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Tax and Legal Update

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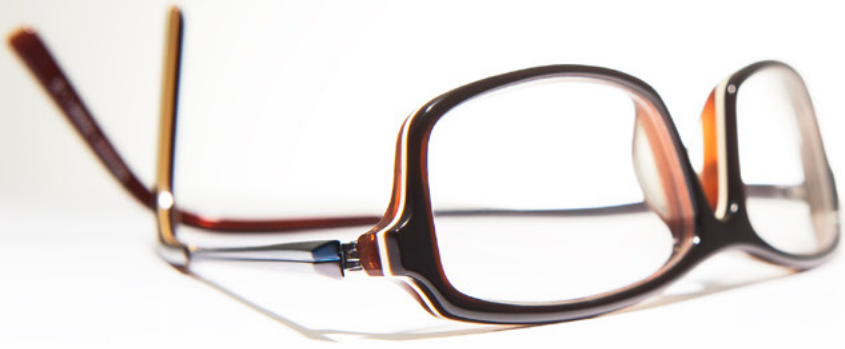

March 2016

Dear readers,

Last week, we filed our first VAT ledger statements. Since then, we already have read how many of the filings failed, and with what kind of sanctions the tax administration will respond in the first half year of this new duty; so far its approach seems sensible.

We can thus focus on what else is happening and what to get ready for. A new amendment to the Income Tax Act is planned for 2017. At this stage, the bill has only been released for external comments and we still have to see in what form and when it will get to parliament. In this edition of the update, we present some of the major topics it deals with. Other news on the home front are the results of a KPMG survey on carousel fraud and the update on the current status of the issue of gratuitous supplies – this topic has been waiting in the wings for some time now.

As for world news, the latest activities of the European Commission deserve attention. In recent years, the Czech Republic has concluded a growing number of bilateral treaties on the exchange of information with countries outside the European Union; these treaties allow Czech tax administrators to obtain information that was not available to them a couple of years ago and which can be used to assess or challenge the nature of certain transactions. Now, the European Commission proposes a range of measures to tackle so-called aggressive tax planning. Although the implementation of the whole package will take some time, the EU also coordinates its actions with the OECD, on whose platform already on 27 January 2016 31 countries signed an agreement on the technical details of the implementation of automated information exchanges. This should thus become a reality next year.

I wish you an inspiring read and, with spring approaching, also lots of optimism and new energy.

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2017 tax news

The Ministry of Finance submitted a draft act amending certain tax laws for external comments. The draft includes, among other things, an amendment to the Income Tax Act. Are there any surprises for taxpayers? Yes. Below we summarise thirteen income tax issues that from 2017 are likely to make taxpayers' lives quite rich.

The Ministry of Finance released for external comments a draft act amending certain tax laws. The draft includes, among other things, an amendment to the Income Tax Act. Are there any surprises for taxpayers? Yes. Below we summarise thirteen income tax issues that from 2017 are likely to make taxpayers' lives quite rich.

The good news is that the draft amendment to the Income Tax Act should contain only less than two hundred amended provisions. After the extensive recodifications of the past years, this is a positive change. Unfortunately, however, the amendment does not include the long-awaited promised conceptual changes to the taxation of gratuitous supplies.

Surprises for individuals

- The ministry is planning to restrict the value-related tax exemption of income from the sale of securities where the income does not exceed CZK 100 000 per year: securities that are/were part of business assets should be excluded from this exemption.
- The tax treatment of partial surrender values from the supplementary pension scheme (Pillar 3) should be consistent with the tax treatment of paid-out values from private life assurance schemes. Tax-exempt employers' contributions for the last ten years should thus be treated as employees' income from employment that will, naturally, be additionally taxed.

Bonuses for legal entities

- As in the case of "famous" Section 24(2)(zc), the applicability of Section 23(4)(e), allowing the non-taxation of revenues associated with non-deductible expenses, should be restricted. In accordance with the proposed amendment, non-taxation would only apply to the re-billing of non-deductible expenses and, from a time perspective, it would only apply to situations in which revenues are realised in the following taxable periods.
- The condition that interest paid to individuals may be deductible only if such interest has actually been paid will be extended to all credit instruments. This would especially negatively affect bond issuers as well as financial institutions dealing with products other than loans or borrowings.

