Discrimination in Taxation of Non-residents
Diskriminace zdanění nerezidentů

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Abstract
The paper focuses on taxation of non-residents from the European Union in the Czech Republic and their possible discrimination from the income tax point of view. It provides detailed comparative analyses of taxation of tax resident and tax non-resident workers (both employees and self-employed) in the Czech Republic. Thorough analysis discusses the issue of discrimination on all levels of taxation taking into consideration tax base, allowances, rates, tax credits as well as tax administration obligations. Unique overview of number of non-residents in the Czech Republic in 2004-2010 shows the importance of the topic. Since the social security contributions are inseparable part of obligatory payments, the paper discusses also their role in international taxation and possible discrimination issues briefly. Results of the analysis show that national tax legislation of the Czech Republic in the field of personal income tax is compliant with the relevant Court of Justice of the EU's decisions. It also meets criteria of tax nondiscrimination principles of locational neutrality (fully) and competitive neutrality (partially).

Keywords
taxation, discrimination, non-residents, social security contributions

JEL Codes
H24, J78

Abstrakt
Článek se zaměřuje na zdanění nerezidentů z Evropské unie v České republice a jejich možnou diskriminaci z pohledu daně z příjmů. Poskytuje detailní komparativní analýzu zdanění českých daňových rezidentů a nerezidentů (jak zaměstnanců, tak osob samostatně výdělečně činných) v České republice. V rámci této komparativní analýzy diskutuje otázku diskriminace při zohlednění daňového základu, odpočtů od základu daně, daňových sazeb, slev na dani, včetně daňových povinností. Článek obsahuje unikátní přehled počtu nerezidentů v České republice v letech 2004-2010. Vzhledem k tomu, že pojistné na sociální pojištění je neodlučitelnou částí povinných plateb z příjmů z výdělečné činnosti, je stručně diskutována právě i role pojistného v mezinárodním zdanění a možná diskriminace. Z analýzy vyplývá, že v oblasti daně z příjmů fyzických osob je národní legislativa České republiky v souladu s relevantními rozsudky Soudního dvora EU. Česká národní legislativa v této oblasti je rovněž v souladu s principy posuzování daňové diskriminace z pohledu místa rezidentury (locational neutrality) a částečně i z pohledu konkurence daňových systémů (competitive neutrality).

Klíčová slova
zdanění, diskriminace, nerezident, pojistné sociálního pojištění

Introduction

With globalization of economies the need for precisely arranged rules for taxation of persons residing in other states in national tax legislations has arisen. Although these rules vary from country to country, the international tax legislation, e. g. regulations of the European Union ("EU ") and double tax treaties, require them not to be discriminatory.

The nondiscrimination rule is crucial for meeting basic freedoms guaranteed to citizens of all member states by Treaty Establishing the European Community. In the personal taxation (including social security) mainly the freedoms of movement of persons and services are in question. Right to move and reside freely is granted to the citizens of the EU member states primarily by Article 45 of The Treaty on the functioning the European Union (European Union, 2008).

Discrimination in general occurs in cases when one person in particular situation is treated differently from another person in the same situation based on discriminating criteria, such as residency, nationality, sex, health condition etc. (European Union, 2000a; European Union, 2000b). Discrimination can be direct or indirect. According to the international tax legislation, both such discriminations must be prevented.

International tax legislation distinguishes between tax residents and tax non-residents. Discrimination in taxation on international level therefore basically means that tax non-residents are taxed differently compared with tax residents, resulting in less favourable treatment of either of them.

Aim of the paper is to analyze the rules of taxation of tax non-residents workers (both employees and self-employed) from the other member states of the European Union in comparison with taxation of tax residents and to discuss the nondiscrimination rule within the Czech income tax policy.

To reach the above mentioned aim, we use text and comparative analysis of relevant legislation and EU case law, followed by deduction method to formulate the conclusions. The important role of the Court of Justice of the European Union in interpretation of European Union law is commented by e.g. Široký (2012).

The structure of the paper is as follows: after this introduction and a brief summary of previous research, the changes in numbers of tax non-residents in the Czech Republic are presented. Then follows a detailed comparative analysis of taxation of tax non-residents and residents, that also includes impacts of social security contributions and their role in international taxation. Discussion and conclusions close the paper.

