BDO NEWS

NOVEMBER 2021 - ISSUE 9

WWW.BDO.CZ

WORKING FROM HOME: PRACTICAL RECOMMENDATIONS FOR EMPLOYERS
MORE ON PAGE 2

VAT EXEMPTION ON RESPIRATORS AND ENERGY
MORE ON PAGE 4

TAX PITFALLS OF CONTRIBUTIONS IN NON-CASH ASSETS
MORE ON PAGE 5

EDITORIAL

Dear Readers,

This fall's elections have led to a lull in tax changes, with the more significant ones likely to be coming in the next calendar year. In this issue of the Newsletter we therefore bring you up to date on, among other things, several important case law decisions that are worthy of your attention.

In the coming months, we will keep an eye on what tax changes the new government has in store for us. Given the outcome of the elections, we can expect changes related to the abolition of electronic sales registration, the current three VAT rates will probably be reduced to two for greater clarity, and perhaps there will finally be an honest attempt at real pension reform. The winning five-party coalition even promised before the election to use the option of paying a percentage of their pension income directly to their parents and grandparents. The coalition has agreed not to raise taxes, but this will be very difficult. I am not at all sure that reducing the number of civil servants, abolishing transport allowances, increasing excise rates on cigarettes or alcohol and other minor items of expenditure in the state budget will be enough to reduce the budget deficit.

Jiří Jandečka
Partner

CONTENT

BDO CZECH REPUBLIC

- Audit, Tax, Accounting & Payroll Advisory, IT and Valuation
- 450 specialists
- 58 Certified Tax Advisers, 35 Certified Auditors, 5 Certified Appraisers
- 6 offices in the Czech Republic

REVIEWING BUSINESS TRANSACTIONS AS A WHOLE

We often hear discussions about certain complex transactions and whether to treat these as a whole or whether it is more appropriate to split them into several parts. Recently, a similar case reached the Supreme Administrative Court. Although in that case there was a presumption or non-recognition of VAT deduction by the buyer, the conclusions can certainly be generalised to the example of income tax. The situation in this case concerned the conclusion of several contracts, which the tax administrator assessed as a single commercial transaction or sale of a business enterprise. Since the VAT Act does not consider the sale of a business enterprise as a taxable item, the tax deduction was not recognised for the purchaser, who claimed a VAT deduction on just one purchase contract for machinery. However, the tax authority included this purchase contract in the transaction as a whole, i.e. only under the sale of the business enterprise. The buyer was not helped by the argument that the seller had duly declared and paid the VAT.

As I pointed out in the introduction, this case concerned VAT, but attention should also be paid to the pitfalls of other taxes. The Income Tax Act will also treat a transparent sale of a business enterprise quite differently from a situation where the transaction is diluted into multiple contractual arrangements. Caution should therefore be exercised, and clients would do well to consult similar major transactions involving sets of assets and rights with their lawyers.

Jiří Jandečka
jiri.jandecka@bdo.cz

TIME TEST FOR EXEMPTION IN CASE OF SHARES EXCHANGED FOR NEW SHARES WITH A DIFFERENT NOMINAL VALUE SUSPENDED

In its recent judgment, the Supreme Administrative Court (SAC) insisted that the three-year time test necessary for the exemption of income of individuals from the transfer of shares is not suspended only in the case of an exchange of shares with an identical nominal value. If shares are exchanged for new shares of a higher nominal value, a new time limit for assessing the exemption starts to run. In the present case, the court dealt with a situation where the complainant was the owner of shares in a company whose general meeting decided to increase the share capital and exchange the existing shares for shares of a higher nominal value. In that case, the shareholder had held the shares continuously, during which time the share capital had been increased and the proportion of the individual shareholders had not changed. The taxpayer then held that even the time test could not be interrupted. The SAC strictly insisted on the linguistic interpretation of Section 4(1)(w) of the Income Tax Act (ITA), where the time test is suspended in case of exchange of shares for shares of higher nominal value. The Supreme Administrative Court also disagreed with the conclusions of the Coordination Committee, where the representatives of the state administration and the Chamber of Tax Advisors concluded that the time test is not suspended in the case of an increase in the nominal value of shares by so-called bypassing. The SJC also did not fail to add that the quoted part of the minutes cannot be regarded as a description of settled administrative practice that could be followed.

