Tax and Legal News

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What's cooking in the Chamber of Deputies?

The summer has whizzed by and the busy fall season is here. Cooler mornings, shorter days and ubiquitous germs are back. A lot of people I know don't much care for the fall. So, it may be all the more surprising that, according to a recent US survey, 41% of American adults voted this season as their favourite.

This is also a challenging period for tax connoisseurs, given the traditional increase in activity of the Chamber of Deputies in the area of new tax legislation proposals. The imaginary "battle" for the attention of the tax advisor and the taxpayer is currently being fought by two major tax-related Chamber bills – numbers 488 and 515.

The first of these is the much-talked-about consolidation package, meaning lots of big changes that we've tried to keep you informed about. But I'd like to focus on one in particular: the proposal to remove the full exemption from income for securities and shares in a corporation for individuals.

The opponents of this proposal managed to pull off a last-minute stunt – postponing the effectiveness of the proposed change by one year (i.e. to 1 January 2025). Interestingly, the relevant amendment appeared sort of in passing, without much hype or attention (as the proposed change in employee benefits was the topic number one).

However, if I had to guess whether this time (after several previous failed attempts) the proposal to abolish the full exemption will succeed, I would say it will. First, politically, it doesn't seem like the best time to fight for the benefits of security holders (at least not publicly). How much better does the fight for benefits designed for the broader spectrum of employees sound, right? The second important aspect is that the latest proposal to abolish the full exemption provides a highly imaginative and original solution to the question of possible retroactivity. As a reminder, the proposal simplistically allows for the deduction – from future (taxable) income from the sale of securities or shares – of the market value of that security or share determined as of 31 December 2024 (31 December 2023 in the original proposal). The rule will probably also help those who would not qualify for the exemption under the current regulations due to failure to meet the time test. Under the current proposal, these taxpayers will also be able to choose whether to deduct the actual cost or the market value (as of 31 December 2024) from income realized after 2025. Well, anyway, we'll see how it all develops over the next year. Waiting tactics can sometimes be successful.

And then there is Parliamentary Document 515 – Czech implementation of Pillar II, a topic we've consistently covered in Tax and Legal News over the past year. Quite rightly. For big taxpayers, this is likely to be one of the most significant tax moves in the last 30 years. The text of the paragraph-by-paragraph version of the law is essentially a rehash of the European directive and related OECD material. Moreover, it's an extremely difficult text to read and understand, both for the layman and the tax adviser, and thus an ideal

candidate for a navigable journey through the legislative process. This may also have been one of the reasons why the Government proposed to the Chamber that the bill be debated in a special way to enable the Chamber to give its assent to it on the first reading.

However, here too we got a surprise, because the Chamber of Deputies disagreed with this procedure. Thus, the bill has to earn its place in Czech legislation through the classic legislative route. The next discussion of the bill is scheduled for the session beginning on 10 October 2023 (as is the consolidation package *Note: This commentary was prepared prior to this session*).

Now, they just have to carry out the whole legislative process in time. If they do not, it would be rather bad news for the Czech state – any tax would probably be collected elsewhere. Although for some Czech taxpayers, it might make life easier for a year.

Of course, we will keep a close eye on further developments for you. You just enjoy the rest of the Indian summer in peace.

The much talked about consolidation package. Lots of big changes that we have tried to keep you informed about. But I'd like to dwell on one of them in particular, namely the proposal to abolish the full exemption on income from securities and shares in a corporation for individuals. The opponents of this proposal managed to pull off a last-minute stunt – delaying the effective date of the proposed change by one year (i.e. to January 1, 2025).

Labour law

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Labour Code amendment – what lies ahead?

On 19 September 2023, a long-discussed amendment of the Labour Code and some other laws was published in the Collection of Laws under number 281/2023. The majority of the amended provisions will come into force on 1 October 2023. Changes concerning leave for so-called special contract workers and continuous rest in a week will come into force on 1 January 2024. The last part of the amendment, which relates in particular to additional agreed overtime work in the healthcare sector, will enter into force on 1 January 2029.

