KPMG

Tax and Legal Update

Tax news

Legal news

World news

Case law

August 2016

Dear readers,

As both chambers of the Czech Parliament refuse to give up their traditional two months of vacation, the legislative process has stalled for the time being. And cynics have it that the two months of parliamentary holidays always suspiciously coincide with economic growth, according to statistics. But to be fair to the Czech legislators: admittedly, a number of previously prepared amendments have been published in the Collection of Laws during this year's summer holidays, concerning for instance VAT or acquisitions of immovable property.

The summer holidays, however, have no effect on the inflow of directives and regulations from EU institutions. These also concern the Czech Republic, and we are covering them in detail in this issue of the Tax and Legal Update.

In case law, a number of positive regional court judgments have come up during the summer – in particular No. 52 Af 34/2014 - 269 and No. 30 Af 122/2013 – 73, concerning transfer pricing. We already talked about these in the previous issue, and we will continue keeping a close watch on cases in this area; I am mentioning these again because I believe that these judgements will be of crucial importance for a number of cases currently being addressed with the tax authorities, and for future administrative practice in the transfer pricing area. I am keeping my fingers crossed for all who are currently battling the issue with the tax authorities.

To those of you who already had your holidays, I hope that the energy gained will last you as long as possible. To the rest, I wish nice summer weather and a minimum of complications.

Daniel Szmaragowski
Director
KPMG Česká republika s.r.o.

Foreign tax authorities will know Czech APAs' content

The government has submitted to the chamber of deputies a draft amendment to the Act on International Cooperation in Tax Administration, which transposes an amendment to Council Directive (EU) 2015/2376, on the mandatory automatic exchange of information in the field of taxation into the Czech legal system. The transposition deadline is 31 December 2016; consequently, the Czech government has proposed to discuss this draft amendment in the chamber on a fast-track basis.

This amendment is not the first one to be discussed this year. Amendment No. 105/2016 Coll., in effect since 16 March, introduced a global standard for the automatic exchange of information, taking into account developments both in the EU and the OECD, harmonised automatic information exchange types and methods and, most of all, included under its wing the automatic exchange of information under the US Foreign Account Tax Compliance Act (FATCA) and the EU Savings Directive, which both relate to the exchange of information between financial institutions and tax authorities. The General Financial Directorate as a primary contact body also has in place a system for the automatic exchange of information regarding various types of income and property. It is also possible to exchange information on demand, which is historically the oldest type of information exchange between tax administrations.

The draft amendment introduces a third type of automatic exchange of information, which is the exchange of tax rulings with cross-border elements. In the Czech Republic this only involves the exchange of advance pricing agreements (APAs) since other types of binding rulings do not include a cross-border element.

In the CR as well as other EU countries taxpayers may ask the tax authority to assess transfer prices applied between related parties within a group of companies. The European Commission's recent inspections show, however, that some European tax authorities' decisions in this respect have resulted in an unjust distribution of profit between various member states. In many cases, the EC considered this a breach of EU public aid rules. From now on, member states will automatically have information about APAs affecting their tax revenues at their disposal. They will not have to rely on spontaneous exchanges and journalists revealing secret information and causing scandals the likes of LuxLeaks.

The automatic exchange of information should involve, apart from other information, the identification of the entities involved in the APA, the APA's content in summary form, the description and the value of a transaction, the selected transfer pricing method as well as the designation of the member state that may be affected by the APA. The APA's full wording will only have to be submitted to the appropriate tax authority on demand.

The amendment should become effective on 1 January 2017. In addition, the tax authorities within the EU should exchange information about all APAs issued in the period from 1 January 2012 to 31 December 2016 and effective on and after 1 January 2014, on a one-off basis. The deadline for conducting this one-off exchange is 31 December 2017. After that, the automatic exchange of information will occur regularly, always twice a year, via the General Financial Directorate that will also be responsible for the processing of received information regarding APAs issued abroad as well as APAs affecting Czech entities.

