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## Czech legislation approaching several and joint liability for VAT payment<sup>1</sup>

**Podejście ustawodawcze Czech do kwestii  
solidarnej odpowiedzialności za płatność  
podatku VAT**

**Abstract.** This article is devoted to the implementation of Article 205 of the VAT directive in the Czech Republic. It focuses on the basic aspects of this instrument tackling VAT evasion from the EU law perspective, a description of the relevant Czech legislation and finally, its comparison with the EU law standards. The content of this article points out that Czech public law bodies do not respect the barriers for several and joint liability for VAT payment settled by the CJEU, moreover that the Czech Parliament failed to implement the right instrument when it implemented the personal guarantee for VAT payment. It is obvious that the complex approach to the implementation is missing in this case and the Czech

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transposition of the several and joint liability for VAT payment broadly failed to comply with the EU level of VAT regulation. The scientific methods used are description, analysis, induction and deduction.

**Keywords:** VAT; several and joint liability; personal guarantee; VAT evasion.

**Streszczenie.** Niniejszy artykuł poświęcony jest realizacji art. 205 dyrektywy VAT w Republice Czeskiej. Poruszono w nim podstawowe aspekty stosowania tego instrumentu w celu zwalczania praktyk uchylania się od płacenia podatku VAT z perspektywy prawa UE, jak również przedstawiono opis stosownych czeskich przepisów prawnych, a także porównano je ze standardami prawa UE. Zgodnie z treścią artykułu czeskie organy prawa publicznego nie przestrzegają barier dotyczących solidarnej odpowiedzialności za zapłatę podatku VAT uregulowanych przez TSUE, a co więcej, wprowadzając osobistą gwarancję zapłaty podatku VAT, czeski parlament nie dopełnił obowiązku wdrożenia odpowiedniego instrumentu. Jest rzeczą oczywistą, że w tym przypadku mamy do czynienia z brakiem kompleksowego podejścia do wdrożenia przepisów prawa, zaś transpozycja przez Republikę Czeską kilku przepisów dotyczących solidarnej odpowiedzialności za zapłatę podatku VAT zasadniczo nie spełnia wymogów rozporządzenia UE w zakresie podatku VAT. Zastosowane w tym przypadku metody naukowe to opis, analiza, indukcja i dedukcja.

**Słowa kluczowe:** podatek VAT; solidarna odpowiedzialność; gwarancja osobista; uchylanie się od płacenia podatku VAT.

## 1. Introduction

Value added tax (hereinafter referred to as “VAT”) represents one of the most important taxes in the European Union (hereinafter referred to as “the EU”). The reasons why are obvious. First of all, the common system of VAT constitutes a core element of the European Union’s single market. The VAT system shall be an instrument helping prevent the distortion of the competition in a particular Member State of the EU and between Member States and also securing the free movement of goods by its harmonization in the EU and its Member States. Secondly, VAT is the major and still growing resource of public revenues, not only for Member States, but also for the EU since VAT is the only tax generating the EU’s own

resources<sup>2</sup>. Owing to these facts, one could expect that the VAT system should be based on clear and simple rules preventing this system from tax evasion and illegitimate tax avoidance, but the opposite reality is true. It is an undisputable fact that the VAT system is complex and based on a considerable number of exceptions and such circumstances make it susceptible to a VAT gap.

The VAT gap is the difference between expected VAT revenues and VAT actually collected, and it provides an estimate of revenue loss due to tax evasion and tax avoidance, bankruptcies, insolvencies or miscalculations. According to the latest study, the VAT gap estimates on 14 % in the Czech Republic in 2016 which represents circa 58,5 billion CZK equaling almost to 10 billion PLN<sup>3</sup>. However, most importantly, this VAT gap equals 4 % of the planned revenues of the state budget for the year 2019 in the Czech Republic<sup>4</sup>. Therefore, it is quite urgent to discover how to effectively tackle the sources of the contemporary level of the VAT gap, estimated in the form of tax evasion and tax avoidance at 1 trillion EUR in the whole EU<sup>5</sup>. It is not a surprise that this global problem should be solved by better administrative cooperation between Member States of the EU. However, it should not be forgotten that the EU level of VAT regulation provides useful instruments serving to tackle VAT evasion. Besides the reverse charge mechanism subjected to the important changes related to its application, the helpful instrument fighting VAT evasion offered by the Council directive 2006/112/EC of 28 November 2006 on the common system of value added tax (hereinafter referred to as “VAT directive”) is the several and joint liability for VAT payment. Although the missing

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<sup>2</sup> European Commission, *Communication from the Economic and Social Committee on an action plan on VAT: Towards a single EU VAT area – Time to decide*, f. n. COM(2016) 148 final, [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/com\\_2016\\_148\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/com_2016_148_en.pdf) (access on-line: 30.10.2017).