The main reason for adopting the Labour Code amendment was the transposition of two European Union directives, the first of which concerns the work-life balance of parents and carers (2019/1158/EU), with the second addressing transparent and foreseeable working conditions (2019/1152/EU), which the Czech Republic should have incorporated into Czech law in August 2022.

What are the main changes introduced by the amendment?

- new remote working arrangements;
- tightening the conditions for work under special contracts for services and special work contracts;
- the option of executing selected documents electronically;
- changes in the delivery of documents by an employer;
- changes in the delivery of documents by an employee;
- extension of the employer's duty to provide information on employee working conditions.

Remote working

The most highly anticipated part of the amendment is the regulation of remote working. Remote work can only be performed on the basis of a written agreement concluded between the employer and the employee. If employees are still working remotely without an agreement, they will have to conclude such an agreement by the end of October 2023. If an employer allows employees to work remotely without concluding a written agreement with them, the employer is now guilty of an offence for which they may be fined up to CZK 300,000 in the event of an inspection.

The amendment does not stipulate what elements a remote work agreement should contain. The content of the agreement is therefore entirely up to the agreement of the parties. The amendment only provides that the agreement may be terminated by mutual agreement or by unilateral notice with 15 days' notice, unless the parties agree that the agreement cannot be terminated.

If a pregnant employee or an employee caring for a child under 9 years of age (or caring for another dependent at the appropriate level) requests to work remotely, the employer need not automatically comply with such a request. However, the employer will have to give the employee written reasons for refusing the request.

In exceptional cases, the employer may order employees to work remotely if an official measure so provides for extraordinary reasons, e.g. due to an epidemic situation. However, remote work may be ordered for employees only for the time strictly necessary and provided that the nature of the work permits it and the location of the remote work is suitable for the performance of the work.

The amendment also explicitly regulates the issue of reimbursement of expenses when performing remote work. If the employer and the employee have not agreed on a method of providing such compensation, the employer shall be obliged to pay such costs incurred by the employee in connection with the remote work as the employee has proved to the employer. The parties may also agree in writing that the employee shall not be entitled to any reimbursement of expenses.

Another option is to provide a lump sum for each hour of remote working, provided that the parties agree in writing or the employer regulates this option in an internal regulation. The amount of the lump sum is set by a decree of the Ministry of Labour and Social Affairs. For 2023, the amount is proposed at CZK 4.60 for each hour of remote work. Where a lump sum is provided to an employee, it includes reimbursement of all costs incurred by the employee in performing remote work.

Subsequent legislation in the Income Tax Act stipulates that lump-sum compensation in the statutory amount will not be subject to personal income tax and therefore not subject to social and health insurance contributions. A private employer may provide a higher lump sum compensation, but the difference will be considered taxable income to the employee. At the same time, the expense so incurred will be tax deductible for the employer.

Special contract for services and special work contract

One of the most tangible impacts on employers and employees is the significant tightening in the area of agreements on work outside the employment relationship.

Employers of employees working under a contract for services or special work contract are now required to schedule their working hours in writing at least 3 days in advance (unless a shorter period is agreed) and to inform them of this schedule. They are also obliged to provide them with additional payments for working, for example, on public holidays or at night, while respecting the standard limits of working time scheduling, including uninterrupted rest periods or breaks. The employer is now also obliged to grant leave to such contract workers in the event of other important personal obstacles to work on the part of the employee and obstacles for reasons of general interest, but without wage compensation.

In addition, from 1 January 2024, employers will be obliged to provide leave to special contract workers. However, the entitlement to holiday does not arise automatically; the same conditions apply as for employees in an employment relationship, i.e. the employment relationship must last at least 4 weeks and the contract worker must work at least 4 times the notional working time, i.e. 80 hours in a given calendar year. The actual amount of leave is then calculated using the formula for calculating the pro rata portion of leave.

Flexibility remains at least as regards the termination of these agreements. However, there is an added obligation for the employer to give reasons in writing for termination at the employee's request, in cases where the employee believes that the reason for termination is the exercise of his/her rights. An employee working under a special agreement may also ask the employer to convert the agreement into a contract of employment, provided that the legal relationship based on the agreement with the employer has lasted at least 180 days in the previous 12 months. The employer will also be required to give reasons in writing for refusing the request within 1 month of receipt of the request.