1 Previous Research and Literature

Mason and Knoll (2012) provided recently a very knowledgeable theoretical analysis of taxation of non-residents with relation to discrimination taking into consideration numerous EU jurisdictions. They present possible approaches to tax nondiscrimination principle, such as locational neutrality (the same tax burden on all income for all tax payers residing

in the same country), leisure neutrality (same tax burden on income with the same source country regardless the residence of the tax payer) and competitive neutrality (either uniform residence taxation or source taxation is required depending on the way of achieving competitive neutrality). They favour competitive neutrality approach for nondiscrimination rules in taxation and argue that there is no need for tax rate harmonization or equal taxation of residents and non-residents to meet tax nondiscrimination rules fully.

Graetz and Warren (2012) also emphasize the incoherence in explanations of Court of Justice of the EU of tax nondiscrimination and they find the requirements of Court of Justice to respect both source and residence nondiscrimination at the same time being "labyrinth of impossibility".

Discrimination of tax non-residents in legal conditions of the Czech Republic is only a briefly researched issue which has not been complexly reviewed so far. In the article about amendment to Czech Income Tax Act in 2011, Novotný and Pecka (2011) commented on partial issues in income taxation with emphasize on nondiscrimination settled by EU legislation. Novotný (2010) discussed also arrangements in Czech tax legislation which followed a formal request of European Commission (2009) that the Czech Republic must change particular legal provisions according to which certain types of income of tax non-residents were taxed on gross bases even though tax residents receiving the same income were allowed to deduct related expenses.

Also Brychta (2011) examines the consistency of Czech tax legislation applying to Czech tax non-residents with EU legislation pointing out the same amendment to Czech Income Tax as commented by Novotný (2010), which in 2009, according to Brychta, contributed to significant consistency of Czech national legislation with EU law.

2 Czech Tax Non-residents in Numbers

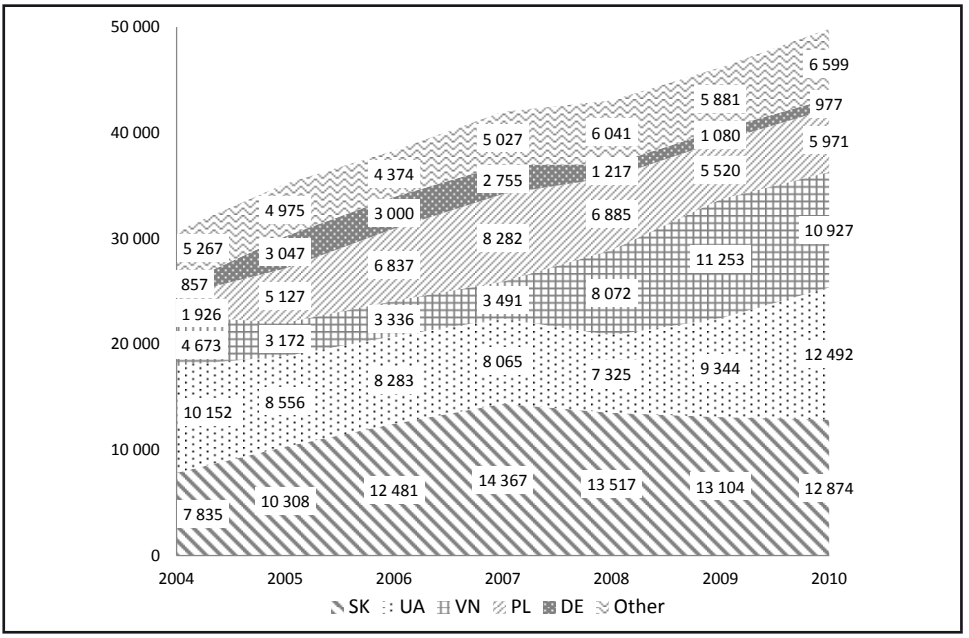
Further we provide overview of numbers of Czech tax non-residents in years 2004-2010, based on primary data from General Financial Directorate (2012). The Czech tax administration collects these data from filed personal income tax returns, i.e. tax non-residents not filing a personal income tax return are not reflected.