Another amendment

In August, the Ministry of Finance submitted another amendment to the Act on International Cooperation in Tax Administration for comments. This amendment should implement Country by Country Reporting (CbCR), another type of automatic information exchange. As a result, corporate groups will be obligated to prepare reports and disclose information relevant in the assessment of whether the group's tax base has been justly distributed between individual member states and jurisdictions. The EU believes that this will help introduce fairer economic competition between multinational groups of companies. The CbCR duty will apply to groups whose ultimate parent entity is located in the EU, as well as to groups that are managed from non-EU countries, and only to multinational corporate groups whose consolidated income for the entire group amounts to at least EUR 750 million (approx. CZK 20 billion). This amendment is proposed to become effective from 5 June 2017.

All the above measures relating to the automatic exchange of information fall into place and follow the EU's and OECD's recent trends in tax administration. Their objective is to motivate multinational corporate groups to pay a fair share of their taxes in countries in which they generate their profits or create values and to prevent them from doing otherwise. Considering the changes in the automatic exchange of information discussed above and the implementation of the Anti-Tax Avoidance Directive that should become effective from 2019, many a corporate group will have to review their transfer prices and other corporate management rules in the immediate future.

Daniel Szmaragowski
dszmaragowski@kpmg.cz
T: +420 222 123 841

Petr Bruštík
pbrustik@kpmg.cz
T: +420 222 123 556

Changes in VAT from end of July 2016

New Customs Act No. 242/2016 Coll. and related amendments to other acts, including Amendment to VAT Act No. 243/2016 Coll., were published in the Collection of Laws. Changes contained in these acts entered into effect on 29 July 2016 (with a few exceptions where the effective dates were 1 August and 1 September). Major changes include the application of the reverse-charge mechanism to the delivery of goods by persons not established in the CR and the reduction of sanctions associated with VAT ledger statements.

The amendment to the VAT Act allows for the application of the reverse-charge mechanism to the delivery of goods in the CR by an entity that is not established in the CR nor is registered as a Czech VAT payer, if their customer is a VAT payer. Entities not established in the CR will therefore no longer be obligated to register for VAT in the CR for this kind of transaction. In addition, such entities will be allowed to apply for the cancellation of their registration within six months of the amendment's effective date if their obligation to register for VAT originated before the amendment's effective date and if they only deliver goods to VAT payers in the Czech Republic. The amendment also introduces a change in the local jurisdiction of the tax authority dealing with entities not established in the CR, which will be taken over by the Moravian-Silesian Tax Authority from 1 September 2016.

The amendment also reduces sanctions associated with VAT ledger statements. The penalty for a delay in the submission of a VAT ledger statement (CZK 1 thousand) will automatically be remitted once a year. Other penalties can be waived, fully or partly, after filing a request with the appropriate tax authority, if justifiable reasons for such a breach of duty exist. Moreover, the amendment cancels the exemption from VAT regarding the delivery of goods in free zones or free warehouses and defines in more detail the six-month deadline for adjusting the amount of tax applicable to receivables from debtors subject to insolvency proceedings.

Veronika Jašová
vjasova@kpmg.cz
T: +420 222 123 754

Autumn changes in immovable property acquisition taxation

In practice, the existing method of immovable property acquisition taxation has led to a high degree of interpretation ambiguity. As a result, an amendment has been prepared, implementing the following changes:

- determination of a taxpayer: the acquirer of immovable property will always be the taxpayer; cancellation of a liability for unpaid tax;
- change in the concept of taxing the acquisition of utilities infrastructure;
- change in the method of determining the tax base upon the acquisition of immovable property by exchange;
- change in the tax exemption of new constructions and residential units that have been completed or have been put into use;
- extended scope of legal entities that are not liable to tax as a result of company conversions;
- extended subject-matter of tax: any extension of the period for which the ownership title to the superficiary right *(building right)* has been created will also be subject to tax.