<sup>3</sup> IHS, Institute For Advance Studies, *Study and Reports on the VAT Gap in the EU-28 Member States: 2018 Final Report*, f. n. TAXUD/2015/CC, [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/2018\\_vat\\_gap\\_report\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/2018_vat_gap_report_en.pdf), p. 23 (access on-line: 9.02.2018).

<sup>4</sup> Compare Article 1(1) of the Act No 336/2018 Coll. [Sbirka zakonu – Collection of Laws, hereinafter: Coll.], on state budget of the Czech Republic for the year 2019.

<sup>5</sup> European Commission, *A huge problem*, [https://ec.europa.eu/taxation\\_customs/against-tax-fraud-tax-evasion/a-huge-problem\\_en](https://ec.europa.eu/taxation_customs/against-tax-fraud-tax-evasion/a-huge-problem_en) (access on-line: 30.10.2017).

trader VAT frauds or carousel frauds are the best-known kinds of VAT evasion in the EU, the beauty of the several and joint liability for VAT payment is that this instrument is suitable to tackle all kinds of VAT evasion. The only question which matters, is how to transpose it in accordance with the EU regulation and not to lose the efficiency to tackle corresponding VAT evasion.

This article follows the previous research efforts of the author<sup>6</sup> and the scientific methods used are description, scientific analysis, induction and deduction. Its aim is to introduce the Czech legislation approaching several and joint liability for VAT payment and to point out pitfalls of this regulation.

## 2. EU law framework

At the beginning, before we can approach the analysis of the Czech several and joint liability regulation, the EU level of regulation should be considered. The EU level basically covers two main sources of applicable law, the VAT directive and the case law of the Court of Justice of the EU (hereinafter referred to as “CJEU”). Unfortunately, the only unique decision of the CJEU which exists in this matter<sup>7</sup> settling principles of the several and joint liability for VAT payment is in the case known as Federation of Technological Industries and Others.

The legislative base of the several and joint liability for VAT payment consists of the single Article 205 of the VAT directive. According to this provision, Member States may provide that a person other than the person liable for the payment of the VAT is to be held jointly and severally liable for payment of VAT. Thus, this article primarily enables Member States to adopt regulations imposing on other person than the taxable per-

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<sup>6</sup> For example, the monograph T. Sejkora, *Finančněprávní nástroje boje proti únikům na dani z přidané hodnoty v prostoru Evropské unie*, Praga 2017, p. 224.

<sup>7</sup> There exists also a second decision dealing with this matter (it is a decision of the CJEU of 21 December 2011, *Vlaamse Oliemaatschappij NV v. FOD Financiën*, C-499/10, ECLI:EU:C:2011:871), however this decision does not settle new principles of the joint and several liability for VAT payment application and just repeats the principles already adopted in the previous case.

son to be held severally and jointly liable for a VAT payment which should be otherwise paid by the taxable person<sup>8</sup>. Also, we can see that the positive applicable EU regulation is quite austere, so no one should be surprised that the interpretation of this article was subjected to the CJEU case law creating limits for its potential implementation.

It is also clear that the several and joint liability for VAT payment represents just part of the VAT obligation of the taxable person. In particular, this other person is held to be a debtor just for the VAT payment, but this several and joint liability does not constitute this other person liability to declare any tax relevant information as it is significant for the tax obligation of taxpayers (taxable persons). This other person is just a debtor in the sphere of the VAT payment. For this reason, it is legitimate to ask what the legal status of this other person should be. Taxable person, taxpayer? The only answer given by the Article 205 of the VAT directive is that this person could be held severally and jointly liable without respect to his taxable status<sup>9</sup>. Therefore, since the EU level of law does not regulate such an aspect, it is necessary to find out the answer in the level of regulation in the nation in question. However, analysing the status of such other person severally and jointly liable for VAT payment from the Czech tax law perspective is a task for a separate article, as the Czech regulation and the professional public are disunited and confused.

