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Tax & Legal

Taxes

Legal

World news

Case law

In brief

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Editorial

It’s not all that common for debates on tax policy to cause headline global news, but that exactly has been the case for plans of several European governments to impose digital services taxes (DST) on the revenues of Big Tech companies. Most of the affected companies such as Google and Facebook are US-headquartered, and the US government is unhappy about the situation, claiming the DST unfairly targets US interests.

In retaliation against the French DST of 3%, the US has threatened to impose tariffs against imports of champagne and cheese from France. This threat has succeeded in persuading France to back down and delay its DST implementation. The US is now making noise about the UK’s DST of 2%, again threatening to slap tariffs on UK products. So far, the UK has been standing firm against US pressure, but we‘ll just have to wait and see if a compromise ensues. The proposed Czech DST is noteworthy both for its size (7%!), and the way the rules have been cleverly crafted to make sure native Czech companies will not suffer. Will the Czech Republic be next in the firing line and on the receiving end of the Americans’ displeasure, and if so, how will it respond?

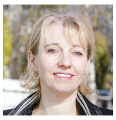
The compromises over DST seem likely to energise the implementation of the OECD’s so-called BEPS 2.0 proposals, a more multilateral approach to resolving the challenges of modern economy taxation. But compared with DST, BEPS 2.0 will have a much more widespread impact on businesses, not just on the likes of Google and Facebook. The anticipated timeline for agreeing BEPS 2.0 is short but will be hideously complex to achieve in practice and we’ll have to see how far and how quickly it goes. My personal prediction is that BEPS 2.0 will happen. But I’m sticking here with the golden rule of forecasting: saying what may happen, but not precisely when…

Patrick Leonard
Partner
KPMG Czech Republic

Quick fixes: GFD information and amendment to EC explanatory notes

The Czech amendment to the VAT Act implementing quick fixes is still waiting for its second reading in the Chamber of Deputies. At the end of January, the General Financial Directorate disclosed information confirming the option of invoking the EU directive 's direct effect. This means that starting from 1 January 2020, Czech entities may proceed in accordance with the amended EU regulations, even if they have not yet been implemented into Czech law.

Veronika Výborná
vvyborna@kpmg.cz



Petra Němcová
pnemcova@kpmg.cz

Marcela Hýnarová
kpmg@kpmg.cz

GFD's information

In its information, the GFD points out that if the option of applying the direct effect of the amended directive is exercised, all other related conditions must also be fulfilled. This mainly concerns deliveries of goods from the Czech Republic to another member state via call-off stock arrangements. Individual flows of goods (i.e. the transfer of goods to a call-off warehouse and its subsequent domestic sale) must correctly be declared in EC Sales Lists, now containing a new separate sheet specifically designed for this purpose. According to the GFD's information, an updated electronic EC Sales List form should be available on the tax portal (www.daneelektronicky.cz) no later than 20 February 2020. The application of the directive is voluntary, which means that meanwhile it is also possible to proceed in accordance with the wording of the VAT Act currently in effect.

EC's explanatory notes

Explanatory notes published by the European Commission at the end of the last year, providing certain guidance also for Czech taxpayers, have already been discussed in the previous issue of our Tax and Legal Update. Today we will focus on another issue of the explanatory notes, in particular documentation proving the transport of goods, since proving the physical delivery of goods to another member state is one of the main conditions substantiating the entitlement to the exemption of the sale of goods from Czech VAT.

Documents necessary to prove the transport of goods to another member states are newly defined in Article 45a of Council Implementing Regulation No. 282/2011. To prove the transport of goods, it is necessary to be in possession of two or three documents issued by two different parties that are independent from each other and from the vendor and the acquirer. However, in some situations such a requirement is practically unfeasible. How to proceed in such cases?

According to the explanatory notes, if the taxable entity does not have the documents required by the regulation in its possession, the exemption from VAT may not be denied to such a taxable entity automatically; it is still possible to prove the exemption from VAT following Article 138 of the directive, i.e. Section 64 of the VAT Act.

The explanatory notes also deal with specific cases, e.g., when suppliers ensure the transport of goods using their own motor vehicles. In such cases, it is admitted that the combination of documents prescribed by Article 45a cannot be obtained. As a result, the conditions set out in the regulation do not apply and the transport of goods must be proven in another manner.

If transport is ensured by the acquirer, the acquirer must furnish the vendor with a written statement of the acceptance of goods by the tenth day of the month following the supply. How to proceed when the acquirer does not provide this statement to the vendor within the set deadline? The EC claims that the ten-day deadline mainly serves to determine the time frame for the statement's delivery and not to penalise the supplier for the failure to provide the statement within the deadline. Therefore, this fact on its own cannot lead to denying the exemption from VAT.