To simplify legal regulations and tax administration, it will no longer be possible to choose a person liable to immovable property acquisition tax in cases where immovable property is being acquired by purchase or exchange. Hence, an immovable property's acquirer will always be liable to tax. Simultaneously, the amendment cancels the concept of a liability for unpaid tax as it has lost its purpose.

A substantial change relates to the taxation of utilities infrastructure acquisitions. The amendment aims to remove the existing ambiguity in whether utilities infrastructure is movable or immovable property from a private-law perspective. According to the amendment, only the onerous acquisition of a building under the Cadastral Act that is part of the utilities infrastructure will be liable to tax. Consequently, water and sewerage pipelines or electric lines will no longer be subject to immovable property acquisition tax.

On the exchange of immovable property, it will no longer be necessary to determine the value of the immovable property being transferred. This simplifies the whole exchange: the agreed consideration will be regarded as the contracted price. To determine the tax base, the contracted price is compared against the comparable tax value, which, for the exchange of immovable properties, will be newly established as 100% of the reference value or the value ascertained by an expert.

The amendment to the Senate's statutory measures will be effective from 1 November 2016.

Karin Osinová
kosinova@kpmg.cz
T: +420 222 123 461

Hana Čuříková
hcurikova@kpmg.cz
T: +420 222 123 590

Penalty for the failure to report exempted income. Who is eligible for waiver?

Individuals have to report exempted income exceeding CZK 5 million to the tax authority, effective from 2015. Those who fail to report such incomes can be penalised quite heavily. A new General Financial Directorate's instruction defines circumstances under which such penalties can be waived.

Individuals are obligated to report exempted incomes exceeding CZK 5 million within the deadlines set for the filing of a tax return for the relevant taxable period. If taxpayers fail to report such incomes within the set deadlines, they may be subject to severe penalties. The amount of the penalties depends on the degree of fault. Those who report income after the deadline but without having been called upon by the tax authority are subject to a penalty of 0.1% of the unreported income. Where taxpayers are summoned by the tax authority to report their income, the penalty amounts to 10% of the unreported income. Where taxpayers do not fulfil their reporting obligation even after they have been ordered to do so by the tax authority, a 15% penalty is charged, which in its effect means that the income at issue has been taxed.

In accordance with the appropriate legislation, the tax administrator may wave penalties where the duty has not been fulfilled for reasons that can be justified considering the specifics of a particular case. The new GFD's instruction removes this relatively vague formulation and determines the degrees of fault as follows:

- where taxpayers fulfil their reporting obligation without the tax authority's appeal within 60 days of the deadline for filing their tax return, up to 90% of the penalty can be waived;
- where taxpayers fulfil their reporting obligation upon the tax authority's appeal within 90 days of the deadline for filing their tax return, up to 70% of the penalty can be waived.

Justifiable reasons are a taxpayer's health problems or natural disasters suffered by taxpayers. In such cases, the tax authority may waive up to 100% of the penalty. It should be pointed out that all facts relating to these justifiable reasons must be duly supported with documentation.

However, justifiable reasons alone may not be sufficient for the waiver of penalties. According to the instruction, the tax authority must also assess to what extent the taxpayer has been complying with their tax administration obligations. Violations listed in the instruction substantially reduce the penalty amount that can be waived. These violations include, for example, the existence of a taxpayer's enforceable underpayment, the final and conclusive imposition of a penalty for a delay in the filing of a tax return, a procedural fine, or the assessment of tax according to whatever information and materials are available (e.g. estimates, benchmarking, etc.).

Alena Švecová
asvecova@kpmg.cz
T: +420 222 123 618

Eva Doložílková
edolozilkova@kpmg.cz
T: +420 222 123 696

Taxation of working pensioners unconstitutional

The Constitutional Court abolished the part of the Income Tax Act concerning taxation of old-age pensions of pensioners whose other income (from employment, business activity or rent) exceeds CZK 840 000 in aggregate per year. Pensioners with such an annual income were obliged to include their pension, irrespective of its amount, in their tax base, and to pay tax on it.