To identify who a Czech tax resident and a Czech tax non-resident is, both international double tax treaties and Czech national tax legislation have their say. The primary purpose of the definition of a tax non-resident in Czech national legislation is to define tax obligations of citizens of countries (or more precisely: "taxpayers from countries") with which no double tax treaty has been signed. Since the Czech Republic has signed double tax treaties with all EU member states, the definition stated in the respective treaty should be decisive for our discussion of EU nondiscrimination rule. However, the definition in national legislation has its role also when deciding tax residency status according to a double tax treaty. The treaty comes in use when both countries' national legislations consider an individual to be their tax resident. In other words, the double tax treaty confirms tax residency for one country. On the other hand, the treaty cannot assign a person's tax residency to a country whose legislation does not consider him or her to be its tax resident.

If the definition of a tax resident according to the international treaty differs from the definition found in national legislation, the international treaty prevails. National legislation also cannot limit the definition of a tax resident contained in the treaty.

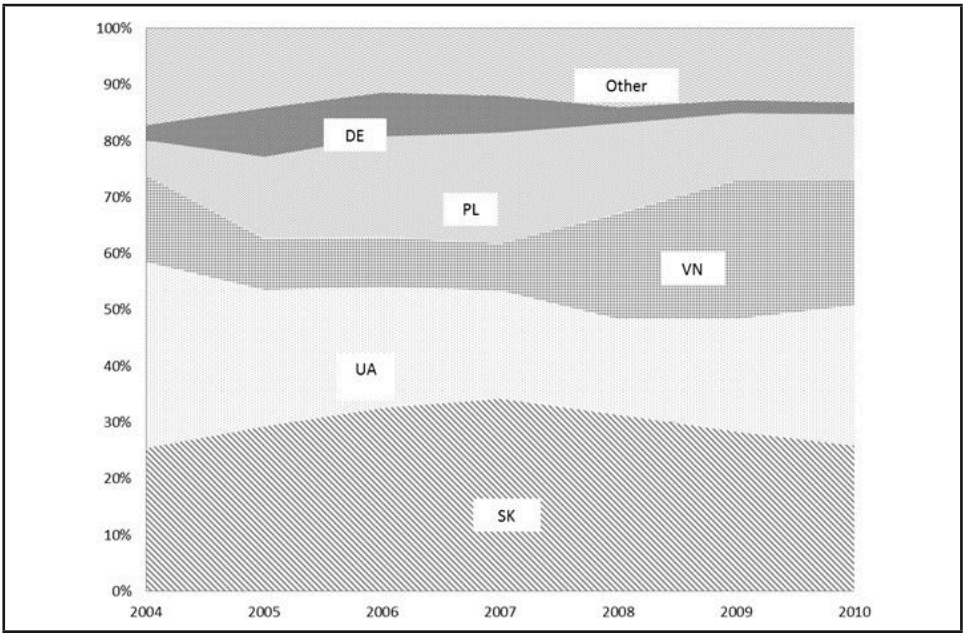
Following figures show numbers of Czech tax non-residents in years 2004 to 2010 structuring 5 most recurrent states, Figure 1 in absolute numbers and Figure 2 in percentage. Both the figures and the comments in this chapter are based on data provided by the General Financial Directorate (2012). It is important to emphasize that data used in the following analyses include only those Czech tax residents and non-residents filing personal income tax return. There are no complex data on total number of Czech tax non-residents including those who have no liability or who do not file personal income tax return. Shortly speaking, the tax return according to Czech tax legislation does not have to be filed for example by an employee having only one employer or more employers successively in a calendar year, because the income tax is collected by the employer(s) in the form of prepayments withheld from income paid to the employee. However, significant part of Czech tax non-residents filing tax return are often tax payers with income from dependent activity (which covers employment) only. Data provided by the General Financial Directorate (2012) show that for example in case of Czech tax non-residents who declared themselves to be Slovak tax residents, the percentage of tax payers filing a tax return and having only income from dependent activity on total number of Czech tax non-residents from Slovakia is 73.3% in 2010. For Czech tax non-residents who declared themselves tax residents of Poland this ratio is even higher, 93.1% in 2010. On the other side the same ratio (i.e. the percentage of Czech tax non-residents from one country filing an individual income tax return and having only income from dependent activity on the total number of Czech tax non-residents from the same country) is quite low for example for Vietnam (5.1%) and Ukraine (3.9%). Reason for such disproportion is due to different status of individuals working in the Czech Republic. Most individuals coming to work in the Czech Republic from Vietnam are in a position of self-employed; for Ukraine the share of self-employed is almost 50 %. On the contrary, most workers coming to the Czech Republic from Slovakia or Poland are in a position of employees (Czech Statistical Office, 2012). The reason for filing a tax return even though the individual has income from dependent activity only is most probably caused by legal obligation to file a tax return for Czech tax non-residents if using tax discounts other than the basic one. This issue is discussed further in the comparative analysis of taxation of Czech tax residents and non-residents below.