However, the EC's explanatory notes are not legally binding and, therefore, it will be up to the Czech financial administration how these cases will be resolved.

Government (not) approving investment incentives

Three applicants for investment incentives were denied financial support to acquire fixed assets by the government. Applications for the support of strategic investment projects were submitted by investors under the previous legislative regime. Aid in form of tax relief was granted.

Karin Stříbrská
kpmg@kpmg.cz

Silvie Jurčíková
sjurcikova@kpmg.cz

In mid-January, the government decided not to grant investment incentives to several strategic investment projects promising the creation of more than 1 600 new jobs. Investors applied for funds to acquire fixed assets (financial support), and for income tax credits.

The government's decision has been influenced by the current economic situation and recent developments in the labour market, e.g. the rate of unemployment that has been at its historical low. The government came to the opinion that the projects in question did not meet the status of strategic investments and material support to acquire fixed assets, as one of the tools to attract foreign investors and boost employment, was no longer substantiated. Applications for the support of strategic investments that are generally subject to government approval were thus dismissed on the grounds that they did not involve investments of a strategic nature. In the future, investors may only utilise aid in form of income tax credits.

Despite investors filing their applications for investment incentives before the effective date of the last amendment to the Act on Investment Incentives, the above decision indicates what the government's position on this matter is likely to be in the future. According to the Minister of Industry and Trade, every direct investment support will be carefully evaluated.

Investors planning to file applications for investment incentives should therefore mainly focus on a project's added value and its link with research and development while quantifying and describing all economic and socio-economic benefits for the region and the state.

A project's chance to obtain investment incentives may significantly be affected by the above, as it is now the government that approves incentives for each individual project, assessing in particular whether a project is in line with the Czech Republic's strategy and whether it reflects the state's current economic situation and its needs that may change over time.

Taxes

VAT on fuel cards to be affected by CJEU case law

Fuel card transactions are operated all across the EU. Therefore, some new measures being implemented in just some of the member states might be problematic. Hence, most EU states are still reluctant to apply the Court of Justice of the EU's judgment in the Vega International (C235/18) and Auto Lease Holland (C185/01) cases.

Tomáš Havel
thavel@kpmg.cz

Lucie Leopoldová
kpmg@kpmg.cz

The General Financial Directorate (GFD) is preparing its information on the application of VAT on fuel cards, aiming to clarify how to implement the conclusions of the CJEU judgements into Czech administrative practice. The information has been submitted to the professional public for comments.

In the experts' opinion, each case involves specific circumstances, and the judgements cannot thus be applied to all existing business models. Neither judgment addresses the situation of oil companies as issuers of fuel cards; instead, they involve companies ordering the cards and thus further along the supply chain, which is an entirely different situation.

Currently, comments are being gathered and analysed, after which they should be discussed with the respective entities in the second half of February or March. The GFD expects to postpone the effective date of the information and provide sufficient time for adjusting the system, if necessary. The originally announced effective date of 1 April 2020 seems currently unrealistic.

We are monitoring the field closely and are actively working on the issue within the Czech Chamber of Tax Advisors.

Transfer prices targeted by auditors

January is traditionally a month in which KPMG's tax department becomes involved in the examination of the financial statements of its audit clients, as transfer pricing may be associated with significant tax risks. Our audit teams assess these risks and communicate them to companies' management bodies, focusing in particular on their systemic nature.


Daniel Szmaragowski
dszmaragowski@kpmg.cz


Zdeněk Řehák
zrehak@kpmg.cz

A typical issue to consider is a drop in operating profit or profit before tax. In our experience, a cautious approach is called for: a manufacturing company reporting a significant fall in profit or continuous losses, and simultaneously trading considerably with related parties always draws the tax authority's attention. In such cases, the tax administrator tends to claim that Czech manufacturing companies are in the position of contract manufacturers and losses should therefore be attributed to their foreign parents.

The tax authorities' simplistic approach is nothing new; but in 2019, we came across new and rather unclear situations relating to manufacturers that are part of corporate groups: the manufacturing capacity and the cost of labour of such manufacturers were on the verge of economic viability, and they were sometimes unable to deliver the contracted volumes. The question then arises what party to a transaction, the contractor or the manufacturer, should actually bear any related extra costs.

Another trend to consider is that the outcomes of transfer pricing inspections carried out at foreign related parties are systemically mirrored at their Czech counterparties, i.e. the accounting implications of such changes are reflected in the financial statements of Czech companies being audited. These changes may involve adjustments to pricing agreements and business cooperation models, e.g., the introduction of royalties or payments for functions performed abroad that have so far not been remunerated. The Czech tax administration is aware of this tendency and repeatedly made itself clear that it will not automatically tolerate any decreases in the Czech income tax base as a result of foreign inspection outcomes.