Taxation of old-age pensions if the income exceeds CZK 840 000 was first introduced in 2011; subsequently, it was cancelled for years 2013–2014 and reintroduced again for 2015.

The Constitutional Court has now abolished this measure, accommodating a motion by seventeen senators stating that the act contravenes the principle of equality and non-discrimination. In its ruling, the court presented a model example comparing a situation of two old-age pensioners with the same amount of pension equalling 36 times the minimum wage, while the amount of their other income differed by one crown only. The tax burden differed by more than CZK 53 000, which the court declared to be a breach of the equality principle.

Based on the Constitutional Court's ruling, pensioners with an annual income exceeding CZK 840 000 will no longer have to tax their old-age pensions. The relevant part of the act has been abolished as at the date of promulgation of the Constitutional Court's judgement in the Collection of Laws; this means that old-age pensions do not have to be taxed on the grounds of other income exceeding CZK 840 000 already in 2016.

The mentioned ruling will not affect the taxation of old-age pensions exceeding 36 times the minimum wage (CZK 356 400 in 2016). Amounts of old-age pensions in excess of the limit shall be subject to tax, and pensioners will have to file a tax return for the relevant taxation period. However, a vast majority of old-age pensions will be tax-free, as pensions this high (above CZK 29 700 per month) are only reached by a fraction of pensioners; the average pension in the first quarter of 2016 was CZK 11 400.

This Constitutional Court's ruling is not the first one dealing with the taxation of old-age pensioners. Already before, the court granted the motion of a group of senators and abolished a part of the Income Tax Act that disallowed old-age pensioners to apply the basic annual tax relief of CZK 24 840.

Gabriela Vokněrová
gvoknerova@kpmg.cz
T: +420 222 124 253

Darina Němcová
dnemcova@kpmg.cz
T: +420 222 123 557

2015 the most effective year in financial administration's history

The financial administration considers 2015 to have been its most successful year so far, mainly due to the enhanced effectiveness of tax and customs administration and the continuing fight against tax evasion, especially with respect to VAT. This derives from the financial and customs administration's annual report.

VAT was traditionally at the centre of the financial administration's attention, undergoing major changes in 2015, involving the introduction of the second reduced VAT rate of 10% on pharmaceuticals, books and essential baby nutrition as well as the extension of the reverse-charge mechanism to other commodities as part of its strategy to fight carousel fraud. The financial administration also expressed satisfaction with its VAT ledger statement project, launched in January 2016.

Tax Cobra, the media-famous tax crime unit, continued with its activities started in 2014. It played an important part in the enhancement of co-operation effectiveness between the financial administration, customs administration and the police, thus helping increase income from taxation. Another successful project as seen by the financial administration was the Help for Prague project focusing on VAT payers virtually residing in Prague who rely on the lower frequency of tax inspections in Prague compared to other regions. In 2015, tax officials also directed their attention to taxpayers who transfer their profits via related parties to countries with lower tax rates. According to the tax administration, all these measures led to the considerable increase in additionally assessed tax of CZK 6.1 billion (63.5%).

2015 was thus the most successful year in the financial administration's history in terms of its tax revenues. Unsurprisingly, first place in the total volume of collected tax again belongs to VAT, showing a 2.8% year-on-year increase. Second place, with a considerable distance, went to corporate income tax, showing a year-on-year increase in revenues of 12.1%. Another step to a higher tax collection effectiveness was the gradual reduction of tax underpayments, which decreased by 1.2% compared to 2014.

The financial administration celebrated successes primarily in VAT collection and fighting VAT evasion and has made it quite clear that it is not planning to ease up in its efforts. We can therefore only recommend paying increased attention to all its activities and being prepared to meet all the tax officials' requirements.