- With respect to the Parent-Subsidiary Directive, which is already being implemented by another draft amendment, this particular amendment should make clear that the tax exemption of dividends paid to a parent company should not apply to any dividends that decrease the tax base of the entity paying the dividends.
- The deductibility criteria relating to expenses for transport by cars that are used through a loan from a creditor over the period of securing debt should be made consistent with the deductibility criteria relating to expenses for cars acquired via finance and operating leases.

Asset-related changes

- Periods prescribed by law to depreciate intangible assets should change into minimum depreciation periods. However, only intangible assets put into use after the effective date of this amendment may be depreciated longer.
- The draft plans to extend the possibility of depreciating technical improvements to sub-lessees and other users; for the time being this would involve only technical improvements made after the effective date of the amendment.
- Entities operating in real estate should take note of a change in determining the cost of a new construction: the net book value of an asset in liquidation will be replaced by the tax residual value of such an asset.

Withholding tax

- The ministry proposes to apply a withholding tax on selected gratuitous incomes of tax non-residents (such as free-of-charge transfers of real property or plants located in the Czech Republic). This, however, brings on a number of practical problems that have so far not been addressed by the tax administration.
- A new one-year deadline for filing a request for explanation should be introduced for persons to whom income is paid and are liable to tax that have doubts whether the payer of the tax is withholding the tax correctly. This will give sufficient time to foreign entities to obtain all the necessary administrative confirmations required by the tax administration.
- The draft amendment reacts to certain practical aspects of the recodified commercial law and clearly determines that, where an advance for dividends is refunded, the tax withheld from this advance should be refunded to the entity that was required to refund the advance. The amendment also further confirms the existing approach to the fulfilment of criteria for an exemption from tax, i.e. that these criteria must be assessed separately for advances and additional final payments.

- A 19% withholding tax on the interest income of selected public benefit entities and unit owners associations should also apply to deposit products. For selected taxpayers, however, the amendment also expects that interest income recipients will issue declarations that they will not include this income in their tax returns for the payers of this tax.

Other taxes

The draft act does not only cover income tax but also changes in other areas such as value added tax, tax administration or local fees and charges. A revolutionary change in this respect will be the introduction of a new legal fiction giving unit funds and investment funds' subfunds the status of a legal entity for VAT purposes. In addition, the draft act introduces a new institute of an unreliable person and a new regulation of a taxable supply and the duty to declare tax: the act should directly include existing interpretations regarding, for example, the taxation of various types of vouchers or services provided on a long-term basis. It also extends the possibility of claiming interest on retained excess deductions to other situations such as tax inspections.

Conversions vs. changes in assets without revaluation

The Ministry of Finance has also prepared a conceptual framework to address situations in which it is necessary to continue with tax depreciation. These will fall into the new "changes in assets without revaluation" category, covering contributions of assets or transfers of assets on company conversions and, according to the legislator, other non-profit-making transactions.

Under the draft act, taxpayers will not continue in tax depreciation but will apply the tax value, i.e. the latest value of assets reported for tax purposes before the change (namely the tax residual value or the book value of selected undepreciated assets). In addition, the original tax values will be preserved where the nature of assets changes as a result of a change in assets without revaluation (e.g. inventories would be reported as fixed assets by the acquirer). The amendment should also clarify the tax treatment of transfers of securities which may or may not be remeasured to fair value depending on the position of the taxpayer.

According to the ministry, the proposed change aims to simplify the existing fragmentary regulation. The question is whether it will achieve its purpose or whether it will further complicate the lives of taxpayers dealing with business restructuring instead.

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Gratuitous supplies

In connection with the approaching deadline for filing income tax returns that will also have to correctly report gratuitous supplies / gifts, the financial administration voiced its opinion on a number of existing issues in this respect. Although the discussion on a platform of the Coordination Committee of the Chamber of Tax Advisors has not yet been concluded, below we present the views of the General Financial Directorate that have so far been made available.

The cancellation of the gift tax and the inclusion of gratuitous supplies under the Income Tax Act have resulted in a number of problems in practice. The most pressing issues in this respect were submitted for discussion on a platform of the Coordination Committee of the Chamber of Tax Advisors. After almost a year of deliberation, the General Financial Directorate ("the GFD") issued its preliminary opinion.