Figure 1: Number of Czech tax non-residents filing individual income tax returns in 2004-2010



Source: unpublished data from the General Financial Directorate provided on request.

Figure 2: Share of Czech tax non-residents filing individual income tax returns in 2004-2010, in %



Source: unpublished data from the General Financial Directorate provided on request.

Since 2004, the number of Czech tax non-residents filing an income tax return in the Czech Republic has been increasing gradually year after year. The number of Czech tax non-residents was 30,710 in 2004, which is 2.01% on the total number of taxpayers filing a personal income tax return. Even though the number of Czech tax non-residents rose each year during years 2004–2010, the percentage of Czech tax non-residents on the total number of taxpayers filing a personal income tax return fluctuated during this period. Lower percentage of Czech tax non-residents was during years 2005–2007, approximately 1.7%. The percentage of Czech tax non-residents has been rising gradually since 2007 to 2010 on 2.72% in 2010. The total number of Czech tax non-residents in 2010 was 49,840.

There are several countries from which only one Czech tax non-resident filing tax return comes; in 2004 it applied to 36 countries and 20 countries in 2010. These countries are for example Taiwan, Hong Kong, Estonia, Egypt and others.

As seen on figures above, most Czech tax non-residents come from Slovakia, Ukraine and Vietnam. Quite significant increase in percentage of Czech tax non-residents from Vietnam and decrease in percentage of Czech tax non-residents from Poland and Germany can be observed comparing the data from 2007 and 2010.

To understand reasons of continuous increase in numbers of Czech non-residents properly, deeper analyses would need to be processed and variables such as economic situation in both the Czech Republic and the country of residency, situation on labour markets both domestic and international, individual characteristics of non-residents etc. would needed to be taken into account. It was not our goal to provide such analysis.

3 Comparative Analysis

Taxation of individuals' income in the Czech Republic might be characterized by the following aspects:

- Tax base;
- Tax allowances;
- Tax rate;
- Tax credits;
- Tax administration.

The position of tax non-residents towards these aspects differs. For better understanding of the position of tax non-residents we analyze each of these aspects separately.

Since the social security contributions are an inseparable part of obligatory payments, we also discuss the discrimination issue for these contributions from the international point of view. However, it is important to point out that the international rules and principles in this area are different from those applicable to income tax.

3.1 Tax Base

Calculation of the tax base for taxable income of Czech tax non-residents is generally the same as for tax residents. Until 2007, the tax base was equal to the individual's gross

taxable income (salary and other taxable monetary and non-monetary benefits), decreased by the individual's part of the social security contributions regardless in which state these contribution were paid. The actually paid amount of contributions (not the hypothetical one as in the construction of tax base described below) on the individual's side was always deducted from gross income for calculation of the tax base.

In 2008, the concept of a so called "super-gross" salary was introduced, which defined the tax base as the individual's gross taxable income increased by the employer's part of the social security contributions. Same as in 2007, the actually paid amount of contributions was taken into consideration, regardless in which state these contributions were paid. Since calculating tax base with foreign contributions turned up difficult to administer, as of 2009 the hypothetical Czech social security contributions are taken into account, even if the individual does not participate in the Czech social security system. These hypothetical Czech social security contributions mean the contributions that would have been paid if the individual was insured under the Czech social security system. The tax is thus in fact paid on the employer's costs of the labour, though hypothetical for the individuals participating in a non-Czech social security system (see Section 6 para. (13) of Act on Income Taxes; Czech Republic, 1992a).