Alena Švecová
asvecova@kpmg.cz
T: +420 222 123 618

Martina Valachová
mvalachova@kpmg.cz
T: +420 222 124 370

Inconspicuous revolution in minor offences law

Unattended by the media, the Act on Liability for Administrative Infractions (*wrongful act governed by administrative law*) and on the Proceedings on Them has passed through the legislative process. The act replaces the twenty-six-year old Administrative Infractions Act (Minor Offences Act), introducing a number of significant changes in this widely applied area of administrative law.

The regulation valid so far does not conceal its age, despite being frequently amended. The new act strives to modernise the regulation, and, more importantly, make the administrative punishment area more systematic. The classification of administrative delicts into 'infractions' (*only committed by individuals*) and 'other administrative delicts' (*committed also by corporate entities*) has been causing problems as to what provisions should govern the proceedings on administrative delicts – as a rule, general provisions of the Administrative Procedure Code have been applied, which entails problems, as the general nature of the code is not suited for the "penal" character of the proceedings.

Through amendments to the related legislation, the legislator has now included all administrative delicts under the scope of the new Act, without a difference. This considerable extension of the term 'infraction' inevitably brings the need to apply the liability also to corporate entities. The Act thus contains detailed provisions on corporate liability (in principle, the same concept of attributability is applied as under the Corporate Criminal Liability Act).

Additionally, the new legislation introduces a more comprehensive regulation of general concepts known in criminal law – namely defences (circumstances excluding the illegality of an act), complicity, statutory bar, error in fact and error in law and the rather controversial concept of attempted infractions. Another problematic concept – banishment – is no longer to be found in the new law.

The old Minor Offences Act contained, apart from general provisions, also a special part summarizing some infractions that were not provided for by specific laws regulating the respective area. The new law, under the banner of systematic purity, takes a different approach, referring the facts of individual infractions either to specific laws, or, for the truly "residual" ones, to the new Act on Some Administrative Infractions. For instance, ever so popular traffic offences will partly be moved to the Road Traffic Act, the Roads Act, the Railways Act, and others. The new Act on Some Administrative Infractions will house, among others, minor offences against property or against peaceful coexistence.

No doubt, the new regulation will take some getting used to – fortunately, the legislators have given citizens enough time to do so: the effective date of the Act has only been set for July 2017.

Martin Hrdlík
mhrdlik@kpmg.cz
T: +420 222 123 392

David Flutka
dflutka@kpmg.cz
T: +420 222 123 667

Electronic signatures refitted

Without attracting the adequate attention of professionals or the public, the EU regulation known as eIDAS entered into effect on 1 July. The regulation directly affects all EU citizens, as we increasingly often make juridical acts in electronic form, which is a trend that is bound to continue. At the same time, some aspects of eIDAS are likely to cause undesirable uncertainty in legal relations.

Regulation (EU) 910/2014 of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (eIDAS), together with the Czech 'adaptation act' that is waiting to be approved by the Senate, regulate the area that has so far been covered mainly by the Act on Electronic Signature (which is being cancelled by the 'adaptation act'.)

The eIDAS regulation covers two areas – rules regarding trust services (namely concerning electronic transactions), and a legal framework for electronic identification (signatures, etc.). Some changes are only terminological ('seal' instead of the presently used term 'sign'), but the regulation also contains factual changes: the electronic seal will be used by corporate entities only (unlike the sign, which can also be used by individuals); this change may for instance have an adverse effect on unincorporated (self-employed) entrepreneurs.

The biggest benefit should be a unified regulation throughout the EU, with recognition of individual national electronic signatures in other EU countries. The eIDAS regulation, however, leaves room for numerous national exceptions, which considerably weakens the mentioned benefit and which has been, e.g., actively used by Czech legislators. The eIDAS regulation also threatens the established practice and interpretations confirmed by case law that messages sent through a data box do not have to be at the same time signed by an electronic signature. While there is some logic in this approach, the truth is that the fact that a document was sent from a data box may not necessarily say anything about the actual identity of the sender.