The strict conclusions of that decision have been the subject of much heated debate in the professional community and will no doubt continue to be. The question is whether the same conclusion would be reached in other similar cases that come before the SAC and are not dealt with by the Enlarged Chamber. In any event, caution should be exercised in comparable situations and each case should be evaluated individually.

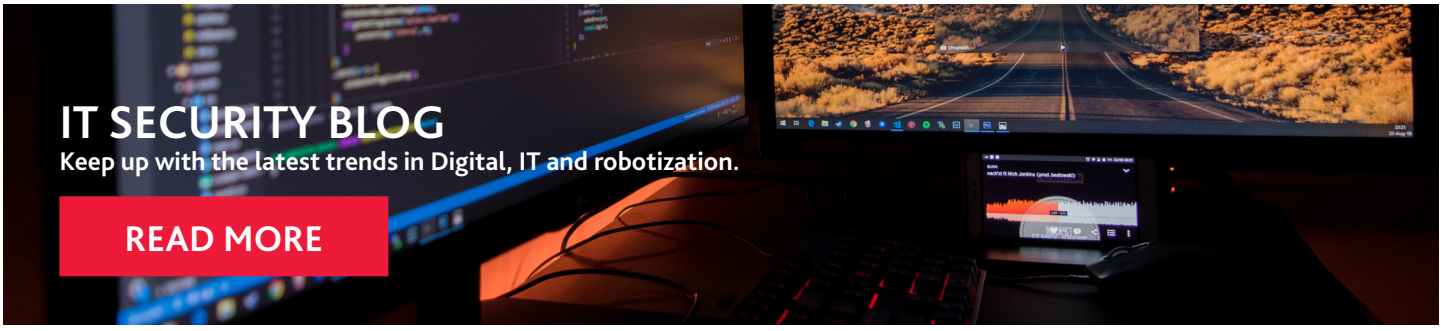
Jiří Jandečka
jiri.jandecka@bdo.cz

WORKING FROM HOME: PRACTICAL RECOMMENDATIONS FOR EMPLOYERS

The past two years have shown us that a relatively large number of work tasks can be carried out remotely. While some employers and employees have welcomed the opportunity to return to the office, others have retained teleworking as a normal mode of operation. Unfortunately, the Czech labour and tax legislation is far from being sufficient to set up a simple and clear teleworking regime. Employers are thus often exposed to the risk of sanctions from the Labour Inspectorate or tax authorities, the potential amount of which increases with the frequency of work from home. The trend towards more teleworking is to be expected given the current state of the pandemic, so the following article provides an overview of basic practical tips and rules.

Working from home cannot be ordered

The employer is obliged to provide the employee with premises for the performance of work – a workplace – or to agree with the employee on another place where the work will be performed. Because of this statutory provision, working from home cannot be unilaterally ordered, even though in some cases ordinary work premises have been closed by mandate or by the employer's decision in response to the pandemic. Teleworking can therefore only be introduced by agreement with the employee, which should be in writing, as is customary in labour law and desirable for the agreement to be demonstrable.



If the employer fails to reach an agreement with the employee, there is no other solution at the time of the closure of the workplace than to apply a modification of one of the obstacles to work.

Need to modify the place of work
If the employer wants to agree with the employee on work from home, the place of work agreed in the employment contract must be examined. If the employee's home is outside the agreed place of work, the place of work must be modified, again in writing.

We recommend that due consideration be given to the formulation of the place of work, as it has implications for other areas such as OHS, compensation, etc.

The employer may even allow the employee to work from home abroad. However, we would like to point out here the possible complicated implications abroad, which vary widely even within EU countries and may lead to foreign obligations for the employer, such as foreign payroll management with local tax and insurance contributions, the need to comply with local working conditions, immigration obligations or the obligation to tax part of the employer's profits abroad.