Option to execute selected documents electronically

The amendment also modifies the rules for delivery of notifications. Excluded from the list of important employment documents subject to a strict procedure for delivery are employment contracts, contracts for services and special work contracts and agreements on the termination of the employment relationship or agreements on the termination of a legal relationship based on one of the above contracts. From 1 October 2023, these documents can be easily executed both physically and electronically, for example by e-mail. However, the mandatory written form will continue to apply.

In the case of electronic execution of the foregoing documents, the employer shall send a copy of such document to the employee's private electronic address, which the employee has provided in writing to the employer for such purposes. The employee is then entitled to withdraw from such contract or agreement (with the exception of the agreement on termination of the employment relationship and the agreement on the termination of the legal relationship based on the contract for service or work contract) in writing no later than 7 days from the date of delivery of a copy thereof to the employee's private e-mail address, unless the employee has commenced performance.

However, the strict rules on delivery laid down in the Labour Code continue to apply to unilateral documents relating to the termination of the employment relationship, the dismissal of a manager and wage and salary assessments.

Document delivery by the employer

The amendment also regulated the delivery of documents by the employer. The employer is obliged to deliver important documents, for which strict rules on service continue to apply, to the employee by hand delivery at the workplace, by hand delivery wherever the employee is present, by electronic communications network or service or by data box. In the event that it is not possible to deliver the document into the employee's own hands at the workplace, the employer will be able to deliver it by post.

The consent of the employee is still required when documents are delivered electronically. Consent may be withdrawn by the employee at any time. A condition for electronic service is a separate written declaration by the employee stating his/her private electronic address for service and the employer's compliance with the employer's information obligation to the employee before consenting to electronic service. Documents delivered electronically must be signed by the employer with a recognised electronic signature.

The electronic delivery of the document will then take place on the day when the employee confirms receipt to the employer by a data message (now without the need for a recognised electronic signature). If the employee does not acknowledge receipt, the document is deemed to have been delivered on the 15th day following the date of delivery.

In the case of delivery of documents to an employee's data box, the employee's consent is no longer required, but the employee must not have the data box unavailable for delivery from natural or legal persons. The delivery of documents to the data box will then take place on the day

the employee logs in to the data box. If the employee does not log in, the document shall be deemed to have been delivered on the 10th day following the date of delivery.

Document delivery by the employee

The employee does not need the employer's consent to the electronic delivery of important documents. The employee shall deliver the documents to the electronic address notified by the employer for this purpose. The document need not be signed with the employee's recognised electronic signature. In such a case, the delivery of the document will take place on the date when the employer confirms receipt to the employee by (ordinary) data message. If the employer does not acknowledge receipt, it shall be deemed to have been delivered on the 15th day following the date of delivery.

An employee who chooses to use a data box to deliver the document to the employer does not need the employer's consent to do so. The letter will then be delivered either on the date the employer logs in to the data box or, if the employer does not log in to the data box, on the 10th day after delivery.

Informing employees

The amendment also expands the list of information an employer must provide to employees in writing, if it is not included in the employment contract. This includes, in particular:

- information on the duration and conditions of the probationary period,
- information on the procedure to be followed by both parties in terminating the employment relationship, including the procedure in the event of an invalid termination of the employment relationship,
- information about the employee's professional development, if the employer provides it,
- information on the extent of overtime work,
- information on the extent of rest and breaks,
- information on the social security body to which the employer pays the employee's social security contributions.

At present, the employer must provide the information to the employee within one month of the commencement of the employment relationship, but this period has now been reduced to 7 days. In the event of a change in this information, the employer must inform the employee without delay, but no later than the day on which the change takes effect.

The information obligation now also applies to contract workers, to whom the employer is obliged to provide information in writing to a similar extent as in the case of regular employees. The information obligation is also extended to employees posted to the territory of another State and to employees posted to another EU Member State in the context of the transnational provision of services who are posted for a period of at least 4 weeks.