The most problematic area is the revised classification of electronic signatures, which causes uncertainty as to what type of electronic signature can be considered equal to a handwritten signature. eIDAS on one hand upgrades a simple electronic signature (such as in an e-mail footer) to a handwritten signature, while, on the other hand, downgrading the highest rank of an electronic signature (a recognised signature) to the level of an own-hand signature only, although it may be used more like a verified signature (necessary for instance for dealings with real property). This may have vast consequences for the prescribed form of juridical acts; nevertheless, any attempts for interpretation on the part of the ministry have so far seemed rather unconvincing.

Martin Kofroň
mkofron@kpmg.cz
T: +420 222 123 745

Věra Kočicová
vkocicova@kpmg.cz
T: +420 222 123 869

Filip Horák
fhorak@kpmg.cz
T: +420 222 123 169

National registers of beneficial owners to be interconnected

At the beginning of July, the European Commission published the Tax Transparency Package. It contains an amendment to the Anti-Money Laundering (AML) Directive 2015/849/EU, and to the Directive on Administrative Cooperation (DAC) 2011/16/EU.

The amended AML Directive lowers the threshold for declaring beneficial owners, introduces stricter rules for checking financial institutions' customers, and proposes a direct interconnection of the national registers of the beneficial owners of companies. It also clarifies national rules as regards the beneficial owners of trusts. The Commission will also adopt an EU list of high risk third countries in terms of anti-money laundering and counter-terrorism financing regimes, and it has proposed a list of due diligence measures that financial institutions will have to implement when dealing with customers from these countries. In this context, Company Law Directive 2009/101/EC will also be amended, to give the public access to information on beneficial owners of companies and trusts.

The DAC Directive is primarily being interlinked with the AML Directive, as tax authorities should have access to the beneficial owner information gathered by financial institutions under the AML Directive. Apart from the changes already proposed, the Commission also announced the following future steps:

- Following the analysis of a pilot project to exchange information on the ultimate beneficial owners of companies and trusts, the Commission will propose a legal solution of the area in the autumn of 2016. Note that the Czech Republic is also introducing the obligatory registration of beneficial owners – an amendment to the Act on Some Measures against Legalisation of Proceeds from Criminal Activity.
- In autumn, the Commission also intends to publish a proposal regarding sanctions and oversight over tax advisors and passive income intermediaries (banks, stockbrokers, etc.). The proposal's aim is to prevent aggressive tax planning; it is likely to include also a proposal for an amendment to the Directive on a Common System of Taxation Applicable to Interest and Royalty Payments, with the Commission intending to propose a certain extent of taxation by withdrawing tax at the source.
- For 2017, the Commission plans to publish a new EU listing process of third countries that enable tax abuse, including appropriate countermeasures. The Commission will also work with the OECD to develop an international blacklist of non-cooperative countries.
- Under preparation is also the strengthening of the protection of whistle-blowers in the tax area.

Changes to the AML and DAC Directives are to be implemented to national systems by 1 January 2017. Following an unprecedentedly fast adoption of the ATAD (Anti-Tax Avoidance Directive) and the automatic exchange of information by individual countries (Country by Country Reporting), the strong political support on the part of all EU member states to pass the proposals and introduce the mentioned measures can be expected.

