Mazars Tax View

March 2023

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Editorial

Dear readers,

I would like to briefly present the contents of the March issue of our Tax Newsletter.

From 1 January 2023, the circle of people for which the Ministry of the Interior is establishing data boxes automatically is expanding. In the opening article we have summarised the most important information and the effects of establishing data boxes by law.

In this issue we are bringing you a trio of interesting cases of the Supreme Administrative Court from the area of corporate income tax. In an article from the area of VAT, we will introduce you to a case of the Court of Justice of the European Union that is substantially changing the long-standing practice in triangular trade.

The Czech government has extended the validity of the act that provides taxation support for gifts provided in connection with the military conflict in Ukraine through 2023, as well. We summarised the conditions and possibilities for the deduction of these gifts in another interesting article.

In the final contribution, we point out the changes concerning the waiving of fines for not submitting a control statement and the waiving of tax sanctions.

I trust that our articles will be helpful and thought-provoking and I wish you a pleasant read.

Pavel Klein
Tax Leading Partner

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The effects of automatic data boxes from January 2023

As of 1 January 2023, Act No. 457/2022 Coll. (hereinafter referred to as the "Act") amending Act No. 300/2008 Coll., on Electronic Acts and Authorised Document Conversion, as later amended, and other related laws, extends the circle of persons to whom data boxes are established automatically by law. Compared to the original legislative plan, data boxes (namely data boxes of the type "data box of a natural person") are not legally established by law for the persons not performing business activity. Nevertheless, such persons may have a data box of a natural person established based on the request.

The area of data boxes falls under the competence of the Ministry of the Interior and detailed information on data boxes is published in electronic form on the website for **data boxes** (mojedatovaschranka.cz) and on the website of the Ministry of the Interior at https://www.mvcr.cz/clanek/datove-schranky-datove-schranky.aspx. The main goal of this massive expansion of data boxes is primarily to increase efficiency and speed up communication between state institutions and the public.

Who is supposed to have a data box automatically established by law

Effective from 1.1.2023, a data box is to be "automatically" established by law:

- for any legal entity registered in the register of entities – thus not only legal entities established by law, legal entities registered in the Commercial Register and organisational units of foreign legal entities registered in the Commercial Register, as was the case in 2022, but also legal entities that are not established for the purpose of doing business, such as foundations, associations or partnership of apartment owners;
- for natural persons doing business entered in the legally specified records or registers - until now the data boxes of these persons (typically self-employed persons) have only been established on the basis of their request, but now the data box of a "natural person doing business" is established by the Ministry of the Interior "automatically".

Data boxes for natural persons without businesses will be established solely upon their request, as has been the case so far.

Effects of the established data box

Once a person has access to a data box established by law, he/she will be obliged to submit forms (e.g., tax returns, registration applications, etc.) to the tax authorities exclusively electronically in the format and structure prescribed by the tax administrator. He/she does not, however, necessarily need to use the data box to do so, he/she can also submit it via the tax administration portal.

From the perspective of the creation of the obligation to file a tax return electronically in connection with the existence of a data box, the decisive moment is no longer the establishment of the data box by law according to the valid legislation, but only when it is made accessible. This will be done when one of the persons defined by the Act first logs in (the access data is sent by the Ministry of the Interior immediately after the establishment of the data box), but no later than the 15th day after the date of the delivery of the access data to these persons.

The existence of an obligation to file a return exclusively electronically is assessed at the moment when the tax return is filed in relation to a particular individual. If the entrepreneur already has an active data box at the time of filing the return in 2023, the submission must only be made electronically, but if the data box is not yet active, he/she can file the return in paper form.

The access to the data box also has a significant impact on the form of communication with the tax offices (and their territorial branches) and on the delivery of documents on the part of the bodies of the Financial Administration of the Czech Republic. Data box owners will have documents related to their

business activities delivered exclusively to their data boxes, other non-business-related documents will be delivered by post even after the establishment and the access of the data box by the natural person.

How long are the messages in the data box available?

Messages in the data box are available for 90 days, after which they are automatically deleted and the user can no longer get at messages older than 90 days directly through the data box. However, he/she has the possibility to use the additional paid Data Safe service, or to download the data message to a computer (or to a mobile phone, or to any data carrier), or to archive the data message on the Citizen Portal (free capacity up to 500 MB). Communication via data boxes with public authorities is free of charge, but there is a charge for commercial messages addressed to, for example, banks, insurance companies, energy suppliers, etc.