Reimbursement of expenses and their tax implications
Dependent work is performed at the employer's expense. Therefore, if the employee incurs additional expenses due to working from home, such as increased energy consumption or wear and tear on their own equipment (chair, desk, PC), they should document these expenses for the employer and the employer will reimburse them. Such claims under the Labour Code then enjoy a favourable tax treatment (for the employer it is a tax-deductible expense and for the employee it is not taxable). However, such claims must be properly documented. In most cases, therefore, they must be the actual expenditure of the individual employee.

The above essentially implies the practical unworkability of the favourable tax treatment. In our experience, documenting the actual expenses of each employee is administratively prohibitive and disproportionate to the potential tax benefit. Unfortunately, the current tax rules and their interpretations do not allow for any other alternative to allow for a favourable tax treatment.
Thus, in practice, employers often proceed by setting a fixed amount, for example, per day of teleworking, which is clearly identified in the employment documentation as a contribution to cover any additional expenses associated with work from home. However, this allowance is subject to taxation and related levies. In our view, such an allowance can be regarded as a tax-deductible expense for the employer in certain circumstances.

We recommend paying attention to how the allowance is communicated to the employees, as they are still entitled to account for their actual expenses and the employer is obliged to provide them as such.

Working hours, provision of meal allowance
From a practical point of view, we recommend that the working hours of employees who work from home be explicitly set so that the employer can guarantee their availability within a certain timeframe. In our opinion, this is also necessary if the employer plans to provide employees with a tax-advantaged meal allowance, which is limited by the requirement to prove that they have worked part of the specified working hours.

SUMMARY: Recommended practice
Based on the above, we recommend that the employer should appropriately address teleworking through a combination of the following documents, the wording of which will be essential in the event of any inspections by the authorities. This also applies to teleworking as a benefit and as the only possibility of continuing to work, e.g. when the workplace is closed.

1. Negotiating a written agreement on teleworking or an amendment to the employment contract. This must be done with each employee separately. We recommend that the agreement to work from home and the employer's right to request a return to the workplace, the place of work or the working hours be regulated here.
2. Establishing an internal regulation in which the employer regulates the general conditions for working from home. Through this unilateral measure, the employer may not in any way curtail the rights of employees.

Here we recommend setting out the general conditions under which teleworking is allowed, the amount of compensation for increased employee costs, the OSH policy, and so on.

Monika Lodrová
monika.lodrova@bdo.cz

CURRENT CASE LAW ON CORPORATE INCOME TAX AND VAT

DIRECT LINK BETWEEN COSTS AND REVENUES

Section 24(2)(zc) of the Income Tax Act (ITA) allows for the recognition as a tax expense of expenses (costs) that are not primarily incurred to achieve, secure and maintain income (revenue), or are explicitly identified in the ITA as a non-tax deductible expense (Section 25 of the ITA), provided that certain conditions are cumulatively met:

1. These are generally expenses that are not primarily tax deductible;
2. There is a direct link, or a sufficiently strong and unmediated logical link, between income (revenue) and expenditure (costs);
3. The expenditure (cost) is tax deductible only to the extent of the directly related income (revenue);
4. The income (revenue) affected the result of the same or previous taxable years.

The Supreme Administrative Court (SAC) was faced with a case in which a legal entity incurred primarily non-tax costs (specifically, travel costs for a third party who was not in an employment relationship, refreshment costs, excess expenses for company meals and non-tax fines and penalties), which it retained in tax costs with reference to the aforementioned Section 24(2)(zc) of the ITA. With this assessment of the procedure, it referred to the direct link between the costs in question and the revenues from software services realised based on its billing model set up among the other members of the group. The basis in the billing model was the actual amount of direct and indirect costs plus a 5% margin. However, the Municipal Court did not find this

alleged direct proportionality to be justified, as it was not apparent how the costs incurred were directly related to the company's revenues from the provision of software services within the group.