Daniel Szmaragowski
dszmaragowski@kpmg.cz
T: +420 222 123 841

Lenka Fialková
lfialkova@kpmg.cz
T: +420 222 123 536

Supreme Court on how to recognise dangerously advantageous transactions

The Insolvency Act protects creditors in cases where debtors facing bankruptcy try, before insolvency proceedings are initiated, to dispose of their property to the detriment of creditors or where they favour one of the creditors. If insolvency administrators suspect this, a lawsuit may be filed seeking to have such a juridical act declared ineffective with retrospective effect. Hence, buyers should be worried – as such lawsuits will be directed against them and once the insolvency administrators succeed, the transactions between debtors and buyers will have no legal effect. Acquirers of a debtor's property will have to return everything that they acquired at an advantage back to the estate, from which the receivables of all other creditors will be satisfied. Paid purchase prices will not be returned to the buyers but will be instead considered receivables registered in the insolvency proceedings. Usually, however, not enough funds are recovered in insolvency proceedings to satisfy all receivables in full.

One type of juridical acts that can be challenged are those where debtors supplied something to the other party without adequate consideration – be it free of charge or for a price substantially lower than usual. The law, however, does not specify what is meant by such a price. The provision therefore had to be interpreted by the Supreme Court (decision 29 Cdo 307/2014).

In the case in question, the insolvency administrator disputed a purchase agreement by which the debtor sold real property appraised by an expert at CZK 9.96 million to his son for CZK 7.5 million. The administrator contested the transaction in a lawsuit claiming that the sale for 75% of the usual price in itself proves a supply without an adequate consideration. The Supreme Court was not quite so strict. Although in its opinion the ratio between the usual price and the contracted price is a principal criterion as well, other circumstances of the contested legal act have also to be considered. The court did not declare the transfer of the real property ineffective, accentuating that the debtor was not in bankruptcy at the time, and was motivated by an effort to raise sufficient funds to pay all his debts that were subject to enforcement procedures.

The court also formulated an important conclusion: the proportion between the contracted and the usual price in the case in question has to be seen as borderline. Had there been no mitigating circumstances in favour of the transaction (to remain effective), a price this low would not stand in court. Therefore, before effecting any advantageous purchases, buyers should review the financial situation of the other party to the contract, in particular where the contracted price approximates no more than three quarters of the usual price.

Martin Hrdlík
mhrdlik@kpmg.cz
T: +420 222 123 392

Věra Kočicová
vkocicova@kpmg.cz
T: +420 222 123 869

Barbora Bezděková
bbezdekova@kpmg.cz
T: +420 222 123 867

Infringement of trademark rights by tenants also concerns landlords

Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights allows the owner of a trademark to apply for an injunction not only against the person who infringes the right, but also against an intermediary whose services are being used by the infringer. In Czech law, the above is regulated by the Act on Enforcement of Intellectual Property Rights. Recently, the Czech Supreme Court referred to the CJEU for a preliminary ruling a the question whether it is actually possible to order an entity operating a market hall (in the case in question DELTA CENTER a.s., a joint-stock company operating the Pražská tržnice market hall as a tenant) to stop the unlawful conduct of market-traders infringing trademark rights and to adopt measures to prevent further unlawful conduct.

According to the CJEU, a tenant of a market hall who sublets various sales points situated in the hall to market-traders, some of whom use their pitches to sell counterfeit branded products, falls within the concept of 'an intermediary whose services are being used by a third party to infringe an intellectual property right' (judgement C-494/15, Tommy Hilfiger and others vs. Delta Center of 7 July 2016). This means that the owners of a trademark may seek protection of their right not only against the infringer (individual market-trader), but also against the operator of the market hall. This decision may be important for shopping mall operators or other entrepreneurs letting or subletting commercial premises.

The conditions for issuing a court order or an injunction against the mediator are identical to those applying to intermediaries mediating services in an on-line market place. These conditions have been already defined by the CJEU in the L'Oréal judgement (C-324/09). According to the judgement, the injunctions must be effective and dissuasive, while also being proportionate and not creating barriers to legitimate trade. The decision in the Tommy Hilfiger case certainly does not mean that intermediaries should exercise general and continuous oversight over the activity of all persons to whom they rent premises. However, they should expect that the trademark owner may approach them with a request to prevent unlawful conduct by persons to whom the intermediaries rent their premises; such request then has to be accommodated.

