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Tax and Legal News | November 2024

Taxes

Assessing the functions and risks of a company in the light of recent case law

Recently, the administrative courts as well as the Supreme Administrative Court of the Slovak Republic have issued several judgments dealing with the assessment of transfer pricing of the manufacturing companies. These judgments bring new insights into the way in which the taxpayer´s functions and risks within the group are assessed.

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Contract manufacturers under Group control

What all the recent judgments have in common is that the tax authorities concluded that taxpayers were contract manufacturers with limited functions and risks. In internationally accepted terminology, this is an entity that carries out production activities with minimal business risk and limited functions. This model is often used in transfer pricing, where the contract manufacturer focuses on production to the exact specifications and instructions of the customer, with most of the risks associated with production, inventory and sales remaining with the customer. Also in these cases, the tax authorities concluded that the companies performed functions 'under the control' of the group and were therefore **not autonomous in deciding on certain key functions** (purchase of inputs, sale of products, strategic decision-making or decision-making on production capacity).

Judgment of the Supreme Administrative Court of the Slovak Republic

Judgment of the Supreme Administrative Court of the Slovak Republic No. 2Sfk/36/2023 confirms that companies which do not perform autonomous key functions may be considered as "dependants" within the group. Such an assessment may lead to an adjustment the company's profit margin on operating expenses (profit adjustment) if that margin is not within the independent range, even if the vast majority of the company's transactions are with independent persons. In the present case, the tax authorities increased the tax base by more than EUR 6 million. Although the judgment does not address the correctness of the application of the transactional net margin method or the correctness of the calculation of the difference in the prices of the controlled transactions, it **does bring an important shift in the assessment of functions and risks**.

Critical views of the administrative courts

On the other hand, the judgments of the Administrative Court in Bratislava (No. BA-1S/111/2019-107) and the Administrative Court in Košice (No. KE-7S/148/2020) **bring more critical views on the procedure of the tax authorities in determining the market profit and assessing the taxpayer's transactions**.

- In the case of the judgment of the Administrative Court in Bratislava, the court **objected to the inclusion of**

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dependent companies and the exclusion of loss-making companies in the comparability analysis. According to the court, the tax authorities's assumption that companies with limited functions and risks cannot make a loss was insufficiently proven.

- The judgment of the Administrative Court in Košice **criticized the tax authorities for applying the arm´s lenght principle to independent transactions, the use of the interquartile range or median without further justification** (only with reference to the OECD Guideline), and **insufficient justification for the use of so-called "aggregate approach" in the assessment of controlled transactions**. The Court also criticised **the lack of justification for the use of the double tax treaty, where** a formal reference to the treaty was insufficient.

Assessment of intra-group services

In addition to the assessment of the contract manufacturer, the judgment of the Supreme Administrative Court of the Slovak Republic confirmed the correctness of the tax authorities' procedure in assessing intra-group services. The tax authorities excluded from tax expenses services received from a related person in the amount of more than EUR 3 million, as the taxpayer did not provide specific outputs as to what services were actually received, what specific benefits accrued to the taxpayer from those services and how the costs were allocated to the company. **The submission of an invoice, a contract or a general list of services is not sufficient evidence to recognize the costs of the services as a tax expenses**. This topic was addressed in our previous article.

What can be seen from examples from court practice

In our experience, this issue is often the subject of disputes with the tax authorities and there is not a lot of case law to date compared to other countries. The new judgements are very useful for practice and contribute to a shift in the development of case law and thus to increasing legal certainty. They also emphasize the **importance of carefully prepared transfer pricing documentation, proper definition and documentation of functions (activities), risks as well as evidence keeping to demonstrate intra-group services**. Underestimation of this preparation may expose companies to significant tax risks.

If you are interested in this topic, please do not hesitate to contact our experts - we will be happy to discuss with you the impact of the judgments on your situation and provide a thorough analysis.

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Taxes

Financial Transactions Tax Act was published in the Collection of Laws

On 25 October 2024, Act on financial transactions tax was published in the Collection of Laws, which is supposed to be one of the tools for the consolidation of public finances. Since the expert discussion could only take place during and after the approval of the act in the National Council, several areas remain unanswered, and in particular, the question whether it will be necessary to amend this act before it enters into force.

