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Amendment to the real estate clause changes taxation rules for profits on the sale of real estate companies

The OECD Multilateral Instrument (MLI), which after ratification by the contractual parties modifies bilateral tax treaties concluded to eliminate double taxation, has already affected 10 double taxation avoidance treaties applied by Slovakia. The MLI inter alia modified the wording of the real estate clause in a number of these tax treaties.



Zuzana Blažejová

zblazejova@kpmg.sk
+421 905 740 000

The real estate clause allows the contracting state in which a company owning significant real estate is established to tax the capital gain from the sale of shares in this company.

The MLI proposes two possible approaches to the real estate clause. However, the wording adopted by the already modified double taxation avoidance treaties reads as follows: „For purposes of a Covered Tax Agreement, gains derived by a resident of a Contracting Jurisdiction from the alienation of shares or comparable interests, such as interests in a partnership or trust, may be taxed in the other Contracting Jurisdiction if, at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50 per cent of their value directly or indirectly from immovable property (real property) situated in that other Contracting Jurisdiction.“



Below we summarise the impact of the new real estate clause on the respective 10 double taxation avoidance treaties:

Contactual country	Existence of real estate clause prior to the MLI	Wording of the new real estate clause
Australia	Yes	365 days rule implemented
Austria	No	Not applicable
France	Yes	Modified to the above wording
Great Britain	No	Not applicable
Israel	Yes	Modified to the above wording
Japan	No	Above wording implemented
Lithuania	Yes	No change
Poland	Yes	Modified to the above wording
Serbia	No	Above wording implemented
Slovenia	Yes	Modified to the above wording



The new real estate clause provides a new definition of real estate companies for the purposes of double taxation avoidance treaties. This change will however affect only those double taxation avoidance treaties where both contractual countries elected to apply the respective change.



In the case of Japan and Serbia the MLI implemented a real estate clause that was previously not included in the respective tax treaties.

Do you want to learn more? Please contact us: zblazejova@kpmg.sk

Failure to meet the deadline for providing additional information to application for VAT refund

The Court of Justice of the EU released judgment, in which it dealt with a question, whether the period of one month to provide additional information to application for VAT refund represents a mandatory time-limit, failure to meet of which would result in losing the right for VAT refund.



Elvira Ungerová
eungerova@kpmg.sk
+421 915 758 807

The company Sea Chefs Cruise Services GmbH, a company established in Germany, requested refund of French VAT through an electronic portal made available for this purpose in Germany. The German tax authorities have electronically forwarded the application to the French tax authorities.

The French tax authorities requested additional information from the mentioned company. As the company did not respond within the one-month deadline set, the tax authorities rejected their VAT refund claim.

The Court of Justice of the European Union ("CJEU") in its judgement in the case C-133/18 „Sea Chefs Cruise Services GmbH“ released on 2 May 2019 has reminded that the right of a taxable person established in an EU member state to obtain the refund of VAT paid in another EU member state, in the manner governed by Directive 2008/9/EC, is the counterpart of such a person's right established by the VAT Directive (Directive 2006/112/EC) to deduct input VAT in his own EU member state.

The deduction system, and accordingly the refund system, is an integral part of the VAT scheme and in principle may not be limited. In particular, the right to deduct is exercisable immediately in respect of all the taxes charged on input transactions. The common system of VAT therefore ensures neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves, in principle, subject to VAT.

As regards the provision determining the deadline for providing additional information to the application for VAT refund filed, it is clear from its wording alone that it does not indicate whether or not the period referred to is a mandatory time-limit. According to CJEU, it can, however be deduced from the context in which it stands in Directive 2008/9 that it does not have a binding character.

The EU member state of refund shall be provided with the additional information requested **within one month** of the date on which the request reaches the person to whom it is addressed. In contrast to the provision determining the time-limit for filing the application for VAT refund, which is **at the latest** on 30 September of the calendar year following the refund period, the provision governing the time-limit for providing additional information, does not contain the words 'at the latest'. CJEU argued that absence of those words indicates that the EU legislature did not seek to set a mandatory time-limit in this provision.

CJEU considered also the fact that the application for VAT refund must be filed by the taxable person (applicant) while additional information can be requested also from someone other than the applicant or a competent authority of an EU member state.

In that case, the absence of a reply or a late reply from that other person or from that authority would result in the taxpayer

losing the right to a refund of VAT, even though he would have no way of influencing the submission of a reply. This would be contrary to the fundamental principles of the common system of VAT.

CJEU concluded that the period of one month to provide additional information to the application for VAT refund from another EU member state, requested by that EU member state, does not constitute a mandatory time-limit.

Hence, if the applicant exceeds or fails to meet the deadline, he is still able to submit, before the national court, additional information suitable for proving the existence of his right to a refund of VAT.

Statutory obligations for publicly traded joint stock companies increase

The National Council of the Slovak Republic has adopted an amendment to the Commercial Code, which enacts new rules in relation to remuneration of members of board of directors, supervisory board and certain individuals in the top management of publicly traded joint stock companies. The amendment also concerns special rules in relation to significant commercial transactions, aiming to increase the protection of interests of the company and associated shareholders, including the minority shareholders.



Milina Schifferdeckerová
mschifferdeckerova@kpmg.sk
+421 907 745 045



Alžbeta Špitová
kpmg@kpmg.sk
+421 259 984 111

Remuneration of members of bodies of publicly traded joint stock companies

Under the new rules each publicly traded company will be obliged to draw up **rules of remuneration** of:

- members of the board of directors
- members of the supervisory board, and
- individuals in the top management of the company, if they are not also members of the board of directors or the supervisory board of the company.