The impact of inclusion of the employer's part of the Czech social security contributions, either actual or hypothetical, on tax non-residents is questionable. In fact, if the individual is subject to a non-Czech social security system, his or her effective tax rate, taking into account the actual net income, might be either higher or lower than in case of an individual who is subject to the Czech social security system. Nevertheless, Czech tax non-residents might be present in both these groups and thus, this measure cannot be considered specifically targeted on tax non-residents.

Determination of the tax base as a so called "super-gross" tax base, i.e. including employer's part of social security contributions, requested further modification of national legislation in international matters. For Czech tax residents inclusion of the employer's part of social security contributions into their tax base from income which was also taxed abroad and use of the credit method for elimination of double taxation in accordance with the relevant double tax treaty resulted in significant tax underpayments in the Czech Republic. This problem was solved in Czech national legislation which stated that even though the international double tax treaty suggests the credit method for preventing double taxation, for income from a dependent activity (employment) performed in a state with which the Czech Republic has concluded a double tax treaty, the method of exclusion of income from taxation in the Czech Republic will be used. This applies only if the income is paid by a tax resident of the state where the work is performed, or on behalf of permanent establishment of a Czech tax resident in the state where the work is performed and if the income is taxed there (see Section 38f para. (1) and (4) of the Act on Income Taxes; Czech Republic, 1992a). Only if favourable for a payer, the credit method stated in the double tax treaty shall be used. Due to the "super-gross" tax base in the Czech Republic, exclusion of income is more favourable in an absolute majority of cases.

Introduction of a so called "super-gross" tax base and inclusion of the hypothetical insurance contributions, when the employee is insured in another than the Czech social

security system, brought up another practical issue of discrimination that needed to be solved. The question arises in situations when employee switches from one social security system during a tax period, which is a quite common scenario when employees are posted abroad. When an employee is for example insured in a foreign social security system for the first half of the year and has income taxable in the Czech Republic, and for the second half of the year he switches to the Czech social security system, the calculation is as follows. During the first half of the year, the so called hypothetical contributions are included into the tax base and no actual contributions are paid into the Czech social security system. After switching to the Czech social security system, the actual Czech social security contributions start to be paid in the Czech Republic and these actually paid contributions are included into the tax base. The total employee's actual social security contributions, paid both to a foreign and to the Czech social security systems, might in fact exceed the maximum assessment base stipulated by Czech social security legislation (Czech Republic, 1992b; Czech Republic, 1996; Czech Republic, 2006). However, for the purposes of calculation of the tax base (i.e., increasing the individual's gross income by the employer's part of the social security contributions), only the amount of contributions which would correspond to the Czech contributions paid from the maximum assessment base might be considered. Another approach would result in discrimination of an employee switching between the social security systems during the tax period compared with an employee being insured under one social security system for the whole tax period. According to an unofficial interpretation, the Ministry of Finance is aware of this issue and agrees that only this approach avoids potential discrimination.

3.2 Tax Rate

Tax rate is currently 15% for all individuals. Although it has been amended in the previous years, the amendments did not differentiate among groups of tax payers. Due to the flat tax rate, individuals who would highly likely have lower income taxable in the Czech Republic (are typically tax non-residents, taxing here only their Czech-source income) are not preferred against individuals probably declaring higher (e.g. total worldwide) income here.[1]

3.3 Tax Allowances and Tax Credits

Same as in case of tax administration described below, another clear restriction for tax non-residents is applicability of tax allowances and tax credits (except for the basic taxpayer tax credits[2]). They are stipulated in single amounts regardless of the individual's tax residency but their applicability is mostly conditioned by Czech tax residency or taxation of more than 90% of income in the Czech Republic (see Section 15 para. (9) and Section

1 *This is true for the the tax non-residents from the other member states of the European Union. Please, notice that a different tax rate (35 %) applies to some types of income of tax non-residents from countries with which the Czech Republic has not concluded a double tax or any simile tax-related treaty.*

2 *Although the basic tax credit had been also subject to the tax residency test, this limitation was valid only for a few months since it was strongly challenged by employers who had to differentiate between their employees according to their tax residency on a monthly basis, which was excessively administratively demanding.*