The second issue arising from the EU regulation of the several and joint liability for VAT payment is the inconsistent wording of the various language versions of the VAT directive. Most of them are using the term “the several and joint liability for VAT payment” and equivalent terms<sup>10</sup>.

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<sup>8</sup> Commission of the European Communities, *Proposal for a sixth Council Directive on the harmonisation of legislation of Member States concerning turnover taxes. Common system of value added tax: uniform basis of assessment. Explanatory Memorandum*, fn- COM (73) 950, Bruksela 1973, p. 24, [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/docs/body/COM\(1973\)950\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/docs/body/COM(1973)950_en.pdf) (access on-line: 3.03.2017).

<sup>9</sup> Compare B. Terra, J. Kajus, *A Guide to the European VAT Directives. Introduction to European VAT*, 1. ed. IBFD, Amsterdam 2011, p. 1178.

<sup>10</sup> Eg. English, German and Portuguese, for more information compare: T. Sejkora, *Subrogační regres u institutu ručení za nezaplacenou DPH* [in:] H. Vičarová Hefnerová,

On the other hand, the Czech and Slovak version of the VAT directive operates with the term “personal guarantee for VAT payment”<sup>11</sup>. Therefore, there is a question as to what the correct content of Article 205 of the VAT directive is, and what instrument should be implemented by the transposition of this provision because both instruments (several and joint liability and personal guarantee) constitute different rights and obligations.

Such difficulties arising from the different wording of the various language versions of the VAT directive should be simply solved according to the CJEU case law related to the interpretation of EU law. As the CJEU constantly stresses, EU law cannot be implemented just according to the particular wording of the directive’s language version and comparison of language versions<sup>12</sup>. Contrary to that, only the interpretation based on the aim of the interpreted provision and the systematics of the related provisions to the interpreted provision is the relevant one<sup>13</sup>. If discrepancies between the various language versions of a similar directive occur, it is prohibited to follow just grammatic interpretation of the relevant provision and the whole complex of the related legislation of EU law must be considered, mainly the purpose of the regulation and its development<sup>14</sup>. Moreover, in respect to the interpretation of the several and joint liability for VAT payment, we are trying to interpret the EU law term. In such a case, CJEU emphasizes that the principle of the independency of EU law terms must be obeyed<sup>15</sup>, pursuant to which the EU law terms cannot be interpreted by the consideration of the Member States’ national law but

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L. Madleňáková (eds.), *Kontroverzní názory v právu. Sborník z konference Olomoucké debaty mladých právníků 2015*, Praga 2015, p. 113 et seq.

<sup>11</sup> This term is called in the Czech and Slovak legislation „ručení“.

<sup>12</sup> M. Bobek, *Soudní dvůr Evropských společenství – UAB Profisa: K výkladovým „opravám“ nesprávných překladů práva Společenství*, “Soudní rozhledy” 2007, No 9, pp. 363-366.

<sup>13</sup> Compare paragraph 17 of the CJEU decision of 8 June 2000, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, C-100/84, ECLI:EU:C:1985:155.

<sup>14</sup> Compare paragraph 20 of the CJEU decision of 6 October 1982, *Srl CILFIT a Lanificio di Gavardo SpA proti Ministero della sanità*, C-283/81, ECLI:EU:C:1982:335.

<sup>15</sup> P. Farmer, R. Lyal, *EC Tax Law*, Nowy Jork 1994, p. 90.

independently<sup>16</sup>. Nevertheless, the truth is that the CJEU has not so far dealt with the question for preliminary ruling related to the content of the term several and joint liability for VAT payment so far.

### **3. Limitation of Several and Joint Liability Implementation**

The third issue arising from the EU level of the several and joint liability regulation is the rather vague provision of Article 205 of the VAT directive itself, because this article establishes quite broad authorisation to Member States as to how to transpose this instrument. From this perspective, it was just a matter of time until the CJEU decided where are the limits of the implementation of the Article 205 of the VAT directive. The result is the CJEU's judgement in the case C-384/04, *Federation of Technological Industries and Others*, establishing several aspects for the implementation of this provision<sup>17</sup>.