Conclusion aka get ready for changes

The time between the promulgation of the amendment in the Collection of Laws and its entry into force was very short and did not give employers much time to adjust employment law documentation and related internal processes. Employers should therefore now focus on adjusting their processes and documentation to ensure compliance with the Labour Code and avoid potential fines.

In particular, by the end of October, employers should conclude written remote working agreements with employees whom they allow to work remotely and who do not already have an agreement in place, and generally think about providing reimbursement to all their employees. Furthermore, we would recommend employers to modify or prepare a new information document for both employees and contract workers, and to revise the model agreements on services and work activity in relation to contract workers. Finally, employers should prepare a written working time schedule for all contract workers and make them aware of it in good time.

If you have any questions, please contact the authors or other members of EY Law or your usual EY team.

The Labour Code amendment introduces new rights and obligations in labour relations as of 1 October 2023. The most significant changes concern the new regulation of remote work and the tightening of the conditions for work on the basis of special work contracts. It also changes the delivery of documents on employees and employers and extends the employer's information obligations.

Photovoltaics

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Photovoltaic power plants – tax aspects

In practice, we are increasingly facing questions from clients regarding the operation of photovoltaic power plants (PV plants). We see different business models and therefore different tax implications. Below is an overview of selected tax aspects in terms of income tax, VAT and electricity tax, which we recommend to assess in detail for such projects.[1]

Corporate income tax

- From the perspective of corporate income tax, focus must be placed on tax depreciation. The tax depreciation of a photovoltaic power plant is subject to a special regime, since for tax purposes it is necessary to distinguish between the construction (technical) and technological parts of the plant.
- The technological part is typically represented mainly by solar panels, inverters and switchboards and their accessories. The construction (technical) part is then usually represented by supporting structures such as racks, cable leads, as well as security and preparatory work.
- The technology part is generally depreciated on a straight-line basis over a period of 240 months up to 100% of the input price (or an increase in the input price).
- The construction (technical) part must be assessed separately.
- The input cost of tangible assets is generally reduced by subsidies provided for their acquisition or technical improvement, unless such funds are charged to income in accordance with a special legal provision.

Value added tax

- From a VAT perspective, there are many aspects to take into account. If we start with the PV plant acquisition itself, we often come across the topic of "subsidies". It is necessary to distinguish between investment subsidies for the acquisition of PV plants and subsidies on the cost. The former is quite common in the PV sector and is a method of financing which may not in itself have any impact on the amount of VAT deducted on the purchase of PV plants if the electricity is fully

1 This commentary is for general informational purposes only and should not be relied upon as the provision of accounting, tax or other professional advice.

used for taxable activities. If the subsidy is conditional on the supply of electricity to a certain entity at a discount, the VAT deduction situation can be much more complicated. However, we don't yet see these types of subsidies on the market.

- The start of operation of the PV plant is preceded by its installation and assembly. If the supply is made between two VAT payers, it will normally be subject to the reverse charge regime. However, this conclusion cannot be drawn across the board and each installation will have to be assessed separately. If the supplier has incorrectly applied VAT, the recipient cannot deduct this tax. If the supplier is a non-established foreign company, the recipient will again be in the position of a company applying tax because it has probably received a service relating to the real property.

- When acquiring a PV plant as a fixed asset, it will also be necessary to assess the possibility of claiming a VAT deduction on the PV panels and related installation work. The amount of the tax deduction depends on the use of the electricity produced subsequently. It is necessary to distinguish whether the electricity is used for economic or non-economic activity or also taxable or exempt activity. PV installed on buildings of hospitals and banks may result in only a small reduced VAT deduction if it is used directly by the bank or hospital. But it can also lead to a full deduction if the bank only taxably leases its own roof to another PV operator.

- The use of electricity for non-economic activities (e.g. non-remunerative activities, public administration activities) will again inevitably lead to a limitation of the right to deduct tax, either in the form of a proportional coefficient on the input or a tax on the output. This issue was recently addressed by the Supreme Administrative Court ("SAC").[2] The payer claimed the full VAT deduction on the purchase of the PV panels and partly provided the electricity generated free of charge to the tenants of the building and partly used it for other purposes. According to the tax administrator, claiming the VAT deduction lead to a fiction of supply of goods (electricity) for consideration. The tax administrator thus charged output VAT to the payer and the Supreme Administrative Court upheld the ruling.