Income tax base adjustment mechanism

The new taxation mechanism can be simplified as follows: if a taxpayer receives a gratuitous supply (and does not charge it directly to revenues), the taxpayer must first increase its tax base and, subsequently, may decrease it under certain conditions:

- The tax base can be reduced if the received supply is used to generate taxable income. This means that companies that have no potential to generate taxable revenues (especially holding companies whose incomes primarily consist of tax-exempt dividends or capital gains from the sale of ownership interests) cannot fulfil this condition. The same procedure applies to interest-free loans, borrowings and gratuitous loans. Here, the GFD does not contradict the conclusions presented in the submitters' contribution for discussion.
- Disagreeing with the financial administration's opinion, the contribution submitters believe that, with respect to gratuitous supplies, it is not generally necessary to use arm's length testing between related parties, as from 2015 the relevant provision does not contain an explicit order to apply it where the agreed price is zero.
- Non-monetary gratuitous supplies are valued using regulations governing the valuation of assets. Opposing the submitters' views, the financial administration is of the opinion that taxpayers should prove the value of a gratuitous supply even where the received supply does not effectively affect the tax base (where it is possible to simultaneously reduce the tax base by the same amount).
- Since taxpayers may, but need not, decrease their tax base, they should do so by themselves and be able prove their claim. According to the GFD, tax administrators should not consider the tax base reductions automatically "against the taxpayer's own will".

What is not a gratuitous supply?
The GFD agreed that income from gratuitous supplies is not involved in a number of situations presented by the submitters. These are, for example:

- Where an interest-free loan is provided by the parent company to a subsidiary, the creditor (the parent company) is presumed to receive consideration in form of an increase in the value of an ownership interest or in form of a potential of receiving higher profit shares. In essence, this does not involve a gratuitous supply.
- Situations in which a shareholder is liable for the obligations of a subsidiary or a statutory liability originates (e.g. a demerger by spin-off) do not involve gratuitous supplies.
- After taking into account the economic circumstances of each individual case, in some instances the securing of an obligation by the transfer of a right with a subsequent borrowing, or a borrowing, may not result in taxable gratuitous income.

Neither the current legislation nor the draft amendment to the Income Tax Act recently published by the Ministry of Finance and discussed above offer a full and precise answer on how to report and tax gifts in certain circumstances. The good news is that the financial administration has not materially contradicted the key principles applicable to the taxation of gratuitous supplies proposed by the contribution submitters. The key issue, i.e. the applicability of transfer pricing rules to gratuitous supplies between related parties, remains unanswered, however. It will be interesting to see how the financial administration's opinions will shift after the March meeting of the Coordination Committee.Co bezúplatným plněním není?

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Companies mistaken in linking carousel fraud to specific industries

Nearly half of Czech businesses (49%) do not know how to distinguish fraudulent companies from legitimate ones. Most (81%) believe that chain fraud does not concern them, as it only occurs in selected sectors of industry and for specific commodities – this according to a survey KPMG Czech Republic carried out among financial managers.

Companies usually associate carousel fraud only with specific industry sectors probably because most of them have learned of such fraud from the media: and the media usually reports only on fraud detected in the area of fuels, precious metals, electronics, or Asian textiles. Only a minority (5%) of respondents got their information from tax administrators. Nonetheless, companies are generally well aware of the principle of carousel fraud – only 14% do not know it at all. However, survey responses imply that only 15% of respondents are familiar with the signs allowing them to identify a fraudulent entity before doing business with them.

Nearly half (48%) of all companies have yet to adopt any additional measures to tackle VAT fraud; only one fifth are already working with such measures. However, these mostly focus solely on a better identification of suppliers, and checks whether suppliers are not unreliable suppliers and whether any payments are made into registered accounts. This, however, may not be seen as sufficient by the tax administration.

The results of the survey indicate a discrepancy between the financial administration's and courts' ideas on the necessary level of checking one's business partner and what businesses think needs to be done to verify their transactional partners. And where the control mechanisms in place are not sufficient from the viewpoint of the tax administration, companies run the risk that, should any preceding transaction have been affected by carousel fraud, their entitlement to deduct the VAT may be challenged in a tax inspection, while proving the opposite may be rather difficult. Frequently, the tax administration does not accept the entitlement for deduction of VAT that the company paid to its suppliers with the price of the goods or services purchased, if it finds out that the supplier, or any of their suppliers, did not report or pay the amount corresponding to the VAT thus received.

We therefore recommend looking for the following features, or a combination of them, indicating fraudulent entities:

- registered office in "office houses";
- very short business history;
- incomplete data or documents in the Commercial Register;
- untrustworthy staffing of statutory bodies.

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Central register of accounts discussed in the Chamber of Deputies;

Another legislative proposal of the Ministry of Finance proceeded from the government to the Chamber of Deputies. The central recording of accounts (CRA) should make it easier for investigative, prosecuting and adjudicating bodies and other state institutions to fight money laundering and terrorism.