We also often encounter the issue of pricing adjustments and their recording in the period to which they relate in terms of substance and timing. We also assess the quality of transfer pricing and inter-company services documentation, bearing in mind that transfer pricing continues to be an area of concern of tax administrators both in the CR and worldwide.

Auditors as external experts are the first line of defence to deal with these issues and initiate communication of transfer pricing risks. Their role is crucial, as they identify the risks and initiate intra-company discussion of relevant remedial measures.

Ministry of Finance income tax plan for 2021

2020 has just begun, but two new amendments to the Income Tax Act for 2021 are already being discussed. The ministry is planning to introduce a lump-sum tax for selected individuals, monetary contributions for employee meals and the cancellation of the 35% withholding tax. But, according to most recent information, investors may remain calm, as the cancellation of the tax exemption of income from the sale of investments that meets the time tests will probably be left out from the amendment.

Jana Fuksová
jfuksova@kpmg.cz

Eva Mikulášková
emikulaskova@kpmg.cz

Changes worthy of our attention are:

- The five-year test for claiming the tax exemption of income from the sale of real property not primarily intended for residential purposes should be extended to 15 years. If the proceeds from the sale are used to satisfy one's own housing needs, within the set time limit, income from the sale should remain tax exempt. The extended time test should not apply to sales of real property acquired before the amendment's effective date.
- The proposed exemption of interest income generated by Czech tax non-residents from bonds issued by Czech entities or the Czech Republic abroad will be analysed further. If concerns regarding the administrative burden are found to be unsubstantiated, the exemption from tax of interest income from Eurobonds generated by both individuals and legal entities might be cancelled.
- Changes to the taxation of zero-coupon bonds and deposit certificates for individuals: under the amendment, the taxable income will likely be determined as the difference between the paid nominal value or the redemption price and the acquisition price that will only be deducted up to the amount of income. Issuers would no longer have to withhold tax but investors themselves would have to include any related profits into their income tax returns.
- The abolishment of a 35% withholding tax for the residents of countries with which the Czech Republic has not entered into the Tax Information Exchange Agreement. The introduction of taxation of controlled foreign companies (CFC) from countries included in the EU list of non-cooperative jurisdictions; for these countries, neither the level of taxation abroad nor the performance of substantial economic activity would be tested. Any income of such entities would be included in the controlling company's tax base.
- The introduction of a voluntary lump-sum tax for self-employed persons whose income does not exceed CZK 1 million and who are not VAT payers and meet certain other criteria. The tax would be paid in monthly instalments as a fixed amount including both an income tax prepayment (of CZK 100, according to the current proposal) and mandatory statutory payments deriving from the minimum assessment base, and pension insurance and state employment policy contributions deriving from the minimum assessment base increased by 15 percent.
- The introduction of a tax-efficient monetary contribution of an employer for the meals of their employees, which would be an alternative to meal vouchers.
- A less strict reporting duty relating to income generated from abroad – the ministry considers increasing the limit for reporting income not subject to withholding tax from the existing CZK 100 thousand to CZK 300 thousand or extending the reporting periodicity.

Based on the latest information, the traditional time test for the exemption of income from the sale of ownership interests and securities, whose cancellation was subject to speculation, should remain in place after the internal comment procedure.

The draft amendment introducing the lump-sum tax is currently subject to external comment procedure, while the second draft amendment containing other changes is still being discussed. The text is likely to change further before it is submitted for further legislative procedures.

New CRD and CRR

The Ministry of Finance has prepared a bill implementing the CRD V directive and CRR II regulation. The new EU legislation brings changes affecting mainly the banking sector as it revises the rules of capital adequacy and capital reserves and introduces the stricter regulation of financial holding companies.

Filip Horák
kpmg@kpmg.cz

Jiří Stratil
jstratil@kpmg.cz

The EU regulator has been preparing the member states' banking sectors for possible hard times ahead. The banking package aiming to reduce risks on the EU level is now on the agenda of Czech legislators as well. The proposed effective date of the act implementing CRD V and CRR II is 29 December 2020. Below, we comment on the most important changes.

First, the rules to calculate Pillar 2 capital requirements will change. Apart from changing the conditions under which the CNB may impose additional capital requirements, the bill introduces the possibility for supervisory bodies to indicate to institutions the level of capital that they expect them to hold in excess of the capital requirements and reserves, i.e. to give capital guidance. This will be a 'soft' requirement by the supervisory bodies, providing them with a new, less strict and formal tool than an additional capital requirement. However, repeated failure to comply may result in a 'hard' requirement to increase Pillar 2 capital.