The first aspect is related to the determination of the "other person" who could be held severally and jointly liable for VAT payment. It is deduced that such other person could be subjected to the several and joint liability for VAT payment if the non-discriminatory qualified relation between this other person and the person liable for VAT payment exists<sup>18</sup>. Certainly, this qualified relation will exist between the provider of the taxable transaction and its recipient. However, even the persons who are not formally part of the contractual relation corresponding to the taxable transaction could be subjected to this specific instrument tackling VAT

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<sup>16</sup> Confédération Fiscale Européenne, *Opinion Statement of the CFE on the Distinction between Taxable and VAT Exempt Letting of Immovable Property* [in:] "European Taxation" 2010, vol. 50, No 2/3, p. 97.

<sup>17</sup> CJEU decision of 11 May 2006, *Commissioners of Customs & Excise and Attorney General v. Federation of Technological Industries and Others*, C-384/04, ECLI:EU:C:2006:309.

<sup>18</sup> Compare the merit of the case decided by the decision of the CJEU of 21 December 2011, *Vlaamse Oliemaatschappij NV v. FOD Financiën*, C-499/10, ECLI:EU:C:2011:871.

evasion if the objective circumstances justify its application<sup>19</sup>. On the other hand, it is still assumed that most of the other persons severally and jointly liable for VAT payment will be customers of taxable person (recipients of taxable transaction)<sup>20</sup>.

The second aspect is focused on the construction of the merits of the national legislation implementing Article 205 of the VAT directive. CJEU states that a person could be “held jointly and severally liable for the payment of VAT if, at the time of the supply, that person knew or had reasonable grounds to suspect that the VAT payable in respect of that supply, or of any previous or subsequent supply, would go unpaid”<sup>21</sup>. It is true that the exercise of the Member State of the EU authorisation to implement EU law provision must be in accordance with two general principles of law, in particular with the legal certainty and proportionality<sup>22</sup> requiring to adopt just such a measure, which is necessary for the achievement of the aim of the national regulation<sup>23</sup>. As the general advocate points out, the implemented national regulation should not constitute a system of strict liability for the VAT payment, which certainly goes beyond what is necessary to preserve the public exchequer’s rights<sup>24</sup> due to the breach of the principle proportionality<sup>25</sup>.

However, there is the third aspect of the several and joint liability to be considered in the form of the total exemption from the several and joint liability for VAT payment application. With the second breath, the CJEU

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<sup>19</sup> W. Berger, C. Kindl, M. Wakounig, *Směrnice ES o dani z přidané hodnoty: praktický komentář*, Praga 2010, p. 550.

<sup>20</sup> K. Kassovic, *Tax Compliance in VAT/GST and Direct Taxation* [in:] S. Pfeiffer, M. Ursprung-Steindl, *Global Trends in VAT/GST and Direct Taxes*, Wiedeň 2015, p. 123.

<sup>21</sup> Compare paragraph 32 of the CJEU decision of 11 May 2006, *Commissioners of Customs & Excise and Attorney General v. Federation of Technological Industries and Others*, C-384/04, ECLI:EU:C:2006:309.

<sup>22</sup> *Ibidem*, paragraph 31.

<sup>23</sup> Compare paragraph 44 of the CJEU decision of 8 June 2000, *Grundstückgemeinschaft Schloßstraße GbR v. Finanzamt Paderborn*, C-396/98, ECLI:EU:C:2000:303.

<sup>24</sup> Compare paragraph 32 of the CJEU decision of 11 May 2006, *Commissioners of Customs & Excise and Attorney General v. Federation of Technological Industries and Others*, C-384/04, ECLI:EU:C:2006:309.

<sup>25</sup> K. Kassovic, *Tax Compliance in VAT/GST...*, p. 123.



stresses that persons “who take every precaution which could reasonably be required of them to ensure that their transactions do not form part of a chain which includes a transaction vitiated by VAT fraud must be able to rely on the legality of those transactions without the risk of being made jointly and severally liable to pay the VAT due from another taxable person”<sup>26</sup>.

There is no doubt that this case law prohibits any Member State of the EU from adopting such a construction of the several and joint liability for VAT payment as would establish the strict liability for VAT payment making practically impossible or excessively difficult to exculpate other person from the liability application. Therefore, the national transposition of the Article 205 of the VAT directive has to grant a procedure to avoid the application of the several and joint liability for VAT payment if the other person exercised the same sort of the due diligence of the supplier or recipient of the taxable transaction. Summarizing that, there must be objective circumstances considered in every case of the several and joint liability for VAT payment application.