Late February, one of the less conspicuous legislative efforts of the Ministry of Finance proceeded from the government to the Chamber of Deputies. The central register of accounts (CRA), while dealing with a rather sensitive area - bank secrecy - nevertheless remains in the shadow of other controversial novelties, such as the electronic reporting of sales or VAT ledger statements.

The declared aim of the CRA is making tax and criminal procedures more efficient, and implementing measures against the financing of terrorism. The ministry plans to create a unified non-public register to record each bank account that a citizen (individual) or a corporate entity has with any domestic bank, branch of foreign bank, or savings and credit cooperative. Whenever the relevant authorities need to know where a person banks, they will no longer need to approach tens of different banking entities operating in the Czech market - a single inquiry to the CRA will be enough.

According to the current proposal, the register would only contain basic information on the existence of the account and persons that have access to the funds in the account; such 'persons' may be also trusts or other legal arrangements without a legal entity status. The register should contain no other data. Nevertheless, those criticising the proposed law point out that it is a typical example of a slippery slope – they expect that after the CRA has been left to operate for some time, inevitably another proposal from the ministry will follow, insisting that in order to fight fraudulent practices even more efficiently, the balances in the accounts should be disclosed as well. And this would be yet another blow to banking secrecy.

Data in the register will be accessible to investigative, prosecuting and adjudicating bodies, financial administration and information services, in the same scope and under the same conditions that currently apply to authorities requesting client information from banks. The register will be managed by the Czech National Bank; it will keep data on active as well as closed accounts for 10 years after their closing. If any of the liable institutions fails to meet its duty to provide the required data to the CRA, this will constitute an administrative delict, with a penalty of up to CZK 10 million.

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First-time s.r.o. registration free-of-charge?

The Chamber of Deputies is currently discussing a draft amendment to the Act on Court Fees. It will relieve founders of limited liability (s.r.o.) companies from the duty to pay a fee for first-time registration in the Commercial Register. However, the members of an s.r.o. will only achieve the relief upon meeting certain conditions. The amendment implements a European regulation aiming to aid in the start-up of small and medium-size businesses.

Under current legislation, founders of limited liability companies (s.r.o.) have to dig deep into their pockets: for the drafting of a foundation deed (memorandum of association or deed of incorporation) they have to pay at least CZK 4,000 to a notary; the court fee for the registration is another CZK 6,000. If the registration is made by a notary instead of the court, the notary gets an extra CZK 300. If their business requires a trade licence, they have to shell out another CZK 1,000.

According to the EU, these expenses are unacceptably high. The European Commission, within its initiative to support small and medium-size businesses (with the so-called Small Business Act) sets the maximum amount of administrative expenses necessary to start business at EUR 100. The EU motivates the member states to reflect this in their national regulations – reducing the fees will be a precondition for drawing support from EU structural and investment funds.

Czech legislators want to reduce these expenses by amending the Act on Court Fees, whereby the founders of limited liability companies would not always have to pay the CZK 6,000 fee for registration in the Commercial Register. The exception from the fee duty will apply to cases where the first-time registration in the Commercial Register is made by a notary based on a notarial record of the foundation deed drafted by the same notary, which has to be short and must contain only elements required by law. Another condition will be that the obligatory contributions will have to be made in monetary form. Further reducing the costs for company founders, the minimum notary´s fee for the drafting of this legal act will be reduced to CZK 2,000.

As the Czech Republic faces a substantial penalty if the regulation is not passed, we expect that the legislation process will run smoothly this time.

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EU tax package

In February, the European Commission presented an ambitious package of anti-tax avoidance measures, provoking considerable responses from both professionals and the public. Below we summarise the responses of the EU finance ministers.

In February, the European Commission presented an ambitious package of anti-tax avoidance measures, provoking considerable responses from both professionals and the public. Further below we summarise the responses of the EU finance ministers.

The crucial part of the package comprises the Anti-Tax Avoidance Directive and revisions to the Administrative Cooperation Directive. The commission also drafted recommendations on the revision of international tax treaties, and a joint strategy vis-a-vis third countries that do not respect the global standard of "fair" taxation. The Anti-Tax Avoidance Directive introduces six measures to tackle aggressive tax planning:

- general limitation of the tax-deductibility of interest (not yet to apply to financial undertakings);
- taxation of profits on substantial cross-border transfers of assets, mainly when discontinuing a business in one EU member state (exit taxation);
- tax off-setting rather than tax exemption of dividends and profits on the sale of companies sourced in third countries with a very low corporate tax rate;
- a general anti-abuse rule;
- rules restricting hybrid mismatch contracts to claim tax benefits (e.g., double deduction of the same tax expense);
- taxation of profits of controlled foreign companies within the tax base of the parent company, when certain conditions are met (CFC rules).

