for an extension of an A1 form to remain in the home country's social security system for postings that exceed 24 months, or for an exception from the basic rules of the current Article 16 of the regulation. Unlike the regulation, another area that the protocol does not regulate are family benefits (including child benefits) and the possibility of exporting unemployment benefits. These areas will therefore only be governed by local legislation. It is possible to conclude a bilateral agreement with the UK to regulate this issue beyond the scope of the protocol.

Similarly to Article 12 of the regulation, the protocol allows workers posted for a period not exceeding 24 months to remain in the home country's health and social insurance system, but at the same time allowing individual member states to derogate from this provision: in the event of an opt-out, posted workers will be subject to social security regulations in the country where they actually work. However, an unofficial survey conducted across EU

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member states has indicated that none of the countries have so far decided to opt out, as all of them plan to follow the protocol.

For the sake of completeness, please note that already under the previous EU-UK Withdrawal Agreement, workers posted from/to the UK before the end of 2020 continue to be subject to the standard EU regulation (including A1 forms and their extension), until their situation changes.

Finally: to determine applicable legal regulations and any entitlement to benefits, it is crucial to assess whether the migrating worker is subject to the EU regulation, the withdrawal agreement, or the protocol.

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Case law

SAC on proving indirect shareholding expenses

The Supreme Administrative Court (SAC) has recognised that it is not easy to prove the exact amount of overhead (indirect) expenses related to holding a share in a subsidiary. However, this practical pitfall does not change the fact that if a taxpayer wishes to avoid excluding 5% of dividend received as tax non-deductible expenses, they must prove the actual amount of the overheads. The calculation algorithm applied must be reasonable and reflect all related expenses.



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The SAC noted that Section 25(1)(zk) of the Income Tax Act offers two possible approaches: either proving the actual amount of shareholding expenses, or determining them as a percentage – 5% of dividends received. The same percentage amount shall also be applied if the taxpayer claims lower overheads but is unable to prove their actual amount.

In the present case, the taxpayer calculated overhead expenses at CZK 365, using a table. The expenses comprised four hours spent by the company's employee exercising the powers of the subsidiary's general meeting. The tax administrator rejected this quantification and, using the percentage rate, excluded CZK 160,000 as tax non-deductible expense. When the case appeared before the Supreme Administrative Court, the court confirmed that the evidence presented did not give any economic reasons supporting or explaining the amount claimed by the taxpayer: the table presented by the taxpayer showed the result of the calculation, but not the individual steps to arrive at such result.

The SAC emphasised that taxpayers must identify and quantify the expenses in a plausible manner, and support them with relevant evidence. Although a certain calculation of the amount of overheads was submitted, no evidence was produced to support the logic behind the calculation or the economic criteria used as a basis, not even after the tax administrator had challenged the calculation and called upon the taxpayer to explain the approach applied.

The SAC agreed that while it can be complicated in practice to support overhead expenses and quantify their exact amount, is necessary that a reasonable calculation algorithm is designed, taking into account all expenses as regards supporting organisational processes related to holding a share in a subsidiary. If a taxpayer wishes to avoid tax non-deductible expenses determined as 5% of the dividend received, it is their responsibility to properly quantify and prove actual expenses. In practice, the amount calculated as a percentage may be many times higher than the actual expenses.

In the present case, the taxpayer failed to bear the burden of proof and, according to the SAC, suffered the consequences of their passivity in the tax proceedings rather than the objective complexity of proving the actual expenses. The judgment thus confirmed, yet again, that increased attention must be paid to calculating and supporting indirect shareholding expenses.

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Case law

SAC on existence of a permanent establishment

In its recent decision, the Supreme Administrative Court (SAC) dealt with selected facts giving rise to a foreign entity's permanent establishment in the Czech Republic. In particular, the court pointed out that the tax administrator must produce sufficient evidence proving beyond any doubt the existence of a permanent establishment.



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The case involved a dispute between a UK company that had established a registered branch in the Czech Republic, and a tax administrator who, ex officio, registered such branch as a permanent establishment for corporate income tax purposes.
The tax administrator based the claim as to the existence of a permanent establishment on the following facts:

- The UK company concluded a lease for non-residential premises (a warehouse).
- Agreements on future business cooperation were concluded between the UK company and a number of Czech entities and with a Chinese business company.
- Invoices were issued, stating the UK company's registered branch as a supplier.
- Payments relating to these invoices were credited to the UK company's account in the Czech Republic.
- The UK company requested authentication data for the electronic reporting of sales.
- The UK company filed a VAT return for June 2016.