#### **4. Personal Guarantee of Authorised Receiver**

Finally, let us focus on the Czech transposition of the Article 205 of the VAT directive. According to the Act No 235/2004 Coll., on VAT (hereinafter referred to as “the Act on VAT”), Czech legislation distinguishes two types of several and joint liability for VAT payment, which are in fact a personal guarantee for VAT payment. The first other person who could be a personal guarantee for VAT payment is authorised receiver.

The authorised receiver is the person subjected to the excise duties regulation. Pursuant to the Article 3 letter h) of the Act No 353/2003 Coll., on excise duties, the authorised receiver is a person who as a trader

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<sup>26</sup> Compare paragraph 33 of the CJEU decision of 11 May 2006, *Commissioners of Customs & Excise and Attorney General v. Federation of Technological Industries and Others*, C-384/04, ECLI:EU:C:2006:309.

under the specific public authorisation accepts products transported from another Member State of the EU and these products are subjected to excise duties under the suspension of excise duties. We can see that such a person is not a contractual party to the contract according to which is exercised the taxable transaction subjected to VAT. However, the qualified relation to the buyer of the products subjected to excise duties is quite obvious in this case. Usually, the authorised receiver is authorised by the buyer of the products subjected to excise duties to overtake them on behalf of the buyer's name. So, even if that authorised receiver stands outside the production chain, it must be concluded that there exists a tight relationship with the taxable transaction.

Now, let us see what the Article 108a of the Act on VAT prescribes. Pursuant to this provision, the authorised receiver personally guarantees the VAT payment by the taxable person if he is obliged to pay excise duty imposed on the delivery of products subjected to excise duty from the other Member State of the EU, and he does not prove that he adopted all reasonably required precautions to ensure that the consignee (buyer) of such products would pay VAT. The first problem related to this provision is the lack of the systematic approach to the CJEU case law. The Article 108a of the Act on VAT establishes the way the authorised receiver could exculpate himself from the personal guarantee for VAT payment application. On the other hand, the Czech legislator did not respect the requirement on the EU law implementation because the Czech Parliament did not consider the systematics of the related provisions of the VAT directive.

The concept of exculpation by the adoption of a reasonably required precaution to ensure that transactions do not form part of a chain affected by VAT fraud is not an original concept of the several and joint liability for VAT payment. In fact, it is principle applied on various instruments tackling VAT evasion, for instance the entitlement of a tax office to refuse to grant the deduction of the input VAT right to a taxable person. Therefore, I do consider this concept as an expression of the proportionality principle in the form of the specific principle applied in the VAT regula-

tion. Nevertheless, according to the relevant case law<sup>27</sup>, the burden of proof should be borne by the tax office<sup>28</sup>. Secondly, the Article 108a of the Act on VAT does not enable the tax office to consider the objective circumstance of the particular case since the several and joint liability for VAT payment application requires to deal with the question, whether an authorised receiver knew or had reasonable grounds to suspect that the VAT payable in respect of the relevant supply, or of any previous or subsequent supply, would go unpaid.

## **5. Personal Guarantee of Recipient of Taxable Transaction**

The second type of personal guarantee for VAT payment is applicable to recipients of taxable transactions. According to the Article 109 of the Act on VAT,

- a) The taxable person personally guarantees the VAT payment if he knew or had reasonable grounds to suspect that the payable VAT stated on the invoice would intentionally not be paid, the supplier got or would get into a position where he could not pay VAT or alternatively the tax evasion would be committed, or the illegal tax benefit would be granted<sup>29</sup>;
- b) The taxable person personally guarantees the VAT payment if the supplier is an unreliable taxable person<sup>30</sup>;

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<sup>27</sup> At the birth, e.g. CJEU decision of 12 January 2006, *Optigen Ltd, Fulcrum Electronics Ltd and Bond House Systems Ltd v. Commissioners of Customs & Excise*, joined cases C-354/03, C-355/03 and C-484/03., ECLI:EU:C:2006:16, and CJEU decision of 6 July 2006, *Axel Kittel v. Belgian State and Belgian State v. Recolta Recycling SPRL*, joined cases C-439/04 and C-440/04, ECLI:EU:C:2006:446.

<sup>28</sup> Compare paragraph 37 and following of the CJEU decision of 6 December 2012, *Bonik EOOD v. Direktor na Direktsia "Obzhalvane I upravlenie na izpalnenieto" – Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite*, C-285/11, ECLI:EU:C:2012:774.