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Act on financial transactions tax **will enter into force on 1 January 2025**, the first taxation period being **April 2025**.

Taxpayer

- Legal entities and branches of foreign legal entities;
- Self-employed individuals and entrepreneurs.

Tax Collector

- Banks and other financial institutions seated or having a branch in Slovakia;
- Taxpayers themselves should they make payments from foreign bank accounts or transactions using non-business accounts or should the costs of carrying out a financial transaction related to their activities in Slovakia be recharged to them.

Taxable Transactions

The aim is to tax:

- Debit of funds from the account;
- Use of a payment card issued to a transaction account for payment;
- Recharged costs connected to a payment that relates to an activity performed in Slovakia.

This means that:

- This tax will apply to transactions conducted exclusively from the business bank accounts;
- Legal entities' accounts will automatically be considered transaction accounts;
- Entrepreneurs will be obliged to open a separate business account by 31 March 2025;
- Transaction on private (non-business) bank account will not be subject to this tax, provided these will not relate to business of the taxpayer.

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Non-Taxable Transactions

Certain financial transactions will not be subject to this tax, including:

- Tax and social security contributions payments;
- Payments between the taxpayer's own accounts in the same bank;
- Transactions made using the payment card, except cash withdrawals;
- Operations related to purchase and management of securities and purchase of government bonds;
- Various other specific financial operations.

Rates

- Debit transactions: 0.4 %, capped at 40 € per transaction
- Cash withdrawals: 0.8 %
- Recharged costs: 0.4 %
- Payment card transactions: Fixed rate of 2 € per year for issued and used payment card

Tax Base

The amount of funds debited from the taxpayer's bank account or the amount of recharged costs for carrying out a financial transaction related to the taxpayer's activity in Slovakia.

Tax Period

- Calendar month for debit transactions, cash withdrawals, and recharged costs;
- Calendar year for use of payment card;
- First tax period will be April 2025; while it will be possible to remit tax for the first three tax periods, subject to further conditions, by 31 July 2025.

Tax Collector's Responsibility

- The tax will in general be collected by Slovak banks (including branches of foreign banks in Slovakia) that will also file announcement on amount of tax to the Tax Authorities;
- Taxpayers who will be also tax collectors, will be obliged to calculate and pay the tax by themselves to the Tax Authorities by the end of the calendar month following the tax period as well as to file the announcement on amount of tax to the Tax Authorities.

Records Keeping

Tax collectors must keep records for each tax period to ensure proper tax determination. These will contain:

- Identification of the taxpayer and tax collector;
- Transaction account numbers, sums of transaction, tax base, tax rate and amount of tax;
- Date of the first use of the payment card.

The records will be kept at least until the end of the period for the expiry of the right to levy tax according to tax administration, and there will be an obligation to submit them to the Tax Authorities upon request.

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Case law

Establishment of new company with the aim to maintain the benefit of the status of small enterprise constitutes an abusive practice

The Court of Justice of the EU (CJEU) released judgement C-171/23 UP CAFFE which is dealing with the question, whether establishment of new company with the aim to maintain the benefit of the status of small enterprise in respect of an activity previously carried out, under that status, by another company, constitutes an abusive practice.

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According to the CJEU:

- special scheme for small enterprises makes it possible, by the administrative simplifications which it entails, to support the creation, activities and competitiveness of small enterprises and to retain a reasonable relationship between the administrative charges connected with fiscal supervision and the small amounts of tax to be reckoned with – this scheme is thus aimed at sparing small enterprises and the Tax Authorities from such a burden;
- if a company is established in order to maintain the benefit of the VAT exemption scheme, in respect of an activity which appears to have been carried out previously by another company, at a time when that other company has ceased to satisfy the conditions necessary to benefit from that scheme, the grant of such a tax advantage would not meet these objectives;
- in case of an abusive practice intended to benefit from the VAT exemption scheme for small enterprises, it is for the national authorities and courts to refuse the benefit thereof, even in the absence of specific national provisions to that effect;
- application in the sphere of VAT of the principle of the prohibition of abusive practices entails, first, determining the situation that would have prevailed in the absence of the transactions constituting such a practice and then assessing that 'redefined' situation.

