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Interesting Facts From Case Law

We have selected several interesting decisions from case law in 2019 concerning the common business practice.

Bookkeeping – a Fine for Poor Stock Records and Stock-Taking

Fines under the Accounting Act of up to 3% of the value of assets have rarely been used by the Tax Office.

At the end of 2019, the NSS 2 Afs 392/2018-45 verdict of the Supreme Administrative Court (SAC) was published, confirming the imposition of a fine by the Tax Office for lack of proper stock records and stock-taking after assessing additional VAT and a penalty with the entity for the same reason.

In this case, the company did not keep proper stock records and did not perform inventory control. **The Tax Office assessed additional VAT (plus penalties) on this basis,** but also **imposed a penalty** in the amount of 1.5% of the company assets for this offence in accordance with the Accounting Act, basically on the same grounds. The SAC has approved this procedure.

The court dismissed the objection that it was the same offence. According to the court, a fine for an administrative accounting offence can be imposed regardless of the results of the tax proceedings. These are factually different acts, which may be penalised in separate proceedings, independently of each other.

In our opinion, the Tax Offices will use a similar procedure: if they conclude that the accounts were not kept correctly, completely and demonstrably, under the Accounting Act they will impose on top of the additional tax assessment (plus penalties) also the penalty according to the Accounting Act.. Its maximum rate is 3% of the value of the assets (or 6% in cases of serious misconduct), so it is a significant sanction.

VAT - Refund of Part of the excessive input VAT

Decision No. II. ÚS 819/18 of the Constitutional Court of spring 2019 gave taxpayers hope that the current practice, in which the entire excessive input VAT is withheld due to one disputed invoice, will change in the future.

In this case, a taxpayer approached the Constitutional Court because the undisputed part of the excessive input VAT was withheld from them together with the disputed part, which is current administrative practice. The state administration argued mainly through the non-existence of a procedure that would prevent this. This procedure was subsequently confirmed by the courts.

The Constitutional Court, however, assessed the situation as an infringement of property rights and refused to accept this practice in its judgement.

An **amendment to the Tax Code** is currently being **discussed in the Parliament**, which will **allow the undisputed part of the excessive input VAT to be refunded,** which will have a positive impact on the cash flow of businesses.

Labour Law - the „Švarc System“

The "Švarc System" has long been one of the recurrent areas dealt by the courts. Does last year's Supreme Administrative Court's 2 Afs 435/2017 ruling indicate in which direction will the judicial and administrative practice go?

The 2 Afs 435/2017-49 case concerned three bricklayers who provided their services as subcontractors to a construction company. **The SAC did not agree with the tax administrator's conclusion that this was a hidden employment.** In accordance with previous case-law, the Supreme Administrative Court recalled the division of activities into three groups:

- those that can only be provided by running a business,
- those that can only be provided within employment; and
- activities of a „double-sided nature“.

According to the SAC, activities of „double-sided nature“ form a group that typically includes various construction work as well as activities in forestry, agriculture, aviation, maintenance and cleaning. In addition it concerns the work of IT specialists, sales representatives, consultants and drivers. Their activities do not necessarily have to be specialised.

The SAC emphasised that the first key prerequisite for a non-employment activity is that it should be **at least a „double-sided nature" activity.** The second prerequisite is that the subcontractor's independence should be the result of his/her free choice in the absence of coercion. The customer cannot be required to „actively" offer employment. Moreover, in the **absence of special circumstances indicating that the parties are merely pretending to be independent while in fact hiding employment,** the activity cannot be reclassified.

The SAC stated that the length of the contractual relationship, the number of customers, the material and tools used, the method of invoicing and remuneration or the comparability of activities with regular employees cannot be decisive criteria on their own for assessing the actual content of the legal relationship.

This judgement is not entirely consistent with previous case-law. We therefore recommend not overestimating the importance of this decision and waiting for future judicial and administrative practice.

Commercial Law - Profit Distribution

Until recently, a decision on profit distribution made later than 6 months after the end of the fiscal period was considered invalid and was seen as unjust enrichment of shareholders in the case of a payout. Judgement of the Supreme Court 27 Cdo 3885/2017 of spring 2019 stated that a decision on profit distribution may be made even after the six-month period.

The General Meeting decides on profit distribution on the basis of ordinary or extraordinary financial statements. A „balance test" needs to be made based on the data from these financial statements, and based on this the amount to be distributed to shareholders must not exceed the profit of the last fiscal period adjusted by retained earnings and accumulated losses from previous periods and reduced by allocations to reserve and other funds.

Previous case law required that the age of the financial statement used as a basis for the distribution of profits should not exceed six months from the end of the previous fiscal period. In practice, advance payments for profit shares have been used as a method of paying out the company profit after the expiry of this deadline.

According to last year's decision of the Supreme Court with effect from January 1, 2014, **the regular financial statement prepared for the previous fiscal period can serve as a basis for the General Meeting's decision on profit distribution until the end of the following fiscal period.**

According to the commercial law valid from 2014, the „insolvency test" is supposed to prevent the payment of profits on the basis of out-of-date data; the statutory body must verify immediately before the payment of dividends that the payment will not cause the company to default.

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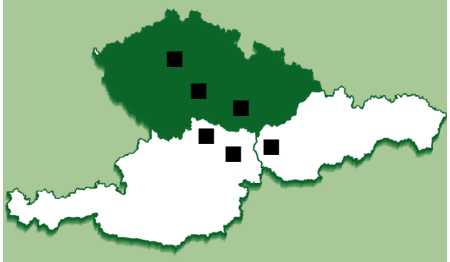

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