Fiction of delivery on weekends and holidays

The law contains an adjustment to the fiction of delivery of a data message, according to which the document (data message) sent by a public authority is considered to have been delivered upon the expiration of 10 days from the delivery of the document to the recipient's data box. The Supreme Administrative Court has recently addressed the question of the moment of delivery in cases where the fiction of the moment of delivery of a data message falls on a Saturday, Sunday or public holiday. It follows from the Supreme Administrative Court's conclusion that, as of 1 January 2023, a new rule is introduced that determines that on Saturday, Sunday and public holidays, data messages that the user has not yet opened will not be automatically delivered and the last day of the period of the fiction of delivery will be the closest following working day.

If you have any question related to data boxes, please do not hesitate to contact our specialists.

Gabriela Ivanco
Tax Manager

Anna Klímová
Editor, Mazars Tax View

Tax deductibility of interest on an acquisition loan – abuse of law

After a longer time, a court decision has appeared in the Czech Republic that is positive for the taxpayer as part of the issue of the tax deductibility of interest on an acquisition loan and the application of the institute of abuse of law. So far, however, this is only the decision of the regional court and the tax administration has filed a cassation appeal in the matter, which will therefore have to be assessed by the Supreme Administrative Court.

The tax deductibility of interest on an acquisition loan granted by a consortium of banks was examined in the proceedings before the regional court. The subject of the acquisition was a Czech operating company owned by foreign related entities of the buyer, which was the Czech acquisition SPV. After the acquisition, the operating company merged with the SPV. However, the acquisition loan was not granted directly to the Czech SPV, but to its parent company. Subsequently, this loan was transferred over several steps to the Czech SPV, and after the merger finally to the operational entity. In fact, this was a debt-push-down transaction, which had already been assessed as an abuse of law several times by the tax administration with the subsequent blessing by the judiciary in relation to the tax deductibility of interest. In this case, the tax administrator and the appellate tax directorate rejected the tax deductibility of interest on an acquisition loan, arguing that the debt-push-down transaction seemed to be calculated, without economic justification and was performed in such a way that the taxpayer would obtain an illegitimate tax advantage.

Nevertheless, the regional court has leaned to the taxpayer‘s side. Below we provide a selection of its arguments:

- the main and, according to the court, legitimate economic reason for the given transactions was the acquisition of an entire group by a new owner, whereas the procedure where the acquisition loan was first accepted and the Czech companies subsequently merged resulted from the conditions of the external financing banking consortium;
- all transactions must be assessed as a whole, not like the tax administrator, which focused only on the acquisition of the operating company itself and its subsequent merger with the Czech SPV. The primary objective was not the acquisition of a new asset in the group, but to take over the entire group by a new investor, and this can be a sufficient economic reason;
- the loan was not granted by a related party – it is essential that the restructuring conditions were laid down by an external party;
- in the case of the provisioning of an external loan, it is difficult to assume that the banks would set the conditions deliberately in order to create an artificial structure to obtain an unjustified tax advantage – on the contrary, the banks wanted the conditions to ensure maximum efficiency in the repayment of the loan, i.e., the procedure was economically rational;
- however, even this structure does not automatically mean excluding the possibility of applying the institute of abuse of law – it cannot be simply argued that any requirement of an (external) bank makes economic sense – but the tax administrator must prove the abuse of the law, which has not happened in this case.

Following the filing of the cassation appeal, the case in question will be examined further by the Supreme Administrative Court and it will be interesting to see what arguments it will bring, whether it will lean towards the taxpayer or the tax administration. In any event, it is still necessary to assess in detail each similar transaction (debt-push-down), taking into account the risk that the tax administrator will assess it as an abuse of law.

Court case 55 Af 4/2020–137

Olga Těhlová
Tax Senior

The payment of a profit share concealed by the sale of shares

In a recent court case, the Supreme Administrative Court (SAC) dealt with the payment of a profit share to a Cypriot company coming from a Czech company. The SAC came to the conclusion that the actual legal situation had been concealed, when the main purpose of the legal acts was the majority shareholder's intention to avoid taxation in the Czech Republic when paying the profit share. It thus agreed with the conclusions of the tax administrator, which assessed an additional withholding tax that was supposed to have been withheld when the profit share was paid to a natural person, the beneficial owner of the income.

In this case, a Czech natural person sold its share in a Czech limited liability company to a newly-created Cypriot company, which fulfilled the conditions for exemption from taxation on the part of the natural person. The provisions relating to the purchase price were relatively specific in the contract in question. It was supposed to be paid over the course of ten years without any further specification of the amount or dates of the individual instalments. Another peculiarity was that at first a 25 share in the company was transferred at a significantly higher price than the remaining 75% share in the company. Based on the agreement of the shareholders (the Czech natural person and the new Cypriot owner), the limited liability company then paid the profit share solely to the Cypriot shareholder (in spite of its share in the company).

The subsequent payment of the profit share to the Cypriot company was exempt from tax in accordance with the Income Tax Act and the relevant Double Taxation Treaty between the Czech Republic and the Republic of Cyprus, while the Cypriot company transferred all the funds thus obtained to the accounts of the natural person (the original shareholder of the limited liability company), as payment of the purchase price for the sale of share.