35ba para. (2) of Act on Income Taxes; Czech Republic, 1992a). This rule has been introduced in 2008 for interest on mortgage financing an individual's main living (up to CZK 300,000 per year); as of 2011, it was extended to all tax allowances (among others charitable donations, private pension contributions, life insurance premium and trade union fees). In addition to this limitation, tax residents might deduct certain tax credits (e.g. for a dependent child) on a monthly basis, while tax non-residents can do so only via an annual tax return (which is reasoned by the necessity to prove the 90% income rule). In our opinion, introduction of this limitation for tax credits and allowances was one of the reasons for significant increase in the number of tax non-residents filing annual tax returns, which can be seen from the data provided by the General Financial Directorate.

Nevertheless, this approach should not contradict the EU law, referring to the decision of the European Court of Justice in the Schumacker case (C-279/93) which required the state of the source of the income to allow tax allowances to a tax non-resident who has "almost all" of his income taxed in that state. When introducing the 90% rule, the Czech government referred to this decision and to the recommendation of the European Commission (1993). Also the decision of the European Court of Justice in the Gerritse case (C-234/01), according to which exclusion of tax non-residents from applicability of the basic tax credit was in compliance with the EU law, and states that these rules should not be challenged as discriminatory. The non-discrimination of tax non-residents was also discussed by the Court of Justice of the EU in the Egon Schempp case (C-403/03), in which the Court of Justice concluded that the European Treaty offers no guarantee that the transfer of an individual's tax residence to another member state will be neutral from the tax perspective.

On the other hand, international aspects were reflected in the extension of the allowances to include also private pension contributions and life insurance premiums paid abroad, which was passed after a formal request from the European Commission (2010).[3] Even though such discrimination was considered to be aimed at foreign pension funds, it could be also found discriminatory for tax non-residents who are expected to use the services of foreign pension funds rather than Czech pension funds more often than Czech tax residents. The cancelation of this discrimination was effective since January 2011 (Amendment No. 346/2010 Coll.), when the possibility of such deduction was also made available for premiums paid to a pension fund from other EU countries, Norway and Iceland.

Recent amendments related to conditions for deduction of charitable donations: while until 2008, only donations to Czech entities were deductible from the tax base, as of 2009 (Amendment No. 2/2009 Coll.; Czech Republic, 2009) also donations to foreign entities are deductible. In 2009, the individual had to prove that the donation is considered charitable based on legislation of the country in which it was made. Since this was difficult to proof, in 2010 the rules were modified (Amendment No. 346/2010 Coll.; Czech Republic, 2010) and the charitability is now determined based on Czech legislation. This should not contradict the EU law, since the conditions for non-Czech donations and Czech donations are thus comparable.

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3 The reasons stem from the Bachmann case (C-204/90), in which the Court of Justice of the EU ruled that since tax non-residents were more likely to hold life insurance policies abroad, limitation of tax allowances only to life insurance premium paid in the country was likely to disadvantage other EU nationals.

3.4 Tax Administration

Although calculation of tax base described above is generally the same, way of tax administration might significantly disadvantage tax non-residents. Specifically, this applies to independent professionals and artists, as well as members of the boards. While for tax resident independent professionals and artists, calculation of their tax base takes into account the related expenses and the tax is paid by themselves after filing of an annual tax return, for Czech tax non-residents the tax is withheld at source at the moment of payment of the income disregarding the related costs. Tax non-residents thus suffer from different treatment from two points of view. Firstly, they do not receive their remuneration in the full amount but decreased by the Czech income tax withheld at source, compared to tax residents who are required to pay the tax only after filing their annual tax return.[4] Secondly, they are excluded at the moment of taxation from the possibility to deduct the related expenses from the taxable income.