The revision to the Administrative Cooperation Directive stipulates a duty of multinational groups with a turnover of at least EUR 750 million to present selected information by individual states where it operates, on an annual basis (country-by-country reporting). This information should include the volume of revenues, profit or income tax. The reporting duty should already apply for the period from 1 January 2016. The duty will be carried out by the entity that is the ultimate owner of the group vis-ŕ-vis the tax administration of its home country. This country will then pass the information on to the other member countries where the individual companies of the group (or their permanent establishments) are located.

At the February session of the Economic and Financial Affairs Council (ECOFIN) the EU finance ministers were first to comment on the draft directives. Although the commission's ambitious goal, supported by the Dutch presidency, is to pass the presented drafts already in the first half of 2016, a considerable number of ministers would prefer implementing the proposed measures in two stages. In their opinion, as the first step the OECD recommendations within the BEPS project should be implemented; only then should the other measures follow. Furthermore, some of the member states oppose the initiatives which go beyond the framework of OECD conclusions and generally request a detailed study of the impacts of the measures proposed. The commission's tax package may thus change significantly, following political negotiations.

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Crime and Punishment in tax – part two

Late January, the Supreme Administrative Court outlined a possible first chapter of the sequel to *Crime and Punishment* in tax. This time, the central motif is the concurrence of a fine for incorrect bookkeeping and a penalty on additionally assessed tax.

The Supreme Administrative Court (SAC) in its recent judgement (4 Afs 241/2015) confirmed that in the event of accounting errors that result in incorrectly determined tax, it is possible to impose a fine under the Accounting Act while at the same time penalising the additional assessment of tax under the Tax Procedure Code.

The SAC dealt with the case of a taxpayer who had valued inventories at variance with applicable accounting regulations. This accounting error also resulted in the tax base being determined incorrectly. Within a tax inspection, the tax administrator:

- imposed a fine of CZK 80,000 for incorrect bookkeeping; and
- at the same time imposed a penalty of 20% of the additionally assessed tax.

The SAC admitted that there is a relation between the tax proceedings and the proceedings on imposing the fine. At the same time, it concluded that a mere relation between reporting a lower amount of tax and incorrect accounting does not mean that the penalty punishing the incorrect tax assertion also punishes the incorrect accounting. The court thus definitely denied the taxpayers' arguments that the tax penalty and the fine punish the same act, which would exclude their concurrent imposition, pursuant to the double jeopardy principle.

At this time of book closings and income tax return preparations, this judgment strongly reminds us that adequate attention should be paid to accounting for amounts that seem immaterial in regards of an audit: possible accounting deficiencies that also affect the tax base carry a double risk of penalisation.

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(Im)movable gas pipelines?

This long-standing dilemma was tackled by the Supreme Administrative Court in its recent judgment; and energy sector players must have been rather unpleasantly surprised to find out that gas pipelines are, in general terms, viewed as immovable.

The Supreme Administrative Court in its judgement 8 Afs 131/2014 opined on the long-discussed issue of the nature of gas equipment for the purpose of real estate transfer tax. Firstly, the court emphasized that it is impossible to make any universal conclusions regarding gas facilities, and that it will always depend on the specific circumstances of a case.

In the case in question, the SAC analysed whether the gas facility in question was fixed to the ground by a firm foundation, i.e. whether it was a building from the perspective of the "old" Civil Code. In this connection, the court mentioned that the Building Act also defines such facilities as buildings. The argumentation based on its separability from the ground surface was brushed aside, referring to the well-known move of a church building in Most: the judges pointed out that strictly speaking, virtually anything is movable. However, for the real estate transfer tax purposes, only "conventional methods of separation are to be considered". A gas facility consisting of a gas main and branches cannot be moved without an unnatural modification of the ground surface or without damaging the equipment. The idea that the gas main and its branches have to be viewed separately because they may have different owners did not appeal to the SAC either.