The general meeting of the company will have the authority to approve and adopt amendments to the rules of remuneration. Members of the board of directors will have the liability for drawing up and submitting the rules of remuneration for approval of the general meeting.

Following the approval of the general meeting, the company will be obliged to publish the rules of remuneration without undue delay on the website of the company. Their validity will be limited for a period of 4 years. After this period the board of directors of the company will be obliged to draw up new rules of remuneration and submit them for approval of the general meeting. Publicly traded joint stock companies are obliged to adopt and publish the first rules of remuneration no later than 31 March 2020.

The amendment also sets out the criteria and substantial requirements of the rules of remuneration, which must observe the business strategy of the company, its long-term goals, the interest of sustainability, prevention of conflicts of interest.

The board of directors will also be obliged to prepare a **report of remuneration**, which will provide a complete overview of the awarded remuneration, including any benefits in any form awarded or due for the preceding financial period to the persons subject to the rules of remuneration. Subsequently, the board of directors will be obliged to submit the report of remuneration to the general meeting. The Commercial Code sets out the substantial requirements of the report of remuneration, whereas the auditor of the company will be entitled to comment on the fulfilment of the report of remuneration. The board of directors of publicly traded joint stock companies is obliged to submit the first report of remuneration to the approval to the general meeting for the fiscal period, which begins after 1 July 2019.

Significant commercial transactions

According to the amendments to the Commercial Code, a significant commercial transaction is regarded as a discharge or a

guarantee under an agreement, if the following conditions are met:

- the discharge or the guarantee are provided by a publicly traded joint stock company,
- the discharge or the guarantee are provided to the benefit of a person associated with the publicly traded joint stock company*, and
- the value of the discharge or the guarantee exceeds 10 % of the value of the company's registered share capital.

Prior to the conclusion of a significant commercial transaction, publicly traded joint stock companies are obliged to:

- deposit a notice on the significant commercial transaction together with its draft to the Collection of Deeds, and
- to publish a notice of deposition of the significant commercial transaction into the Collection of Deeds.

In cases of violation of the abovementioned obligations, the value of the significant commercial transaction must be refunded to the company under the rules of unjust enrichment. The members of the board of directors which exercised their office at the time of closing and also members of the board of directors who have exercised their office at the time when the company has not exercised the right to a refund or the security provided and knew or could have known about it in the light of all circumstances, guarantee jointly and inseparably its refund.

The amendments with respect to the significant commercial transactions does not apply to a significant commercial transaction, if the following conditions are met:

1. in the ordinary course of business and under normal market conditions, taking into account normal market conditions and the conditions under which the company normally provides similar transactions in the ordinary course of business with others;
2. concluded by a publicly traded joint stock company, which is a bank or a foreign bank on the basis of imposed remedial measures, forced administration and measures of early intervention pursuant to the special regulation;
3. the conclusion of which was proposed to all of its shareholders as associated persons with the publicly traded joint stock company under equal terms;
4. provided as remuneration to members of the Company's bodies pursuant to Section 201a para. (2) of the Commercial Code; or
5. concluded with a company associated with the publicly traded joint stock company**

These changes are due to the transposition of Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies.

The changes to the Commercial Code shall become effective as of 1 July 2019.

* A person associated with the publicly traded joint stock company is considered:

1. a member of the statutory body, a senior employee, a proxy or a member of the supervisory board of a publicly traded joint stock company,
2. a natural or other legal person, which holds a qualified holding in the publicly traded joint stock company,
3. a member of the statutory body, a senior employee, a proxy or a member of the supervisory board of a person referred to in Lit. (b)
4. a related person of a natural person referred to in Lit. (b) to (c),
5. another legal person in which a public limited company or one of the persons referred to in points Lit. (a) to (d) has a qualified holding.

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Qualified holding means a direct or indirect share representing at least 5% of the registered share capital of a legal person or of voting rights in a legal person, or the possibility of exercising influence over the management of a legal person comparable to that corresponding to that interest; an indirect share means a share held indirectly by way of legal entities in which the holder of an indirect share has a qualifying holding.

** An associated company is a company, in which the publicly traded joint stock company has shares or shares linked with all voting rights.

Three main changes brought by draft amendment to the Slovak VAT Act

The Slovak Ministry of Finance introduced a draft amendment to the Slovak VAT Act bringing three major changes which are proposed to be effective from 1 January 2020.



Zuzana Šidlová
zsidlova@kpmg.sk
+421 915 758 942

The Slovak Ministry of Finance introduced a draft amendment to the Slovak VAT Act bringing three major changes which are proposed **to be effective from 1 January 2020:**

- “Quick fixes” as regards the call-off stock simplification, chain transactions and intra-community supplies of goods;
- New rules for the VAT exemption for taxable supplies related to the international trade in customs and special warehouse;
- Other changes that include i.a.:
 - Rules for correction of the tax base for travel agents;
 - Determination of the tax base upon free-of charge supply of low value tangible assets;
 - Obligation to adjust the input VAT deducted (via capital goods scheme) also with respect to purchase of services related to these goods.

We will keep you informed on the next steps within the legislative process.

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www.kpmg.sk

Tel.: +421 2 5998 4111

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