- Obligations do not end with the application of the initial deduction of VAT on the PV plant. This is followed by the obligation to monitor and possibly adjust the tax deduction for fixed assets if the purpose and scope of their use changes. The technological part is monitored for 5 years, and the construction part as part of the real estate for as long as 10 years. A change of use may lead to an obligation to repay 1/5 or 1/10 of the deduction in a given year.

- Finally, we come to the stage of using the electricity itself. Most often, we see a combination of self-consumption with the supply of surpluses to the grid. The supply of electricity to the network of a licensed electricity trader is subject to the reverse charge regime. Self-consumption has to be assessed according to the VAT payer's activity. A factory producing goods will not be subject to any VAT on its own electricity consumption, but should keep records of consumption to prove its entitlement to a deduction from the PV panels themselves. A tax advisor who has an office and residence in the home will need to distinguish self-consumption for private purposes from self-consumption for business purposes. The private consumption must be taxed or the PV tax deduction must be adjusted.

- In practice, we often see various forms of cooperation between multiple entities, whether capital-linked or even completely independent. These need to be assessed in detail according to specific agreed parameters.

2 Supreme Administrative Court Judgment of 26 September 2022, No. 10 Afs 165 / 2020-37

Electricity tax

- It should be remembered that this tax is also payable in the case of self-consumption at the point of consumption if the installed capacity is above 30kW. In such a case, it is necessary to register for the tax and keep mandatory records. With an installed capacity of up to 30kW, self-consumption is generally exempt from electricity tax.

- The sale of electricity is subject to electricity tax regardless of the output of the PV plant. The exemption can only be claimed if the customer is (i) the holder of a tax-exempt electricity purchase permit or (ii) the holder of a tax-free electricity purchase permit (i.e. an electricity trader – holder of a licence issued by the Energy Regulatory Office, ERO).

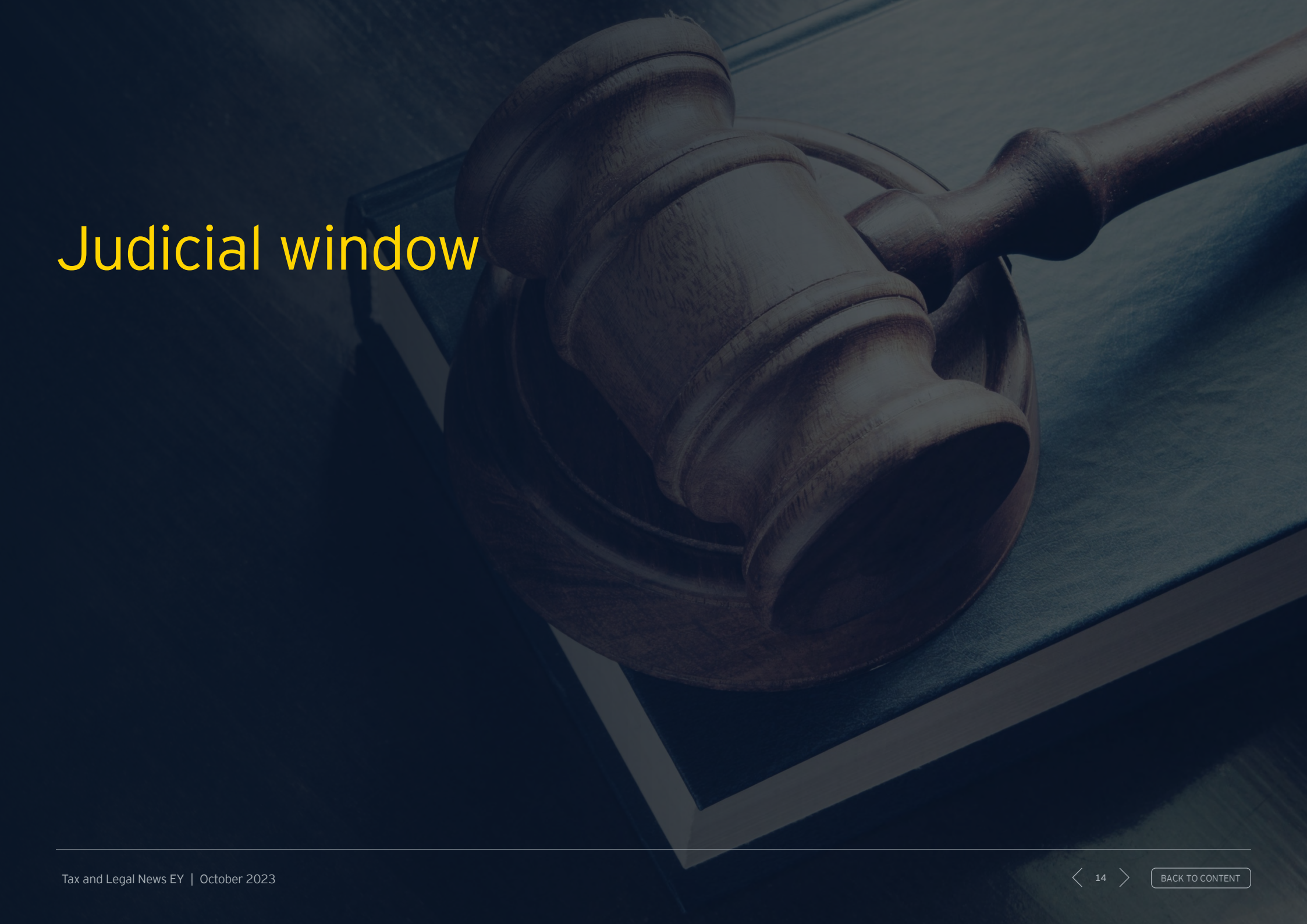
- The tax on electricity is generally included in the VAT calculation base, but unlike VAT, advance payments are not taxed here.