In its judgment 1 Afs 190/2021 - 30 of 14 October 2021, the SAC concluded that the company had not sufficiently demonstrated a direct link between the costs specified above and its revenues. It thus excluded these from tax deductible costs, assessed a tax liability and imposed the relevant penalties.

It follows from the judgment that the direct link is to be understood as meaning that the costs in question affect the amount of revenue, not only by being recharged to members within the group as revenue for software services provided, but also by the fact that their expenditure contributed to the achievement of revenue in a way other than by automatically increasing it. The direct link in this case cannot therefore be inferred from the company's specific financing model, which was based on a simple mathematical formula in which all costs are automatically increased by a fixed rate and the resulting amount is overcharged.

PROOF OF DESTRUCTION OF UNSALEABLE STOCKS

Proper documentation of the volume of inventories (materials, products and goods) destroyed is a necessary condition for a procedure that will not give rise to any tax liability for the VAT payer carrying out the destruction. A destruction report containing a specification of the object and manner of destruction, the reasons for the destruction, the identification of the persons carrying out the destruction, and the time and place of the destruction may be regarded as sufficiently strong evidence. It is also recommended to take testimonial photographic documentation, video footage, etc.

The assessment of sufficient proof of the destruction of stocks, specifically of unsaleable cigarettes, was dealt with by the Supreme Administrative Court (SAC). In its Judgment 5 Afs 199/2020 - 39 of 18 October 2021, it ruled that a company allegedly carrying out the destruction of cigarettes did not sufficiently document the destruction, as it provided the court with „only" witness statements of persons who participated in the destruction (which differed in some passages) and written reports as evidence. Other facts prejudicial to the company were the failure to record the witnesses' journeys to the site of the destruction in the logbook, the failure to record the date of the destruction in the accounts but only in the extraordinary inventory, which was not confirmed by the witnesses as having taken place at all, the failure to take advantage of the opportunity to buy back cigarettes from the original suppliers and the failure to notify the destruction of cigarettes on an open fire to the relevant fire brigade.

The company thus failed to bear the burden of proof, and the SAC reclassified this unproven destruction of the goods (failure to document their fate) as a supply for purposes unrelated to the company's economic activity for VAT purposes. The SAC concluded that in this case the supply of goods, i.e. a taxable supply subject to VAT under Section 13(4)(a) of the VAT Act, was an output VAT and imposed penalties.

§ 13 odst. 4 písm. a) zákona o DPH o dodání zboží, čili zdanitelné plnění podléhající DPH, doměřil DPH na výstupu a uvalil povinnosti uhradit penále.

Lenka Froschová
lenka.froschova@bdo.cz

VAT EXEMPTION ON RESPIRATORS AND ENERGY

The Minister of Finance has extended the VAT waiver on the supply of respirators, including their purchase from another Member State and import, until the end of 2021. It has newly waived VAT on the supply of electricity and/or gas for November and December 2021.

The VAT remission on the supply of respirators has been with us for some time, so there is no interpretative ambiguity. However, this does not apply to the VAT remission on the supply of electricity and gas.

If you domestically supply goods as defined in the GFD Information dated 2 February 2021 (especially FFP2, KN95 or N95 respirators) or purchase these goods from abroad, you do not deduct VAT. However, the right to deduct on the purchase remains. For the record, nanofiber masks did not qualify for the waiver privilege.

The waiver of VAT on energy is mainly aimed at reducing the financial burden on the population due to the significant global increase in electricity and gas prices. Unfortunately, due to considerable uncertainties and technical issues, it is possible that suppliers will ignore the waiver, citing the direct effect of the European VAT Directive.

The VAT waiver on gas and electricity applies to supplies with a date of taxable supply in November and December 2021. The waiver also applies to advances that would otherwise be liable for VAT paid in those months.

