

Theoretical aspects of tax avoidance in the field of income taxes

Abstract in English

The dissertation deals with the theoretical aspects of the controlled foreign company rules (CFC rules), which are the transposition of the Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market (ATA Directive). It focuses on current issues of compliance of the Czech CFC rules with double tax treaties and with primary EU law, as well as the question of the ability of this legislation to achieve its purpose, which is to prevent tax avoidance. The purpose of the dissertation is to join the doctrinal discussion of conceptual problems associated with the CFC rules and at the same time to present conclusions that will enable the Czech tax policy makers to better deal with the legislation of this measure and achieve greater legal certainty in implementation of this measure.

The argumentation presented in this dissertation leads to several theoretical and practical conclusions. First, it points to the fact that the Czech CFC rules are not entirely able to achieve its purpose and thus to prevent tax evasion. This dissertation identifies reasons of this problem which are (i) the scope of the CFC rules, which is not wide enough to cover all actions that are deleterious regarding the base erosion of the controlling company's tax base in the state of its tax residence, (ii) the insufficient definition of the method how the criteria for determining the control relationship between a controlling company and a CFC are assessed when the controlling company indirectly participates in the CFC (i.e., through another entity) and (iii) insufficient definition of the moment at which these criteria are assessed. Furthermore, this thesis finds that the examined legislation is in accordance with primary EU law (specifically the freedom of establishment) as regards the scope of the CFC rules. The thesis concludes that the criterion of substantial economic activity enshrined in the Income Tax Act includes a range of activities that the CJEU would not evaluate as wholly artificial arrangements. This allows the criterion of substantial economic activity set by the Czech CFC rules to be interpreted and applied in accordance with the CJEU's conclusions. With regard to the third issue under consideration concerning the compliance of the Czech CFC rules with double tax treaties, the thesis concludes that the Czech CFC rules are (i) inconsistent with the legal norm of double tax treaties, which allocates the right to tax business income, and (ii) that those CFC rules does not make it possible to fully meet the obligation arising from the double tax treaties, which is to avoid double legal taxation. The main reason is the fact that the Czech CFC rules are primarily designed as a domestic allocation rule, which in terms of the Czech tax system assigns CFC income directly to the controlling company (and not to the CFC), and thus is in violation of generally followed

principles for the allocation of income to a particular taxpayer and in contravention of the principles for defining the scope of tax jurisdiction. At the same time, it is found that the Czech CFC rules do not allow to meet the obligations arising from double tax treaties, on the basis of which double taxation is avoided by the exemption method, although the Czech CFC rules eliminate double legal and economic taxation on several levels.

Following the identified problematic aspects, possible solutions are proposed to eliminate these shortcomings and at the same time to be in line with EU primary law and not to pose a risk regarding the gold-plating of the ATA Directive.

As part of the argumentation, the dissertation touches on the basic aspects of international taxation, describes the functioning of CFC structures and tax consequences of this structures. The thesis deals with the basic principle of operation of CFC rules, their purpose and models of their legal concept. Then it identifies the nature and purpose of the Czech CFC rules. It concludes that primary purpose of the Czech CFC rules is to eliminate the base erosion, especially in the base erosion in the form of tax avoidance. To achieve this purpose, the Czech CFC rules are designed as a domestic allocation rule, which assigns, from the point of view of the Czech tax system, CFC income directly to the controlling company. This conception allows to tax CFC income in the Czech Republic in the hands of the controlling company.

The argumentation of the dissertation is bound by the scope and methodology of the dissertation. The dissertation focuses only on the analysis and assessment of the Czech CFC rules in relation to the current EU legislation and double tax treaties. It does not address the issue of the relationship between the examined CFC rules and the draft of the OECD minimum tax (which is part of the outputs of Action 1 of the BEPS Project - Tax Challenges of the Digital Economy) and the possible impact of this proposed measure on existing CFC rules. Furthermore, the thesis does not deal in detail with the issue of compliance of the Czech CFC rules with primary EU law regarding the application of these rules to a CFC which is a tax resident of the state included on the EU list of non-cooperative jurisdictions for tax purposes or which is permanent establishment of the controlling company in such state. This is due to the nature of this measure, which is different from the rest of the CFC rules contained in the Income Tax Act and due to the fact that this measure is not a transposition of the ATA Directive. As for the methodology of the work, the dissertation primarily uses doctrinal discussion, using normative and empirical research to support doctrinal arguments as needed.

Keywords:

Controlled Foreign Company Rules; CFC; Project BEPS; Action 3; ATAD