Another change will concern capital reserves: the bill introduces the possibility to create a capital reserve to cover systemic risks, depending on the types of exposures defined in the bill. The rates of capital reserves for other systemically important institutions have been modified as well.

The bill is also to introduce a duty to establish an 'intermediate parent undertaking' for large non-EU groups that include at least two subsidiary institutions established in the EU. The regulation aims to facilitate the supervision of these groups and improve the entities' chances to withstand crises.

Changes will also affect the regulation of financial holding companies and mixed financial holdings, as a financial institution (typically a bank) controlled by a holding entity may not always be able to ensure that requirements are met on a consolidated basis across the group. To ensure compliance with prudential requirements on a consolidated basis, controlling persons will be subjected to the supervisory bodies' direct jurisdiction.

Finally, the rules for the remuneration of financial institution staff will change, with more emphasis being placed on gender equality and proportionality principles.

Amendment to the Labour Code (part 1): at least 160 hours of vacations for all

An extensive amendment to the Labour Code has been on the deputies' agenda since January. In the upcoming issues of Tax and Legal Update, we will summarise for you the amendment's major changes. In the first of a series of articles, we will look into perhaps the most important change, as it concerns the calculation of vacations. Starting 2021, vacations should be calculated based on hours rather than days worked, which is the case now.

Romana Szuťányi
kpmg@kpmg.cz

Václav Bělohoubek
kpmg@kpmg.cz

The current legal regulation under which vacations are calculated based on days worked is not always fair. For instance, an employee having worked ten hours in a week, distributed into four days will have worked more days for the purposes of calculating vacation entitlement than an employee working 24 hours in two twelve-hour shifts. Calculating vacations based on days is also unsuitable for employees who work shifts of uneven length – an employee always needs to take one day of vacations, regardless of whether they would have worked a 6-hour, 8-hour or 12-hour shift on that day – and this can make a huge difference, both for the employee and the employer.

The proposed concept keeps the basic length of vacations at four weeks. However, vacation entitlements will no longer be calculated based on days worked but based on an employee's weekly working hours. The number of hours of annual vacation entitlement will therefore reflect the number of hours the employee has actually worked.

The entitlement to an annual vacation shall arise for an employee who, during the continuous existence of employment with the same employer, has worked for 52 weeks in a calendar year for the stipulated weekly hours or agreed-upon shorter weekly hours, calculated as an average for each of the 52 weeks (for instance, 40 hours a week). The length of the annual vacation shall thus equal the specific employee's weekly working hours multiplied by the number of weeks of their vacation entitlement. In practice, this means that an employee working 40 hours a week entitled to 5 weeks of vacation will have an annual vacation entitlement in the scope of 200 hours (40 hours x 5 weeks).

An employee not entitled to an annual vacation but during the continuous existence of employment with the same employer having worked for at least four weeks for the stipulated weekly hours or agreed-upon shorter weekly hours shall be entitled to the proportionate part of an annual vacation. This means that for each set of weekly worked hours, the employee shall be entitled to a 1/52 share of the annual vacation. The law even considers the possibility that an employee may work more than 52 weeks per calendar year (recalculated to weekly hours worked): in such a case, more than 52 full multiples of weekly hours shall be taken as the basis for calculating the employee's vacation entitlement in the given calendar year.

With the change in calculating vacation entitlement also comes a change in the possibility to reduce vacation entitlement: nowadays, employers may reduce vacation entitlements by any unexcused absences, and by long-term impediments to work. Under the new rules, this will only be possible for unexcused absences, and only hours actually missed shall be considered. Vacation entitlements will no longer be reduced due to impediments to work, as these can now be reflected in the number of hours worked within the weekly working hours and will affect the overall vacation entitlement in this way.

The amendment also allows employees to request the transfer of vacation days in excess of the statutory minimum length of four weeks (six weeks for teaching staff) to the subsequent year.

The change in the concept of vacations will certainly affect employers, who will have to get ready for the new system in a timely and diligent manner. In the next article of our series devoted to the Labour Code amendment, we will discuss the upcoming changes in the rules of delivering documents to employees.

Labour Inspection Office focuses on concealed mediation of employment – CZK 10 million penalty possible

The fact that illegal work is closely watched by the Czech Labour Inspection Office is nothing new for employers. 'Svarc' systems (where workers formally maintain a self-employed status while in fact carrying out dependant work) or the employment of foreigners without proper permits are among the most frequent violations uncovered by the office. Recently, inspectors have been targeting yet another form of illegal work: the lease of labour concealed as a contract for work or services. Such outsourcing structures may carry a risk of a penalty of up to 10 million Czech crowns.