The GFD has sought to clarify most of the ambiguities in the decision to waive VAT on energy in two hastily issued information notes (dated 20 and 27 October 2021). Here is a brief summary:

- In the context of the entire decision, it clear that at issue is any gas that is:
  a) intended to be used or offered for sale for the purpose of

propelling engines; or

b) intended to be used or offered for sale for the production of heat, irrespective of the method of consumption of the heat. Therefore, the tax exemption covers, among other things, gas supplied for the production of heat in households and domestic boiler rooms (i.e. for cooking or heating), for the production of electricity or for the combined production of electricity and heat in generators, for the propulsion of engines such as LPG or CNG, as well as gas used in metallurgical processes. This gas can thus be supplied not only through the distribution system but also in tankers, cylinders (typically propane butane cylinders), etc.

- Only in cases where the actual consumption is determined otherwise than by a reading from a meter (typically subsequent calculation of consumption per individual dwelling or non-residential premises where no metering equipment is installed, e.g. by floor area, etc.) or in situations where, although the reading from the meter is taken first, it is reasonable to carry out other necessary calculations (determination of distribution losses, etc.), can the date of determination of the actual consumption be regarded as the date of taxable supply.
- In the case of a supply of a gas cylinder, for example, the standard date of taxable supply is determined in accordance with Article 21(1) (a) of the VAT Act, i.e. on the date of supply.
- If consideration is received prior to the taxable supply, the obligation to declare tax on the amount received arises on the date of receipt of the consideration (advance). This means that the decision applies only to advances paid in the last two months of the year.
- If the date of taxable supply occurs later, for example in February 2022, and an underpayment arises again, this will again be advantageous for non-payers and payers who are not fully entitled to the deduction. VAT is waived on advances paid in the last two months of 2021, so instead of being paid to the state, the full payments will be credited against the energy bill.
- The remission is reported on line 26 of the tax return. This line is also used by taxpayers who purchase the waived gas or electricity from abroad or under the reverse charge regime. The waiver is not reported in the control report.
- According to the tax administration, suppliers must apply the waiver.
- Furthermore, the tax administration insists that taxpayers claiming VAT deductions are not entitled to deduct VAT if the supplier indicates the (waived) tax on the invoice.
- For the two months in question, the payment schedule is not considered to be an invoice; according to the tax administration, it is only a prescription for payment. In practice, both payment and payment schedules can cause problems. We recommend that any claim for VAT deduction from these schedules always be assessed individually.

Petr Linx
petr.linx@bdo.cz

TAX PITFALLS OF CONTRIBUTIONS IN NON-CASH ASSETS

When a property is transferred to a non-taxpayer, the transferee does not automatically become a VAT payer, as it would, for example, with the transfer of a business enterprise or the spin-off of a property. On the contrary, the contribution may be a taxable transaction that can substantially distort the group's finances when the property is contributed to a non-taxpayer, either by paying output tax or by partially recovering deductions already claimed. Early voluntary registration of the transferee may be a solution.

When deciding on a non-cash contribution, it is necessary to think about value added tax whenever a deduction has been claimed for the non-cash assets being contributed. In the case of immovable property, this happens not only at the time of construction but also for subsequent technical improvements. Particularly in the case of buildings built many decades ago, it is often forgotten at the time of the contribution that the transferor has also claimed a deduction in the past, even if only for technical improvements. Even their contribution is subject to tax and is described in the VAT Act as a supply of goods.

There are a number of options for the tax treatment of real estate in particular. In a situation where the contribution will be subject to tax because the transferor has claimed a deduction on the acquisition in the past, it is necessary to determine whether the 10-year period for adjusting the deduction has expired. This period essentially overrides the five-year period from the date of completion after which the supply of the property, and therefore the contribution, can be exempted. Only properties for which more than 10 years have elapsed since the deduction was claimed can be contributed by the owner to the non-payer without any financial detriment, since the contribution is exempt and nothing is refunded from the deductions claimed so far. For all other contributions of property, it is preferable to first voluntarily register the purchaser as a taxpayer, if possible, and only then transfer the property. This is because the voluntary reverse charge provision can also be used for the contribution, which means that the transferor does not have to make adjustments to the input deduction. The tax is then only declared when the transferee reports it in the tax return if it is fully entitled to the deduction, which means that it does not pay any VAT to the tax office.