This approach was challenged by the European Commission (2009) as contradicting the free movement of persons and free movement of capital. In July 2009, the legislation was thus amended to allow tax non-residents, residing in another EU or EEA country, to include such income in their annual Czech personal income tax return and deduct the withheld tax as a tax prepayment. This amendment brought up several questions, which were also discussed at the Coordination Committee of the Ministry of Finance and the Chamber of Tax Advisers (2010). Potential discrimination of tax non-residents by this treatment was not commented, because the authors of the analysis discussed at this Committee described this treatment in an introductory note as not introducing so high level of discrimination which would contradict the EU law, while the effective taxation is in fact the same for both tax residents and tax non-residents. Issues opened in the discussion included thus only practical application of the amendment of legislation, among others the obligations of a taxpayer voluntarily filing the tax return to register for the Czech tax purposes and pay the Czech tax advances (after they file their first tax return). The Ministry of Finance stressed the voluntariness of the filing of the tax return and no intention to advantage tax non-residents, which, in their opinion, must be kept in mind when interpreting the law. Therefore, the Ministry of Finance did not find any reason for stipulation of a different treatment of tax non-residents in the area of tax registration, payment of tax advances, deadlines for tax filing etc. With respect to the related costs which might be deducted, the Ministry of Finance did not give any specific instructions (e.g., on determination of direct and/or indirect costs etc.) but referred only to a general request to prove connection between the deducted costs and the income taxable in the Czech Republic. Since the burden of proof lies upon the taxpayer in this case, he or she, having no binding guidelines, has to carefully consider each of the incurred expenses, both direct and indirect, and prepare sufficient proofs for their deductibility.

Members of a Czech company's boards are in similar situation; the Czech tax is withheld from their income at source without possibility to apply tax allowances. However, disadvantage of tax non-residents compared to tax residents is in this case only a delayed ap-

4 *That throughout the year, the individuals who file annual tax return (i.e. tax residents in this case) and their tax exceeds the statutory limits have to pay quarterly or semiannual tax advances.*

plication of tax allowances because no costs are deductible against the members of the boards' income according to Czech law. The formal request of the European Commission mentioned above covered this group of individuals as well; the amendment of legislation allowing tax non-residents to include their income to the annual tax return and deduct the withheld tax as a prepayment applies to them, too.

The resulting taxation of Czech tax non-residents is thus the same as for Czech tax residents; differences remain from the cash-flow point of view, since tax non-residents incur the tax costs immediately (with mostly a tax refund being paid to them after filing the tax return), tax residents keep the money until the tax filing (and tax payment) deadline. The Court of Justice of the EU (2008) in the Truck Center Case (C-282/07) did not find this approach contradicting the EU law, pointing at obligation of tax residents to pay tax advances during the year. Nevertheless, in another decision (Scorpio C-290/04) the Court of Justice of the EU (2006) required immediate deduction of the costs already at the moment of taxation, refusing their application via a tax return as too administratively demanding. According to the Court's opinion in the Gerritse Case (C-234/01), tax withholding at source without deduction of costs is in compliance with the EU basic freedoms only in case of progressive taxation being applied to net income and a lower single tax rate being applied to the gross income taxed at source (Court of Justice of the EU, 2003).

3.5 Social Security Contributions

Important, and due to their amount very significant from the labour cost point of view, obligatory payments from personal income (both from employment and self-employment) are social security contributions. It is still questionable whether and to what extent the social security contributions can be classified as taxes or whether they are of different character.[5] To discuss this issue properly, it is crucial to differentiate between various subsystems of the Czech social security. As for the health insurance it can be said, that the nature of the contributions is very close to income tax, pointing out the missing connection of amount paid on contributions with the amount of benefits received. On the other hand, old-age pension insurance and sickness insurance possess more of the elements of classical insurance, with benefits being closely correlated to the amounts of contributions to the system, although the solidarity aspect widens this connection significantly.

For the social security purposes other principles and rules than for the income tax apply. International agreements on social security are used for situations with cross-border element.[6] Even though the actual residency status (in a broader view as the centre of vital interest) of the individual is important to determine the applicable social security legislation, the concept of a resident and a non-resident with matching source income as used for taxation does not apply. According to the international agreements the applicable national legislation is determined and provisions of this national legislation apply fully on the total world-wide income of the individual, regardless of the country of source.

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5 More to this topic e.g. Vostatek (1996) or Rytířová and Tepperová (2012).

6 International agreements in this case refer both to the multilateral and bilateral agreements on social security as general rule for coordination of social security. See European Union (2009), European Union (2004), Ministry of Labour and Social Affairs (2012) - an overview of bilateral agreements about social security.