Barbora Cvinerová
bcvinerova@kpmg.cz

Kateřina Randlová
kpmg@kpmg.cz

The office's inspection practice is responding to a fairly new offence: the concealed mediation of employment, which was incorporated in the Employment Act in the autumn of 2017. The law defines it as a lease of labour without observing the conditions for the mediation of employment that apply to employment agencies. Typically, this involves situations where, e.g., a company lacks its own staff to carry out assembling work, therefore finds an external contractor and concludes with them a contract for the delivery of the assembling work. The contractor, however, does not deliver the work on a 'turn-key' basis, but only mediates personnel who then carries out the work for the client, same as their regular employees.

The line between permitted and prohibited outsourcing is fine and unclear and many companies may not be aware of problems in their supplier contracts. Yet, the lease of labour for consideration may legally be provided solely by employment agencies holding a permit issued by the Labour Office's General Directorate. The strict conditions that must be met to obtain such permits (incl. qualification requirements, insurance coverage, or half a million deposit), and the duties that employment agencies must comply with while they do business (e.g. requirements regarding contracts with clients/users of agency employees, necessity to ensure comparable working and wage conditions, and a wide range of reporting duties) are the main reasons why companies increasingly often resort to concealed agency employment, which is illegal.

While the number of inspections by the office has been decreasing, their scope has increased. In our experience, an inspection initiated at one company will frequently be extended to others, typically subcontractors providing labour. Supplier structures have become increasingly complex, often involving a chain of contracts for work or services. Yet, the office is usually able to untangle them and detect individual breaches.

The office also confirms another phenomenon not uncommon in the labour market: employing foreigners without a valid permit for work in the Czech Republic – typically, foreigners with Polish visas that allow them to work in Poland. These foreigners are also frequently involved in complex customer-supplier relations. Employment agencies with workers holding work permits issued for work entirely different than the work they actually carry out are also no exception.

It is obvious that the office will continue to focus its inspection activity on illegal employment: it is the most severe labour-law offence and carries the highest penalty. At the moment, sanctions for the failure to meet the conditions for mediation of employment mainly concern providers not holding the respective licence. However, the possibility that sanctions may also affect the customers of such providers cannot be entirely ruled out. How to avoid a fine? The recipe is simple – have your outsourcing contracts reviewed by a lawyer and adjust the conditions of collaboration to conform with a legal form of outsourcing.

News in cross-border business conversions – demerger by separation

Demergers as a form of business conversion quite common in the Czech context and a useful tool to manage risks and tax aspects of transactions, have finally been harmonised on the EU level. The amendment to the respective directive introduces new rules for cross-border relocations and demergers, including a cross-border conversion so-far unknown in the Czech Republic: demerger by separation. The implementation deadline is 31 January 2023.


Martina Pelikánová
kpmg@kpmg.cz


Petr Janíček
pjanicek@kpmg.cz

Currently, Czech legislation (and practice) recognises two types of demergers (or ‘divisions’ in EU terminology):

- demerger by split-up, whereby all the demerging corporation’s assets and liabilities pass on to at least two successor corporations, while the demerging corporation is dissolved
- demerger by spin-off, whereby the demerging corporation is not dissolved, retains a part of its assets and liabilities, and a part of its assets and liabilities passes on to at least one successor corporation.

Czech legislation further classifies demergers depending on whether new corporations are formed (split-up/spin-off by formation of a new company), the assets and liabilities are merged by acquisition with an existing company (split-up/spin-off by acquisition), or a combination of these occurs. The Czech law regulating conversions of business companies and cooperatives also regulates the procedure to be followed in cross-border demergers.

The abovementioned amendment lays down the harmonised rules of cross-border demergers for all EU member states, for both split-up (‘full division’) and spin-off (‘partial division’), but only for demergers associated with the formation of new companies. So far, the EU regulation does not cover the split-ups/spin-offs by acquisition, due to the complexity of the process. However, the regulation contains a third demerger variant: demerger (‘division’) by separation.

While not yet regulated by Czech law, demerger by separation is a cross-border business conversion that allows for the formation of a new company by ‘separation’: a part of the demerging corporation’s assets and liabilities pass on to one or more successor companies. Unlike the already known forms of demerger, here, the demerging company (not the shareholders/members of the demerging company) gains the shares/interests in the newly formed successor company and thus becomes the sole shareholder/member of the company formed by separation. Under existing legislation, the shareholders/members of the demerging company become the shareholders/members of the newly formed company.

Demerger by separation thus simulates a situation where a corporation founds a subsidiary in which it contributes a part of its assets and liabilities or a part of a business establishment, but with all the advantages of a business transformation, for instance tax implications, legal succession to concluded contracts, etc.

The new regulation may give entrepreneurs a useful tool to facilitate cross-border restructuring and make it less costly. We expect that the new law will also allow demergers by separation as pure intra-state conversions.