Finally, a little beyond taxes, we should add that the recycling fee should also be considered when the PV plant is shut down. The fee is part of the price of each PV panel supplied. Recycling is legally obliged to be provided and paid for by the manufacturers or importers of these panels (however, in the case of solar power plants commissioned before the end of 2012, the owners are obliged to provide and pay for recycling).

If you are interested in this area, please contact the authors of the article or your usual EY team.

When acquiring a PV plant as a fixed asset, it will also be necessary to assess the possibility of claiming a VAT deduction on the PV panels and related installation work. The amount of the tax deduction depends on the use of the electricity produced. A distinction must be made as to whether the electricity is used for economic or non-economic activity or also taxable or exempt activity.

Judicial window



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The Supreme Administrative Court on proving the shareholding costs

In this issue, we present an interesting decision of the Supreme Administrative Court (SAC) on the topic of proving excluded costs of the parent company related to the holding of shares in a subsidiary according to § 25(1)(zk) of the Income Tax Act (ITA).

View of the tax administrator

- The company changed its claims in the course of the proceedings – it quantified the overhead costs related to the participations, but provided no evidence to prove them.
- The submitted tables did not show the individual calculation steps and irregularities were identified.
- Nor could the proposed questioning of a witness help to clarify the change in the number of working days he had to work, which were related to his holding of shares in subsidiaries. In light of all the facts, changes in the allegations and other contradictions, this testimony could not remove doubts as to the veracity of the claimed amount of costs. The submitted calculations were deficient on a broader scale than just the labour pool spent by each person and the related coefficient. Therefore, they could not be remedied by the proposed testimony.
- All overheads (both related and unrelated to the holding of shares in subsidiaries) are recorded in the overall accounts and the company has not explained the basis on which it has allocated some of them (in several amended calculations) to the holding of shares. With regard to the interest costs, it subsequently admitted that they could be related to the holding of shares, though it had initially claimed that they were only related to the retail business.
- Due to such inconsistencies, the submitted calculation cannot be considered as a clear algorithm for the allocation of overheads.

View of the Regional Court

The Regional Court sided with the company – a selection of its arguments:

- It referred to the case law of the Supreme Administrative Court, in particular to the conclusion that it would not be possible to quantify

the absolute value of the actual overhead costs, but that it would usually be necessary to develop a reasonable algorithm for their calculation.