Where it is proven that the establishment of a company constitutes an abusive practice intended to maintain the benefit of the VAT exemption scheme for small enterprises, in respect of an activity previously carried out, under that scheme, by another company, the company accordingly established cannot apply that scheme, even in the absence of specific provisions laying down the prohibition of such abusive practices in the national legislation.

More information can be found on the following link: Judgement of the CJEU C-171/23 UP CAFFE

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World news

European Union updates list of non-cooperative jurisdictions for tax purposes

The Council of the European Union approves a revised list of non-cooperative jurisdictions for tax purposes. Following the meeting, one country was removed from the blacklist. At the same time, no other countries were added to the list.

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At its meeting on 8 October 2024, the ECOFIN Council **excluded Antigua and Barbuda from the Blacklist.** This country is awaiting additional review by the Global Forum in the context of information exchange and has therefore been moved to the grey list.

There are currently 11 jurisdictions on the blacklist:

- **American Samoa**
- **Anguilla**
- **Fiji**
- **Guam**
- **Palau**
- **Panama**
- **Russia**
- **Samoa**
- **Trinidad and Tobago**
- **US Virgin Islands**
- **Vanuatu**

The next review on non-cooperative jurisdictions is scheduled for February 2025. With this step, the Council of the European Union continues its efforts to improve global tax transparency and fair taxation.

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In brief

One sentence summary | October 2024

Last month’s tax and legal news in brief.

Daňové a právne oddelenie
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- The European Central Bank decreases interest rates. From 23 October 2024, the interest rate on main refinancing operations is reduced to 3.40%, the interest rate on overnight refinancing operations to 3.65% and the interest rate on overnight sterilisation operations to 3.25%.|

- As of 1 January 2025, **the monthly minimum wage will change to EUR 816** and **the hourly wage according to the number of hours worked will change to EUR 4,690**, according to the notification of the Slovak Ministry of Labour and Social Affairs and Family. The Notice of the Ministry of Labour, Social Affairs and Family on the amounts of minimum wage entitlements for 2025 has also been published in the Collection of Laws, which can be found at this link.

- Parliament has approved **an amendment to the Minimum Wage Act,** under which the amount of the monthly minimum wage is changed from the current **57%** to **60%** of the average nominal monthly wage.

- The President ratified **the treaty between the Slovak Republic and the Kyrgyz Republic** on the avoidance of double taxation in the field of income taxes and the prevention of tax evasion and avoidance.

- On 25 October 2024, the Act No. 279/2024 Coll. on Financial Transaction Tax was published in the Collection of Laws, as well as the Act No. 278/2024 Coll. amending several acts related to improving the state of public finances.

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Did You Know?

Did you know that you can interrupt the tax depreciation?

In certain cases, the taxpayer is obliged to interrupt the tax depreciation. However, did you know that the Slovak Income Tax Act also states the interruption of the application of tax depreciation of tangible assets as a voluntary option?

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The taxpayer **may decide** to interrupt the application of **tax depreciation of tangible assets** for one entire tax period or several entire tax periods. In the following year (tax period), the taxpayer continues the depreciation as if it had not been interrupted. The total depreciation period is thus extended by the period of suspension of depreciation.

At the same time, it is important to note that the interruption of depreciation can only be used for **tangible assets**, i.e. that it is not possible to interrupt the depreciation of intangible assets.

The interruption applies to the **entire tax period**, and it is not possible to interrupt depreciation only for specific months of the year.

The possibility to interrupt depreciation arises already in the first tax period in which the asset is put into use. It is possible to interrupt depreciation for a given asset and then renew it several times during its depreciation period.

The taxpayer can choose for which tangible assets the tax depreciation is suspended, or he can decide to suspend the depreciation of all tangible assets. In this way, the taxpayer can **optimize** his tax base and e.g. prevent the possible expiration of the tax loss deduction (arising in the previous tax periods).

However, please note that there are cases when the taxpayer **cannot interrupt** the tax depreciation. This includes micro-taxpayers who apply advantageous tax depreciation regime or taxpayers that are recipients of investment aid or incentives. The interruption cannot be applied during tax audit and tax assessment proceedings.

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