Brexit from a Czech immigration law perspective

With the last day of January, the never-ending story of Brexit finally ended. The law implementing the withdrawal agreement was passed by the Parliament of the United Kingdom of Great Britain and Northern Ireland early this year and signed by Queen Elisabeth II. The withdrawal agreement was then approved by the members of the European Parliament. After a long period of uncertainty, negotiations and delays, the European Union has one less member. What will the post-Brexit time be like under Czech immigration law, and what should UK nationals prepare for?

Barbora Cvinerová
bcvinerova@kpmg.cz

Markéta Volejníčková
kpmg@kpmg.cz

Lukáš Sova
kpmg@kpmg.cz

The United Kingdom's withdrawal from the European Union followed the 'soft Brexit' scenario – with a deal. At the moment of the withdrawal, a transition period started to run, to end on 31 December 2020, with the possibility of an up-to-two-year extension. During the transition, not much will change: UK nationals will continue to be viewed as EU citizens; hence, they may continue to reside and work in the Czech Republic without the need to apply for any residence or work permits, as is the case for citizens of countries that are not members of the EU (third countries).

Unless the transition period is extended, with the beginning of 2021, UK nationals will become third-country citizens from the viewpoint of Czech immigration law and will no longer enjoy the benefits of free movement and access to job market within the EU. Therefore, if they wish to stay in the Czech Republic, they will have to adjust their residency status no later than on the last day of the transition period.

This can be done at any branch of the Czech Ministry of Internal Affairs, at the Department of Asylum and Migration Policy. To apply, it is necessary to appear in person, with all necessary documents, ideally on an agreed-upon day and time. There is a wide range of residence permits available to third-country citizens, and it is important to choose the one that best corresponds to the purpose of an individual's stay in the Czech Republic. UK nationals currently not holding a certificate of temporary or permanent residence and not planning to reside in Czech territory after the end of the transition period will not have to apply for any residence permit.

The Lex Brexit, meaning the law whereby the Czech Republic was preparing for a 'hard Brexit', i.e. a withdrawal with no deal, will not enter into effect at all. What will change upon the elapse of the transition period, is the decree regulating the jurisdiction of embassies that accept applications for Czech residence permits: while third-country nationals have to apply at an embassy in the country where they are citizens (or the country that issued their travel document or where they have a permanent residence), UK nationals will be given the option to apply at any embassy of the Czech Republic.

Although no major changes to Czech immigration laws have resulted from Brexit, we recommend not leaving things to the last minute and using the transition period to prepare for when UK nationals will no longer enjoy the benefits of residence and free access to the job market. Most importantly, this means choosing a suitable residence permit, possibly also a work visa, and preparing the documents necessary for the respective application.

Application of beneficial ownership and anti-abuse principles in the EU

Courts across the EU have been inspired by the so-called Danish judgements of the Court of Justice of the EU, and so some national courts’ decisions on the taxation of dividends and interest payments received by holdings have followed the beneficial ownership principle (the Spanish case) and the anti-abuse principle for artificial arrangements (the Dutch case) applied by the CJEU.

Diana Marková
dmarkova@kpmg.cz

Matěj Kolář
kpmg@kpmg.cz

We [previously wrote] about the decisions of the Court of Justice of the EU (CJEU) in the so-called Danish cases, providing guidance on the application of the beneficial ownership and anti-abuse principles. Regarding beneficial ownership, the principle can be interpreted using the Commentary to the OECD Model Convention. Further, the general anti-abuse principle can be relied on by a member state even if the anti-abuse clause has not been implemented into the member state’s legislation.

The CJEU’s decisions have been followed within the decision making of national courts across the EU. The decision made by the Spanish Central Tax Court in October 2019 involves both principles and uses the Danish cases as one of the main pillars behind the decision. The background of the case involves a Spanish debtor receiving financing from its Dutch shareholder. The interest received by the Dutch company was instantly transferred to a tax resident in Andorra. The most interesting point in this case is that the decision of the court goes against the prior approach of the Spanish National High Court. At the time of the judgment, the requirement of beneficial ownership had not been implemented into Spanish legislation. The Spanish company used this to challenge the argument of the Spanish tax administrator. The court nonetheless decided that to benefit from the exemption from withholding tax, the recipient must be the beneficial owner of the interest (i.e. must have control over the further use of the received income). According to the court, this approach is in accordance with the overall aim of the Interest and Royalties Directive.