On the basis of a tax inspection, the tax administrator assessed an additional tax on the Czech limited liability company, the subject of which was the payment of aprofit share to the Cypriot company. The tax administrator stated that the beneficial owner of the profit shares paid out was the original Czech shareholder of the limited liability company and the paid amounts only "flowed" through the foreign accounts. Thus, they were transactions that concealed the true legal situation, namely the payment of a profit share to a natural person, which would be subject to taxation in the Czech Republic.

Court case 2 Afs 94/2021-48

Vendula Velenská

Tax Senior

Tax (non)deductibility of re-invoicing expenses

We are bringing the conclusions of the court case of the Supreme Administrative Court (hereinafter referred to as the "SAC") in the area of the application the Section 24 (2) (zc) of Act No. 586/1992 Coll., on Income Taxes (hereinafter referred to as "ITA"), as amended by the end of 2014. In the considered case, the tax administrator assessed an additional tax and a penalty for the tax periods of 2013 and 2014 to the taxpayer. The reason for this was that the taxpayer included representation expenses in the tax deductible expenses pursuant to the aforementioned provisions of ITA.

The taxpayer submitted contracts with customers to the tax administrator, some contracts included general provisions for the payment of the expenses of goods' acceptance by the taxpayer. These were representation costs (specifically accommodation, meals, hospitality, air tickets, car rental, rental of movable assets, services during the conclusion of contracts, travel allowances, taxis, entrance fees to museums, cosmetics, etc.) paid by the taxpayer on behalf of the customer. The representation expenses were included by the taxpayer in the final price of the sold goods and considered with reference to Section 24 (2) (zc) to be tax deductible.

The tax administrator stated that the condition of a direct connection between the expenses and taxable revenues was not fulfilled. He pointed out that the close link between the acquisition of goods and the fact that the customer's representatives had their trip to accept the goods paid for along with other related expenses was not sufficiently demonstrated. It was not demonstrated whether such expenditures had to be incurred in order to conclude the transaction at all. According to the tax administrator, the inclusion of the expenses in the price calculation does not automatically lead to their transformation into tax deductible expenses, i.e., the method of pricing is not decisive for assessing tax deductibility.

The SAC ruled in favour of the tax administrator. In order for representation expenses paid for the customers' representatives to be considered tax deductible, the taxpayer would not only need to demonstrate the contexts in which the transactions were incurred, but also that without them, the customer would either not have purchased the goods or not under such conditions. However, this was not demonstrated for the transactions being assessed.

Court case 2 Afs 139/2021-51

Eliška Košťáková
Tax Senior

The case of the Court of Justice of the EU amends the current practice in triangular trade

In its recent decision C-247/21 Luxury Trust Automobil, the Court of Justice of the EU ('CJEU') expressed, somewhat surprisingly, the view that the correct content of invoices for triangular trade has a major impact on the possibility of applying this regime.

In 2014, the Austrian company Luxury Trust Automobil (hereinafter as the 'Intermediary') purchased vehicles from a supplier established in the United Kingdom and sold them to customer from the Czech Republic. The vehicles were transported directly from the United Kingdom to the Czech Republic and all participants acted under the VAT number of their country of establishment. The Intermediary decided to apply the triangular trade regime to this transaction and issued an invoice without VAT, stating the reference 'Exempt intra-Community triangular transaction'. However, it did not refer to the fact that the VAT liability in the Czech Republic is transferred to the customer, or the commonly-used reference 'Reverse charge' (or 'dan odvede zakaznik' according to the language mutation of the invoice).

According to the CJEU, a triangular transaction is a voluntary regime that an intermediary decides to use at the time the transaction is realized and manifests his will by actively transferring the VAT liability to the final customer, since only in this way can the final customer be certain of the chosen VAT regime and his possible VAT liability. In this logic, the CJEU stated in its decision that an invoice must contain the note 'Reverse charge' when using a triangular regime. If the intermediary does not indicate this on the invoice, the triangular transaction is not deemed to have been carried out and the intermediary must register for VAT in the destination EU Member State. Even a supplementary correction of the invoice cannot remedy this fact. The reference on the invoice is therefore not merely a formality, as has been perceived so far, but a necessary condition for the application of the triangular simplification at all.

From experience, we know that complex cross-border transactions are often only subsequently treated from the VAT perspective in order to eliminate negative VAT effects. The above decision has a major impact on the current practice, where the correcting of invoices and VAT reports retroactively achieves the use of a triangular regime. Now it will no longer be possible to do this and the intermediary will not be able to avoid registering for VAT in the destination country.

At the same time, we highly recommend reviewing the invoice requirements, where companies in the position of an intermediary or final customer currently use triangular simplification regime.