In the case in question, a municipality was selling to a gas distributor a gas pipeline, i.e. main and branches, built during the introduction of gas energy to the village. The SAC concluded that the gas facility is an immovable item, and as such is subject to the tax on the transfer of immovables. However, in the initial part of the judgment the SAC clearly stated that it did not deal with the nature of gas pipelines from the perspective of recodified private law. The question thus remains whether these conclusions will stand in the light of the new concept of immovables.

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REACH expenses as viewed by the courts

According to a recent judgement of the Supreme Administrative Court, the costs of the registration of a chemical substance (REACH) do not involve an intangible asset, and cannot be viewed as such from tax or accounting perspective. This SAC conclusion contradicts the previous opinion of the General Financial Directorate.

In the case in question, a taxpayer had the duty to register a hazardous chemical they produced and wanted to release to the European market with the European Chemicals Agency (ECHA). The taxpayer accounted for the registration fees (referred to as REACH), including other expenses connected with the registration as operating expenses of the current period and deducted them from the tax base in the full amount. The tax authorities, however, were of the opinion that these were costs for the acquisition of a fixed asset and would have to be amortised. Their reasoning was based on the General Financial Directorate Information of 2011, according to which the decision on the registration of a chemical substance issued by ECHA fulfils the elements of intellectual property rights acquired for consideration from other entities.

Neither the regional court nor the Supreme Administrative Court shared the tax administration's opinion. Even though some defining elements of intangible assets for tax purposes were met, the courts did not find that the condition of acquisition for consideration was accomplished. According to the SAC, the "for-consideration" concept means that the transaction is advantageous for both parties, i.e. a situation when one party to a transaction provides payment while the other provides a supply. As far as REACH is concerned, the payment for the registration is merely a precondition that the authorities will deal with the registration application, but does not in itself guarantee the success of the registration procedure.

Furthermore, the courts believed that obtaining a registration cannot be compared to a transfer of a right for consideration from another entity simply because the registration did not exist before the filing of the application. The SAC stated that the registration of a chemical means, basically, a public authority consent to produce and market a chemical substance. Therefore, according to the SAC, not only is there no reason why these expenses should be viewed as intangible fixed assets from the accounting perspective, but the conditions for accruing them have not been met either.

With respect to the previous standpoint of the General Financial Directorate, it is possible that the tax authorities will continue to insist on amortizing or accruing. However, the judgement opens up the possibility for directly claiming expenses relating to a registration procedure, not only for chemicals, but for other commodities that are subject to similar regulations as well.

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In brief

- The Chamber of Deputies approved the electronic reporting of sales in February although the Ministry of Finance had ceased technical preparations for its implementation in autumn. Despite the approval, the electronic reporting of sales as one of the instruments meant to fight tax evasion is in further delay; its implementation has been postponed for the fourth time. The ministry currently has the ambitious plan to launch electronic reporting at the end of 2016. This means that within just a few months the ministry will have to prepare and test the technical background used by both financial administration and business entities. Businesses will have to report each cash transaction at the moment of making such a transaction, using a web interface of the financial administration's central data repository. Considering the implementation of VAT ledger statements, the deadline for launching the electronic reporting of sales seems to be rather optimistic.
- Amendment to the Valuation Decree No. 53/2016 Coll. was published in the Collection of Laws.
- On its website, the GFD published information on the application of a reverse-charge mechanism to selected taxable supplies in 2015 and 2016.
- On its website, the GFD disclosed information from its practice regarding the submission of first VAT ledger statements as well as answers to questions regarding the completion of a part of the questionnaire focusing on the receipt of services from foreign persons liable to tax whose registered offices are outside the EU.
- The European Union and Monaco entered into a tax transparency and information exchange agreement.
- The European Commission published a list of advanced pricing agreements relating to VAT that are issued by the states for companies planning complex cross-border transactions. This is a pilot project which commenced in June 2013 and involves 18 states. Italy and Ireland are the latest states joining the project. The Czech Republic is not participating. http://ec.europa.eu/taxation_customs/taxation/vat/traders/cross_border_rulings/index_en.htm.
- The European Commission organised an orientation debate on the future of VAT in the EU, Commissioners discussing ways forward for VAT in the EU. The Commission plans to put forward an Action Plan in March as it is aware that the VAT system must be modernised to be able to react to innovative business models and the digital economy and, in particular, to fraud. Simultaneously, the system should not create an excessive administrative burden for small and medium-size businesses.
- The OECD announced that it has established a new platform through which states other than the OECD and G20 members may get involved in the BEPS projects as "affiliated states".