<sup>29</sup> Pursuant to the Article 109(1) of the Act on VAT.

<sup>30</sup> Pursuant to the Article 109(3) of the Act on VAT.

- c) The taxable person personally guarantees the VAT payment imposed on the delivery of fuel if the supplier is not registered as a supplier of fuel in the appropriate register<sup>31</sup>;
- d) The taxable person personally guarantees the VAT payment if the contribution<sup>32</sup>
  - (1) diverges from the usual price without any economic justification;
  - (2) is paid on a foreign payment account;
  - (3) is paid on a non-registered payment account in the VAT register and the contribution exceeds twice the limit for cashless payments;
  - (4) is in the form of a virtual currency.

Ad a), as we can see, also in this case, the Czech legislator misses the consistent and complex approach to the implementation of the Article 205 of the VAT directive. Contrary to the personal guarantee of the authorised recipient regulation, which lacks the knowledge test about the reasonable grounds to suspect that the VAT payable in respect of the relevant supply, or of any previous or subsequent supply, would go unpaid, the regulation of the Article 109(1) of the Act on VAT is missing the exculpation of the taxable person by the adoption of reasonably required precautions ensuring that accepted taxable transaction does not form part of a chain affected by the VAT fraud. However, this lack of regulation could be surpassed by the euro-conform interpretation. But the problem is the praxis of tax authorities. The praxis related to the burden of proof is exactly the same as in case of the personal guarantee of the authorised recipient. Pursuant to the opinion of the General financial directorate, it is the recipient of the taxable transaction who needs to provide enough evidence that he adopted all reasonably required precautions ensuring that the accepted taxable transaction did not form part of a chain affected by VAT fraud<sup>33</sup>. Fortu-

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<sup>31</sup> Pursuant to the Article 109(4) of the Act on VAT.

<sup>32</sup> Pursuant to the Article 109(2) of the Act on VAT.

<sup>33</sup> Generální finanční ředitelství, Sekce metodiky a výkonu daní, Odbor Nepřímých daní, *Informace GFŘ: k institutu ručení podle zákona č. 235/2004 Sb. o dani z přidané hodnoty*, f. No 3308/13/7001-21002-012287, p. 3, <http://www.financnisprava.cz/assets/cs/prilohy/d-seznam-dani/Ruceni.pdf> [access on-line: 17. 03.2017].

nately, there are some cases before the Czech Supreme Administrative Court dealing with this issue turning the situation in favour of taxable persons<sup>34</sup>.

The second problem of this provision is related to the part dealing with the situation when the illegal tax benefit is granted. The CJEU stressed that the one condition of the several and joint liability for VAT payment application is the knowledge test about the fact that VAT in the business chain would go unpaid<sup>35</sup>. Considering the tax benefit, the tax benefit does not necessarily equal to the unpaid tax. Therefore, in my opinion, the personal guarantee of the recipient of the taxable transaction applied base on the granting of the illegal tax benefit should apply only in the case when illegal tax benefit results in the tax evasion in the form of the illegally unpaid VAT.

Other merits of the personal guarantee for VAT payment of the recipient of the taxable transactions have common issues. First of all, all of them are based on strict liability without any possibility for the taxable person to exculpate himself if the conditions assumed by the Article 109 of the Act on VAT are met. It is indisputable that all objects in merits of the Article 109 paragraph 2, 3 and 4 of the Act on VAT represent indicators that VAT evasion could be present in the respective business chain, however such strict liability is not in accordance with the principle of proportionality and due to this fact, it is contrary to EU law. Also, I must blame the legislator for the fact that such regulation creates a stigma that a particular activity or form of payment for the taxable transaction is generally fraudulent or related to illegal activity of any kind *per se*. However, let me point out some practical issues related to these personal guarantees for VAT payment types.

Ad b), unreliable taxable person is the specific status of the taxable person which is granted if the taxable person seriously breached obliga-

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<sup>34</sup> Compare the decision of the Czech Supreme Administrative Court of 30 January 2018, f. No 5 Afs 60/2017.

<sup>35</sup> Paragraph 32 of the CJEU decision of 11 May 2006, *Commissioners of Customs & Excise and Attorney General v. Federation of Technological Industries and Others*, C-384/04, ECLI:EU:C:2006:309.

tions related to the administration of VAT and the tax office decided so<sup>36</sup>. Then, this status of the taxable person is published in the VAT register which is accessible via the internet.