If you have any questions with regard to the above or are interested in reviewing your current set-up, our team is fully at your disposal.

Štěpánka Šťastná
Tax Senior

Petra Slobodzianová
Tax Manager

Donations provided in 2023 in connection with the military conflict on the territory of Ukraine

At its meeting in January 2023, the Government of the Czech Republic approved a proposal to extend the validity of measures in the field of taxation in connection with the military conflict on the territory of Ukraine caused by the invasion of the army of the Russian Federation. This measure was originally adopted by Act No. 128/2022 Coll., which indirectly amended the income Taxes Act and which originally applied only to donations provided in 2022. However, as the armed conflict in Ukraine continues to rage on, while citizens and business entities continue to provide assistance to Ukraine and its population, the government approved the extension of these measures for 2023.

The aim of the aforementioned measure was the tax support for the taxpayer's charitable activity to help Ukraine and its people in the ongoing war with the Russian Federation. The measures have brought the following changes in the area of gifts for 2022:

1. the range of subjects to whom the gift can be given has been extended,
2. the range of the purposes for which the gift may be given has been extended,
3. the range of entities that can apply the deduction has been extended,
4. the period (after the 2020 and 2021 coronavirus pandemics) was extended, allowing the increased maximum limit for the deduction of gifts of 30% of the tax base to be used.

These measures have now been extended to 2023, when they will be applied in the following manner:

With regard to point 1, donations provided in 2023 not only to the Czech organisers of collections can be deducted from taxes, but also those provided directly to Ukraine (e.g., through the Ukrainian Embassy or directly to the Ukrainian Ministry of Defence), its territorial administrative offices and legal or natural persons whose registered office or residence is located within Ukraine, if the conditions of the beneficiary and the purpose for which the gratuitous fulfilment can be deducted from the tax base are met.

With regard to point 2, a tax-deductible donation can be provided for traditional scientific, educational, cultural and similar charitable purposes, as well as in

military assistance to Ukraine. Supporting Ukraine's defence efforts means anything that can help Ukraine in the military conflict and is not charitable or humanitarian aid. This includes, for example, military equipment, weapons, ammunition, and military accessories for military officers or volunteers.

With regard to point 3, a taxpayer who is a resident of Ukraine will be able to deduct the gift from his/her tax base if the total of his/her income from the resources in the Czech Republic amounts to at least 90% of his/her total income in the given year. Another facilitation of the situation for natural persons is the fact that if a taxpayer/natural person provides a gift to Ukraine through its representative office in the Czech Republic, then the taxpayer who is an employee and should not, if he would not wish to claim the gift thus provided, be obliged to file a tax return (i.e., the employer could make an annual settlement of advances and tax benefits), he/she can claim the value of the gift thus provided as a non-taxable part of the tax base through his/her employer and is not obliged to file a tax return on personal income tax for this reason only, as would normally be the case.

Finally, with regard to point 4, the Income Tax Act specifies certain minimum and maximum limits for the tax deductibility of a gift for a natural person. For gifts made by individuals used as a non-taxable part of the tax base, their aggregate value must be at least CZK 1000 or exceed 2% of the tax base (it is enough to fulfil one of the two given conditions). As a standard (the last time in 2019), donations of a maximum amount of 15% of the tax base can be deducted. This maximum limit for the tax deductibility of a granted gift is therefore increased to 30% again for the donor for 2023, just as in the years 2020-2022.

Jana Nováková
Tax Senior

Gabriela Ivanco
Tax Manager

Changes in the waiving of fines for control statement and tax sanctions

The Financial Administration amended the conditions for the waiving of fines for not submitting a control statement and issued a new instruction concerning the general waiver of tax accessories.

Changes in the waiving of fines for the control statement

The changes react to the amendment to the VAT Act effective as of January 2023. This is mainly a modification of situations where a fine can be imposed at half the regular amount. The addition of "substantive conditions" appear to be a more fundamental change. The tax administrator is now entitled to also take into account the nature, intensity or other circumstances that led to the fine in the decision-making process as part of the assessment of the scope of the waiver. The instruction in the wording of the latest amendment can be found here.

Changes in the waiving of tax sanctions – tax accessories

From 1 February 2023, the new instruction GFŘ-D-58, which replaced instruction GFŘ-D-47, resolves the problem of waiving tax sanctions. The main change is in particular the extension of the areas in which the tax administrator is entitled to take into account the nature, intensity or other circumstances which led to the imposition of the sanction in the context of assessing the scope of the waiver. The tax administrator can now assess the factual reasons that led to, for example, to the additional assessment of the tax and the related penalty. On the basis of their assessment, the waiver can be rejected or reduced. The full text of the instruction can be found here.

If interested, we are ready to discuss your particular situation and provide you with related assistance.

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