Viktor Dušek
vdusek@kpmg.cz
T: +420 222 123 746

Věra Kočicová
vkocicova@kpmg.cz
T: +420 222 123 869

Ladislav Karas
lkaras@kpmg.cz
T: +420 222 123 276

Unestimated estimates

The Supreme Administrative Court (SAC) in its recent judgment (9 Afs 203/2015) dealt with the timing of a reduction in revenues arising from an overpayment of healthcare services that was settled in a different period. The taxpayer, a healthcare facility, wanted to claim it as an item reducing the tax base, within a tax inspection. The core of the dispute was in what period the settlement should be claimed (deducted from the tax base) in a situation where no estimates had been recognised. Although the facts of the case were highly specific, several general principles may be derived from the SAC ruling:

- The SAC remarked on the substance of estimates: they are to be established for expenses and revenues that actually and provably occurred, with their exact amounts so far not known.
- The key criterion to determine whether the settlement should have been accounted for by means of an estimated receivable/payable is whether the taxpayer was aware of the expense, revenue or its change as at the date of the financial statement, with the only unknown circumstance being its exact amount. According to the court, it is not enough if the circumstances of the estimated item are known after the balance sheet date and before the deadline for filing a tax return.
- The court also emphasised that if an unjustifiable significant difference between the reality and the estimate is identified in the subsequent period, the difference may be reflected in the previous periods, either still when filing an ordinary tax return, or later, by filing an additional tax return. On the other hand, observing the proper manner of accounting leads to the recognition of the differences only in the period when they are settled.

At the time of preparing tax returns, the SAC has, again, reminded taxpayers that estimates and accruals are governed by certain rules not to be underestimated.

Alena Švecová
asvecova@kpmg.cz
T: +420 222 123 618

Jana Fuksová
jfuksova@kpmg.cz
T: +420 222 124 319

In brief

- The Business and Innovation Agency (formerly CzechInvest) has published new rules for applicants and recipients of subsidies from the Operational Programme Enterprise, Competitiveness and Innovation. The document contains instructions on how to obtain support from EU funds; from the preparation of a business plan to the submission of an application for payment. The most significant areas are the setting of time-limits throughout the project life-cycle, the procedure for filing and submitting an application for payment, an adjustment of conditions for an application to review a decision on the subsidy provided, the definition of removable and unremovable errors relating to the tender and a limitation on letting the subsidised assets for a period of 5 years after receiving the subsidy.
- At the end of July the results of the first round of the Ministry of Industry and Trade's TRIO programme, designed to support research, development and innovation, were published. As the second round is planned for the second half of September 2016, the Ministry of Industry and Trade has announced the possibility to book individual, preliminary consultations regarding the conditions of the planned round. Consultations will be carried out in the second half of August.
- New Government Decree No. 244/2016 Coll. effective from 29 July 2016 introduces changes in the reporting of data for statistical purposes (Intrastat). To translate the value of goods carried in foreign currencies, the foreign exchange rate that reporting entities use to translate the value of goods as part of value added tax will be used instead of the foreign exchange rate used to calculate customs values. The exchange rate for VAT will be used both to translate values for setting the reporting threshold and to translate values for reporting Intrastat data. To translate foreign currency in respect of data for the July 2016 reference period, the exchange rate to calculate customs value, i.e. the method applicable prior to the effective date of the new regulation, will be used. However, to report data for August 2016 and later reference periods, the exchange rate for VAT will already be applicable. A list of selected goods, accompanied with a supplementary statistical code, will be set by the Czech Statistical Office in a statement published in the Collection of Laws. Reports do not need to be corrected unless the value of goods to which an erroneous or inaccurate data relates exceeds CZK 10,000. Accordingly, the value has been increased from CZK 1,000 to CZK 10,000.
- On its website, the tax authority has published Instruction D-29 on waiving fines for a failure to submit a VAT ledger statement.