Another decision, mostly dealing with the anti-abuse principle, is that of the Dutch Supreme Court from January 2020. The Dutch court ruled in favour of the tax authority and stated that dividends derived from a substantial shareholding in a Dutch company by a Luxembourg holding are taxable in the Netherlands, evaluating the whole structure as artificial and primarily aimed at avoiding tax. To arrive at its conclusion, the court used two tests. After applying *the tax avoidance test*, the court concluded that interposing a company tax resident in Luxembourg between a shareholder tax resident in a third country (Switzerland) and a Dutch company was an artificial structure, since the interposed company had no real substance. Under *the business test*, the court concluded that the shareholding in the Dutch company was not a business asset of the taxpayer but just a pure investment, i.e. the company did not ensure any functions or services and had solely a holding function.

We recommend closely evaluating any flows of dividends, interest or royalties in your company/group, and if you come across any questions, please do not hesitate to contact us.

Unexpected CJEU judgment: commissionaire structure application

In Case C-707/18, regarding Romanian law, the Court of Justice of the EU (CJEU) dealt with an issue concerning the purchaser who in their own name and at their own expense ensured administrative acts necessary to complete a sale of plots of land. According to the court, regardless of whether the vendor had paid for such services, this involved the application of a commissionaire structure.

Martin Krapinec
mkrapinec@kpmg.cz

Hana Hašková
hhaskova@kpmg.cz

The vendor concluded a pre-contract with the purchaser, based on which the purchaser acquired an entitlement to purchase plots of land. Subsequently, both parties entered into a standard purchase contract. The pre-contract's subject-matter was to ensure the administrative acts necessary for the sale of land. In the pre-contract, the purchaser undertook to perform at their own expense services associated with gathering the necessary documentation and registering the land in the Land Register, etc. Under Romanian legislation, the ensuring of these acts is necessary to be able to conclude a purchase contract in due manner.

The purchaser hired a third party to ensure the fulfilment of all administrative requirements arising from the pre-contract. Expenses for these administrative acts were therefore never invoiced to the vendor, as the purchaser treated them as expenses associated with the investment and incurred to generate taxable income.

However, the tax administrator assessed to the purchaser an additional VAT on the services associated with ensuring the registration in the Land Register by a third party, arguing that these services were provided by the purchaser in their own name but for the account of the vendor who had been legally obliged to perform the administrative acts concerned. Consequently, the tax administrator classified this as a typical commissionaire structure. The CJEU confirmed the tax administrator's conclusions, claiming that even though no remuneration had been agreed for these services, the transaction at issue involved the provision of a taxable supply (as in the case of a commissionaire structure) and VAT should really be paid.

Municipal Court in Prague: tax returns declaring lower tax may not be filed after deadline

The deadline for filing an additional tax return is the end of the month following the month in which a taxpayer learned that the tax concerned had been determined incorrectly, irrespective of whether an additional tax return declares a lower or higher tax. What will happen when the taxpayer files an additional tax return after the set deadline? The Municipal Court in Prague claims that tax returns declaring a lower tax may not be submitted after the deadline at all.

Jana Fuksová
jfuksova@kpmg.cz

Josef Riesner
kpmg@kpmg.cz

There are generally two basic deadlines for filing additional tax returns: the first is the end of the month following the month in which the taxpayer learned that they should file an additional tax return, and the second is the end of the lapse period for determining a tax. In case file no. 9 Af 1/2018, the Municipal Court dealt with an additional tax return to decrease tax filed after the first deadline. The court agreed with the tax administrator who dismissed the additional tax return in question on the grounds of late filing. According to the court, the taxpayer's entitlement to file an additional tax return declaring a lower tax extinguishes as soon as the set deadline expires.

With respect to the matter at hand, the court held that the entitlement to file an additional tax return for a lower tax will extinguish even if only one of the two deadlines has expired. In the case of an additional tax return for a higher tax, the situation is different: the taxpayer *must* and not only *may* file an additional tax return. This duty lasts over the entire period for assessing tax, and any default results in sanctions under the Tax Procedure Rules. The court did not agree with the taxpayer's argument that the situation had been so complex that a special opinion had to be obtained whether to file an additional tax return.

In practice, to determine the moment from which the first deadline begins to run can be quite complicated. In the case in question, however, it was quite simple, according to the court: it was the date on which a decision constituting the grounds for filing an additional tax return was delivered to the taxpayer's legal representative. The case is yet to be discussed by the Supreme Administrative Court. However, the Municipal Court's judgment makes it clear that no one should procrastinate when filing an additional tax return and that all should make sure that the appropriate deadlines are met, just as with ordinary tax returns.

In brief

Latest news, February 2020

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

Václav Baňka
vbanka@kpmg.cz

Lenka Fialková
lfialkova@kpmg.cz

DOMESTIC NEWS IN BRIEF

- From 2020, the parental allowance to take care of a family’s youngest child increases from CZK 220 thousand to CZK 300 thousand and from CZK 330 thousand to CZK 450 thousand for two and more children born simultaneously. This increase applies to all recipients that have not yet utilised the total parental allowance amount as at 1 January 2020. The amendment also increases the number of hours in a month which a child may spent in pre-school facilities from 46 to 92.