The first problem is that one of the requirements on invoices is the statement of the date of the taxable transaction which is normally stated as a particular day<sup>37</sup>. Therefore, we can meet the situation where the taxable person will accept the taxable transaction in the same day as the supplier will become an unreliable taxable person, however, at the moment of the delivery, the information about the status of the supplier as an unreliable taxable person was not published in the VAT register. Respecting this potential situation, it is also necessary to point out that the VAT register does not allow the extraction of a statement from the VAT register with the information about a taxable person which is electronically signed with the timestamp as it is possible to extract a statement from the business register or commercial register. The second issue is that this provision does not distinguish between forms of payments, in cash and cashless. For example, the taxable person has an urgent need of some supply which is not planned and for this reason, this taxable person personally and randomly visits the store of the unreliable taxable person, for instance because the location of the store is close to the office of the taxable person. Even in this case, the taxable person has to check whether the supplier (potential one) is an unreliable taxable person via the internet. Nevertheless, I can imagine that the taxable person has access to the internet every time he concludes a contract.

Ad c), with the personal guarantee for VAT payment imposed on the delivery of fuel if the supplier is not registered as a supplier of fuel in the respective register the same issues are connected as were described in the paragraph above. Also in this case, the taxable person (recipient of the taxable supply of fuel) must check the VAT register and in addition, the register of the fuel distributors via the internet. However, the model example could be even more absurd. Please, imagine the taxable person, an attorney at law, who needs to arrive at the court hearing in the client's

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<sup>36</sup> Article 106 (1) of the Act on VAT.

<sup>37</sup> Article 29(1)(h) of the Act on VAT.

case on time and who is traveling there by car. This attorney needs to put fuel in the tank of his car, therefore he is pleased when he comes across a fuel station near the road on which he is travelling. Therefore, he stops there, refuels, pays, and drives away. However, this attorney is the personal guarantee for the VAT payment by the operator of that fuel station because this operator lost his authorization to operate this kind of business and has not stopped running his fuel station yet. Again, the provision of the Article 109(4) of the Act on VAT requires to check the VAT register and register of fuel distributors via the internet before he starts to buy fuel. But, there is one practical problem, most operators of fuel stations prohibit the usage of cell phones in the area of the fuel station due to the security requirements. It is a fact that this prohibition is not given by law, but on the other hand it takes into consideration the technical norm ČSN 60079-0-10-14. So, the only way this attorney could comply with the VAT regulation without the breach of the prohibition of the cell phone usage at the fuel station, is to stop near by the fuel station and check both mentioned registries and then, finally proceed to refuel.

Ad d), also there could be found reasonable objective circumstances why such payments are made in the form presumed by the Article 109(2) of the Act on VAT. For example, on the side of the recipient of the taxable transaction, there is always economic justification for the purchase of goods or services for the lowest price possible. So even in the case that the price for the taxable transaction was lower than the market price, there is an evident economic justification for getting a higher profit on the part of the recipient of the taxable transaction. Also, payment to the foreign payment account has justification. Moreover, it is a General financial directorate which admits that such payment is not quite usual, but it is not excluded in the ordinary business<sup>38</sup>. It is an undisputable fact that a broad part of the Czech national economy is oriented on foreign trade in which it is significant that business operators often use payment accounts in foreign currencies. Finally, the personal guarantee for VAT payment is illogical as applied to transactions paid on the payment accounts unpublished

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<sup>38</sup> Generální finanční ředitelství, Sekce metodiky a výkonu daní, Odbor Nepřímých daní, *Informace GFŘ...*, p. 4.

in the VAT register if the price exceeds double the limit for obligatory cashless payment. According to the applicable law, the taxable person must identify payment accounts used for his business and notify them to the tax administrator. However, the decision on whether or not to publish them or some of them in the VAT register accessible via the internet is fully in the discretion of the taxable person. From my perspective, when the law does not prescribe the obligation to publish a payment account used for business in the VAT register, then there should be negative consequence in the form of personal guarantee of customers if the taxable person decides not to publish it in this register.