- According to the court, the company offered an algorithm in principle. The proposed testimony could have contributed to establishing or proving the credibility of the allegations as to how much of the working time was spent by any given person in connection with holding shares in the subsidiaries, and therefore to strengthening the credibility of the stated algorithm used to calculate indirect costs.

- Although changes in the company's reasoning and the gradual refinement of its claims do not add to their credibility, the taxpayer must be allowed to bear its burden of proof and to propose relevant evidence to that end.

View of the SAC

The SAC found the tax administrator's cassation to be justified – a wselection of its arguments:

- In the calculation, the company described that it accurately "defined" some costs as related costs; some were calculated according to the proportion of persons who contributed to the costs related to the holding of shares and according to their time pool; others were calculated in a combined manner. However, it did not clarify or document the key used to determine which costs within the overall accounting were allocated to the "head office" and which to the subsidiaries. This is moreover in a situation where, in the previous proceedings, it stated that it had not kept any records at all distinguishing between the costs of the head office and the costs of holding shares in the subsidiaries, and it was therefore not clear on what basis it had allocated specific costs in the subsequent proceedings.

- The tax administrator described many ambiguities and inconsistencies in the submitted calculations. However, the proposed witness interviews could only disprove some of them, i.e. to clarify the time spent by the persons concerned on activities related to the holding of shares in the subsidiaries within their work pool. However, all the indirect costs claimed in the companies' new calculations could not be demonstrated in this way in the circumstances of the case. Therefore, in the absence of the company's evidence or proposed evidence on all the disputed facts of the submitted calculation, it is necessary to agree with the tax administrator that taking the proposed witness statements would be superfluous.

- If the company wished to claim the actual overheads associated with holding shares in the subsidiaries, it had to prove the full amount of those overheads unequivocally, rather than making haphazard estimates in relation to certain costs, which it changed several times during the appeal proceedings. In such a situation, it was entirely appropriate to apply the "statutory assumption" of 5% of the income from dividends and other profit shares paid by the subsidiary instead of the "estimate" provided by the company. A taxpayer simply cannot be allowed to quantify costs which it is unable to prove beyond doubt in order to avoid the statutory overhead rate and thus reduce its tax liability.

- The SAC generally agrees that the taxpayer should be given the opportunity to re-establish its claims on further appeal, but in the facts of the case, the company would have to provide a calculation based on incontrovertible evidence, not just a generic calculation which did not make it possible to ascertain exactly how it had determined which costs related to the holding of shares in subsidiaries. In essence, the company arbitrarily selected the cost items it allocated as holding-related items on the basis of bare (unsubstantiated) explanations. It then changed and modified its claims and calculations according to the tax administrator's objections.

What can we take from this? Having nothing or only "a little framework" and possibly relying on additions in response to the tax administration's criticisms is probably not an optimal strategy. It makes sense to formulate a clear and sophisticated algorithm based on sound allocation criteria.

If you have any questions, please contact either the authors of the article or your usual EY team.

The SAC generally agrees that the taxpayer should be given the opportunity to re-establish its claims in further appeal proceedings, but in the factual circumstances, the company would have had to provide a calculation based on incontrovertible evidence, not just a generalised calculation which did not allow it to establish exactly how it had determined which costs were related to holding shares in subsidiaries.

For further information please contact either your usual partner or manager.

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Did you know:

- The Ministry of Finance has commented on the main impacts of "terminating" the Double Tax Treaty with Russia?
- Exemption from VAT on import-related transport services cannot be conditional on specific means of proof?
- The VAT Committee has once again discussed the issue of VAT on fuel cards?
- The EU has adopted new rules to prevent the consumption of products that contribute to deforestation or the degradation of forests worldwide?
- In Judgment C-453/22, the Court of Justice of the EU dealt with the right to recover wrongly-charged VAT?
- Real estate tax payers can now use the service of pre-filling the tax return with data from the tax office and the land registry, which has been launched as part of a pilot operation?
- EY is organising a seminar on tax case law of the Supreme Administrative Court?