In its decision, the SAC held that these facts were not sufficient to trigger the existence of a permanent establishment under the double tax treaty between the Czech Republic and the United Kingdom. The main reasons for the SAC's opinion were as follows:

- The leases concluded by the UK company concerned storage premises; under the double tax treaty, such activity is not regarded as giving rise to a permanent establishment. Thus, the leases rather refuted the tax administrator's arguments, in this particular case.
- The fact that the registered branch was stated as a supplier in the invoices is not in itself relevant. Moreover, the registered branch does not have a legal personality in the Czech Republic allowing it to enter into the commercial contracts to which the invoices related.
- According to the SAC, the fact that payments relating to the invoices were credited to the UK company's Czech account does not say anything about the nature of the branch's activity, and it is not possible to confirm the existence of a permanent establishment on this basis.

In its decision, the SAC thus sided with the municipal court, recommending that the tax authority substantiate its decision with further evidence to be obtained, for example, in an on-site investigation. The SAC also recommended that the tax administrator obtain more detailed information on the parameters of the activities carried out by the UK company's registered branch, while emphasising that the court does not in any way anticipate the tax administration's future decisions.

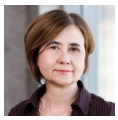
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News in brief, February 2021

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



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DOMESTIC NEWS IN BRIEF

- The Chamber of Deputies passed an amendment to the Act on Income Tax in the wording returned by the Senate (technical adjustments), temporarily increasing the limit for deducting gits and donations to 30% of the tax base for the 2020 and 2021 taxable periods (natural persons) and for the taxable period ended in the period from 1 March 2020 to 28 February 2022 (legal persons). The amendment will enter into effect after its promulgation in the Collection of Laws.
- Parts of LEX COVID relating to legal persons have been amended (No. 191/2020 Coll.). The deadline during which legal persons may decide per rollam (decision-making outside general meetings carried out in writing or through technical tools) even if their founding acts do not permit so have been extended until 30 June 2021 irrespective of the duration of emergency measures associated with the pandemic.
- The Ministry of Finance announced that the Czech Republic signed a double taxation treaty with San Marino on 27 January 2021 in Rome. Standard legislative processes to ratify the treaty and subsequently implement it into practice will follow in both countries. The ministry also informed that a double taxation treaty with Bangladesh entered into effect on 15 January 2021. Owing to a difference in taxable periods, the treaty will become effective in Bangladesh on 1 July 2021 and in the Czech Republic on 1 January 2022.
- An updated list of double taxation treaties in effect in the Czech Republic is available at the ministry of finance's website. New treaty countries are Botswana, Ghana and Kyrgyzstan.
- Financial Bulletin No. 7/2021 provides the following information:
    - A list of types of taxes and parts thereof for which the tax authorities keep personal tax accounts and collect payments from taxable entities using appropriate bank accounts (the Ministry of Finance's reporting duty pursuant to Section 149(3) of Act No. 280/2009 Coll., the Tax Procedure Code, as amended).
    - How to correctly pay tax to the tax authority in 2021.
- The GFD issued information on under what circumstances taxpayers are entitled to claim income tax credit for the electronic reporting of sales while reporting is suspended.
- The Minister of Finance's Decision on the Waiver of Income Tax Due to an Extraordinary Event published in Financial Bulletin No. 5/2021 waives income tax on remuneration paid to students for the performance of work under the Crisis Act.
- Changes originating from amendments to the VAT Act and the Tax Procedure Code entered into effect on 1 January 2021; as a result, the following documents have been updated: GFD's information on the registration for VAT as amended by Amendment No. 2 and GFD's information for persons liable to tax not established in the CR (VAT registration and other selected tax duties) as amended by Amendment No. 1.
- The General Customs Directorate draws the attention of exporters, hauliers and logistic companies to a growing number of problems with confirmations of goods leaving France for Great Britain accompanied by domestic export declarations, as some French exit customs offices do not send confirmations of the goods exiting the EU to the Czech Republic.
- Following the effectiveness of an amendment to the Tax Procedure Code, the customs administration draws attention to the regulation of tax assertion filings, as only filings via prescribed XML structure forms shall

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be admissible.
- The customs administration published the full wording of its information on changes to rates and designation of selected products stated in tax returns.
- The Ministry of Justice disclosed an overview of changes to laws in 2021 including, e.g., changes to insolvency regulations, new rules on experts and interpreters (translators), and an amendment to the Act on Corporations and other relevant laws.
- The ministry also informs about the status of debating an act on the registration of beneficial owners with planned effectiveness in the first half of 2021.

FOREIGN NEWS IN BRIEF

- In light of the ongoing COVID-19 pandemic the OECD has released its updated guidance analysing the impact of the COVID-19 crisis on the interpretation of international tax treaty provisions concerning the creation of permanent establishments, changes in tax residence for entities and individuals, as well as income from employment.
- The European Commission has released a roadmap for the introduction of an EU digital levy. The roadmap is open for public consultation until 12 April 2021. The plan does not clarify how it relates to the directive on digital services tax or to other similar taxes implemented unilaterally by individual member states. The digital levy should represent income for the EU budget and should comply with double taxation treaties and conclusions of negotiations at the OECD level regarding changes to the taxation of digital economy. These negotiations are planned to be completed by mid-2021.

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