## 6. Conclusion

The previous passage of this article is a good example of how the implementation of the short and vague EU law provision can be difficult. Even though the Article 205 of the VAT directive gives the impression of being a clear provision, it was just a matter of time before the CJEU decided to adopt limits for its implementation. Due to this fact, there are three basic aspects which must be considered if the Article 205 of the VAT directive is implemented. Pursuant to the first aspect, only if the non-discriminatory qualified relation between other person and person liable for VAT payment exists, this other person could be held to be severally and jointly liable for VAT payment. However, this person could be “held jointly and severally liable for the payment of VAT if, at the time of the supply, that person knew or had reasonable grounds to suspect that the VAT payable in respect of that supply, or of any previous or subsequent supply, would go unpaid”<sup>39</sup>, considering the second aspect. Finally, anyone “who take[s] every precaution which could reasonably be required of them to ensure that their transactions do not form part of a chain which includes a transaction vitiated by VAT fraud must be able to rely on the legality of those

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<sup>39</sup> Compare paragraph 32 of the CJEU decision of 11 May 2006, *Commissioners of Customs & Excise and Attorney General v. Federation of Technological Industries and Others*, C-384/04, ECLI:EU:C:2006:309.



transactions without the risk of being made jointly and severally liable to pay the VAT due from another taxable person”<sup>40</sup>.

Applying these aspects on the Czech approach to the implementation of the Article 205 of the VAT directive, it is clear that the Czech legislation does not comply with the EU law requirements, because it establishes a system of strict liability of another person than the taxable person for VAT payment often without any way how to exculpate. Also, this regulation does not consider all the objective circumstances of the case of the application of the personal guarantee for VAT payment. Nevertheless, there is one more question to be answered in relation to compliance with EU law. Does the content of the instrument of personal guarantee for VAT payment equal the several and joint liability for VAT payment?

The answer is no. Following the doctrine of the correlation of private and public law, the Czech Supreme Administrative Court derived that the instrument of personal guarantee must come out of its archetype in civil law<sup>41</sup>, and therefore it is necessary to derive as well two basic features of the personal guarantee in tax matters, in particular accessory and subsidiarity to the main debt<sup>42</sup>. We can see that the Czech Supreme Administrative Court applies the civil law grounds on the tax law regulation, which is unacceptable in the VAT regulation<sup>43</sup>. Moreover, the general tax law regulation represented by act No 280/2009 Coll., tax procedure code, does not provide the person personally guaranteeing the tax payment with the status of the taxpayer (taxable person)<sup>44</sup>. Finally, from the perspective of the systematics of this code, the personal guarantee for tax payment is the

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<sup>40</sup> Compare paragraph 33 of the CJEU decision of 11 May 2006, *Commissioners of Customs & Excise and Attorney General v. Federation of Technological Industries and Others*, C-384/04, ECLI:EU:C:2006:309.

<sup>41</sup> Compare the decision of Czech Supreme Administrative Court of 5 November 2009, f. No 1 Afs 86/2009.

<sup>42</sup> Compare the decision of Czech Supreme Administrative Court of 30 November 2009, f. No 1 Afs 73/2006.

<sup>43</sup> Compare Ch. Amand, G. Schellmann, R. Vermeulen, *Immovable Property and VAT – Lessons from Past Experience*, “International VAT Monitor” 2005, vol. 16, No 5, p. 334.

<sup>44</sup> *A contrario* to the Article 172(2) and Article 20(1) of the act No 280/2009 Coll., tax procedure code.

instrument ensuring the tax payment. However the VAT directive regulates this type of instruments in the Article 206.

Contrary to that, the several and joint liability is a type of passive solidarity for the debt. As the CJEU deduced, “from very nature of joint and several liability, each debtor is liable for the total amount of the debt and the creditor remains, in principle, free to request the payment of that debt by one or several debtors as he chooses”<sup>45</sup>. Comparing that with the personal guarantee, both features (subsidiarity and accessory) are missing in case of several and joint liability. Finally, it must be implied by the systematic interpretation of the VAT directive, that the other person severally and jointly liable for VAT payment pursuant to the Article 205 of such directive has the status of a taxable person in respect to his obligation to pay VAT.

Summarizing that, it could be concluded that the Czech approach to the implementation of the Article 205 of the VAT directive evinces great deficiencies in transposition of EU law. Unfortunately, apart from the case law of the Czech Supreme Administrative Court, the Czech legislator has not shown any effort to get closer to the required level of the harmonization.

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<sup>45</sup> See paragraph 85 of the CJEU decision of 18 May 2017, „*Latvijas Dzēlceļš*” VAS v. *Valsts ieņēmumu dienests*, C-154/16, ECLI:EU:C:2017:392.

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