In some cases, the property is transferred within five years of its completion. There, the reverse charge scheme cannot be used, and VAT must be paid to the tax office on the contribution. As stated by the General Financial Directorate (GFD) in its opinion in one of the coordination committees, although according to the law the transferor and the transferee are jointly and severally liable for this obligation, the transferee also pays the tax to the transferor's personal tax account. Therefore, according to the GFD, it is not possible under normal taxation outside the reverse charge regime for the transferee to declare the tax liability and claim a deduction on the contribution in the same tax return. The tax liability under the normal regime is always reported by the transferor, even if it is physically borne by the transferee.

Obviously non-cash contributions should also be thoroughly evaluated from the VAT point of view. Besides the author of this article, other experts from the VAT team – Igor Pantůček and Petr Linx – can help you find the optimal solution.

Petr Vondráš
petr.vondras@bdo.cz

MARK IN YOUR CALENDARS: EVENTS AND SEMINARS

We would like to invite you to our autumn seminars, where we will introduce you to the latest news and planned changes in the field of tax, payroll and accounting. The seminars will be held in the form of a presentation across the Czech Republic. However, we also offer you the opportunity to watch video recordings remotely.

SEMINAR: NEWS IN WAGES IN 2022, WORK FROM HOME AND EMPLOYMENT OF FOREIGNER

- 26 November 2021 - Brno
- 29 November 2021 - České Budějovice
- 30 November 2021 - Prague

As in previous years, we have prepared a seminar for you this year summarising the basic salary and personnel changes that will affect both you personally and your company. At the seminar we will discuss the most important changes in payroll accounting for 2021 and upcoming news for 2022. We will talk about what changes await us in the field of labour law, personal income taxes, health insurance and social security premiums, changes in deductions from wages and specifics of employment of foreigners.

Lecturers

- Veronika Sovová, Manager
- Monika Lodrová, Manager, Head of Personal Income Tax
- Michaela Tydlačková, Senior Consultant

SEMINAR: EXPERIENCE WITH 2021 TAXES AND NEWS FOR 2022

- 30 November 2021 - Pilsen
- 1 December 2021 - Domažlice
- 2 December 2021 - Prague
- 3 December 2021 - Tábor
- 6 December 2021 - České Budějovice

Like we do every year, we have prepared a tax seminar for you, the aim of which is to provide an explanation of all the main amended provisions for 2022 concerning income tax and value added tax. We will also draw your attention to the most important changes in connection with the filing of tax returns for 2021. In addition, you will learn about this year's news in the area of financial statements, and we will tell you about the planned changes for 2022.

Lecturers

- Zenon Folwarczny, Partner, Head of Tax
- Tomáš Klíma, Partner
- Igor Pantůček, Partner, Head of VAT
- Ivan Kovář, Partner
- Martin Tuček, Partner
- Petr Vondraš, Manager
- Petr Linx, Manager
- Michaela Srpová, Manager
- Jan Tuček, Manager

SEMINAR: FINANCIAL STATEMENTS FOR 2021 AND NEWS FOR 2022

- 7 December 2021 – Prague
- 14 December 2021 – Brno

We have prepared a traditional seminar for you, the aim of which is to provide you with an explanation of all the novelties that the year 2021 brought to us in accounting and to remind you of the steps that need to be implemented within the year end work of business entities. We will also introduce you to the planned changes in accounting and related tax regulations for 2022.

Lecturer

- Jiří Pospíšil, Manager, Accounting Methodologist

You can find more events that we organise with external partners on our website HERE. You can also register for the above BDO seminars on this website.

We will also keep you up to date with events, news and noteworthy information in the areas of tax, accounting, law and other topics related to your business on our company social media profiles. Stay up to date with us:

facebook.com/BDOCzechRepublic

linkedin.com/company/BDOCzechRepublic

instagram.com/BDOCzechRepublic

BDO Czech Republic s.r.o., Czech limited company (registration Number 264 02 220, registered in Prague, No. C. 168717, certificate of Chamber of auditors No. 462) is a member of BDO International Limited, a UK company limited by guarantee, and forms part of the international BDO network of independent member firms.