- From 1 January 2020, following the average wage growth, the maximum unemployment benefit amount increased from CZK 18 111 to CZK 19 389 a month, and the maximum retraining benefit rose from CZK 20 297 to CZK 21 729 a month. The amount of earnings permitted to be generated by jobseekers who are not on the dole and wish to make some extra money from a non-colliding job increased from CZK 6 675 to CZK 7 300 a month.

- The Act on the Right to Digital Services (12/220 Coll.) entered into effect on 1 February 2020. It guarantees citizens direct electronic communication with the authorities, excepting matters that cannot be arranged through the internet, such as vehicle roadworthiness testing or the physical collection of identity cards. To prove one’s identity, e-ID cards or other identity cards used by banks will fully suffice.

- The deputies passed an amendment to the Labour Code in the first reading, regulating e.g. a job-sharing concept.

- A bill on digital services tax passed through the first reading in the deputies’ chamber in January and is now to be discussed by the budget committee. The government expects to collect as much as five billion Czech crowns for the budget. In response, the United States of America has threatened to introduce countermeasures such as customs duties on Czech products.

- The Chamber of Deputies discussed an amendment to the Tax Procedure Rules in the second reading, introducing e.g. the *Moje daně* portal and proposing, for example, to extend the deadline for refunding excess VAT deductions, to change default interest rates, or to cancel the five-day tolerance period upon a late submission of a tax return or a late tax payment.

- An amendment transposing EU legislation on VAT and mandatory disclosure rules (DAC 6) into Czech legislation is still waiting for the second reading in the Chamber of Deputies. The transposition deadline has already expired in both cases and the European Commission has sent the Czech Republic (and other countries not meeting the transposition deadline) a letter calling them to complete the implementation. Whereas EU legislation on VAT has already been in effect from 1 January 2020 and the Ministry of Finance has issued some information on how to proceed in this situation, the legislation on mandatory disclosure rules should only enter into effect on 1 July 2020; the reporting duty under DAC 6 shall apply to cross-border arrangements implemented after 25 June 2018.

FOREIGN NEWS IN BRIEF

- The European Commission has presented the European Green Deal, a roadmap containing actions to make Europe the first climate neutral continent by 2050. In particular, the roadmap of key actions provides an indicative timetable of June 2021 for a proposal to revise the Energy Taxation Directive.

- The EU and the UK will enter into intensive discussions on a new partnership and free trade agreement during the transition period, set to run until 31 December 2020.

- Members of the European Parliament (MEPs) have called on the EU Commission and the member states to agree on a joint and ambitious EU position on the taxation of the digital economy and supported the Commission's commitment to propose an EU solution if agreement cannot be reached internationally by the end of 2020.

- The Austrian Ministry of Finance has published guidance on the Austrian digital services tax. The tax will apply at a rate of 5% of the fee earned by the service provider with deductions available for services obtained from other unrelated advertising service providers.

- The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (2016) (MLI) has entered into force in respect of Denmark and Iceland. The MLI was also ratified by Chile, Estonia and Indonesia and will enter into effect three months after each jurisdiction deposits its instrument of ratification with the OECD. Liechtenstein deposited its instrument of ratification with the OECD in December 2019, the MLI will enter into force for Liechtenstein on 1 April 2020. Jordan also signed the MLI, bringing the total number of signatories to 93 jurisdictions.

- The OECD has published updated country-by-country reporting (CbCR) guidance. For more information, please refer to the guidance and summary.

- The OECD has published a report on the exchange of tax rulings, in it assessing the progress of 112 jurisdictions on the spontaneous exchange of information on tax rulings. The report notes that 30 thousand in-scope exchanges of tax rulings have taken place.

- The Dutch Ministry of Finance has published a list of low-tax jurisdictions for 2020. The list captures jurisdictions that are on the European Union's list of non-cooperative jurisdictions, and jurisdictions which have a corporate tax rate of less than 9%. In addition, the following jurisdictions have also been added to the Dutch list for 2020: Anguilla, the Bahamas, Bahrain, Barbados, Bermuda, British Virgin Islands, Cayman Islands, Guernsey, Isle of Man, Jersey, Turks and Caicos Islands, Turkmenistan, Vanuatu and the United Arab Emirates.

- A decree has been published in Poland deferring a key change to the Polish withholding tax regime until the end of June 2020. The deferred measure relates to the obligation to collect withholding tax regardless of relief at source being available under a double tax treaty or a domestic exemption in Polish law based on an EU directive.

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