Contributions are thus paid to one social security system at a time only, supposing coordination of the systems of the respective countries by the international agreement.

The question of discrimination in Czech social security legislation also occurs, although the most disturbing provisions have been already removed. Till 2009 Czech legislation covering sickness insurance and old-age pension insurance excluded employees working for the employer seated in a country with which no agreement on social security existed regardless the residency of the employee (see Section 5 of the Act on Sickness Insurance of Employees; Czech Republic, 1996). Such exclusion of employees covered by an international treaty or the EU social security regulations could have been found discriminatory. For this reason, since 2009 the old-age pension insurance and sickness insurance enable employees working for an employer seated in a country with which no agreement on social security exists to enter the Czech old-age pension insurance and sickness insurance voluntarily.

Specific conditions for employees working for the employer seated in country with which no agreement on social security exists apply also for the purposes of health insurance, for which these employees are not considered as "employees" (see general definition of an employee and an employer in the Act on Contributions on General Health Insurance; Czech Republic, 1992b). Since the voluntary participation in the Czech health insurance system is not possible due to a different character of the health insurance system compared to the sickness and old-age pension insurance systems, if these employees are covered by an international agreement or the EU social security regulations, they are insured in Czech health insurance system under a special category called "individuals without taxable income".

Even though the parameters in national legislation about calculation of the social security contributions are fully at the discretion of each country, they should not contain discriminatory provisions. However, such discriminatory provisions can be found in health insurance legislation for employees with employment contracts based on a non Czech law. Reason for this is the current definition of the assessment base for the Czech health insurance contributions (see Section 3 para. (2) and (13) in the Act on Contributions on General Health Insurance; Czech Republic, 1992b). While in case of a labour contract based on the Czech Labour Code certain types of income are excluded from the assessment base, no such exclusion is applied for labour contracts based on foreign law. This differentiation has not been challenged so far. Similar provisions existed also in the old-age pension insurance and the sickness insurance till 2009, but were removed due to their discriminatory character. However, it can be said that the discriminatory character was not so significant for old-age pension insurance and sickness insurance, because the benefits paid from the system are calculated from the assessment base and thus, the higher the base, the lower the contribution. However, due to involvement of solidarity, the increase in benefits does not fully correspond to the increase in the contributions.

In the field of social security contribution the term "posted employee" has a significant role. For the purposes of social security international agreements and regulations, a posted employee is an employee who works for a limited period of time (usually 24 months at maximum) in another country than the country where his employer has its seat. Further

other conditions must apply, such as that there is still an organic link between the posted employee and his employer who posted him, meaning who sends him to work abroad. Application of such provisions means that in the area of social security, the structure under which the employee is assigned abroad (e.g. posted, hired out or locally employed) is very important when determining all obligations. On the other hand, for the purposes of personal income tax when calculating the employee's final tax liability, it is much more important whether the employee is a Czech tax resident or a Czech tax non-resident. The applied structure of assignment has certain impacts on calculation of tax prepayments and their administration, but it is reflected only insignificantly in the total tax liability where the tax residency has its main say.[7]

3.6 Tax Nondiscrimination Principles

In theoretical structuring of approaches to nondiscrimination published by Mason and Knoll (2012) as mentioned above, locational, leisure and competitive neutrality are recognized.

It can be said that Czech legislation in the field of taxation of non-residents fully satisfies criteria of locational neutrality, i.e. there is the same taxation of payers with respect to where they reside.

On the other hand, it is clear from the analysis above that there are some differences between taxation of Czech tax residents and non-residents and thus the theoretical criteria for leisure neutrality are not fulfilled. However, it corresponds to Mason and Knoll's assumptions that it is not possible to fully meet the criteria both for locational and for leisure neutrality at the same time without completely harmonized effective tax rates. The differences in taxation of Czech tax residents and non-residents are within the relevant Court of Justice of the EU's decisions.

Competitive neutrality approach to tax nondiscrimination is according to Mason and Knoll (2012) dual. Competitive neutrality can be achieved either via worldwide taxation or via ideal deduction, where worldwide taxation assumes unlimited credits for source taxes and ideal deduction assumes uniform source taxation. When judging whether the criteria for tax nondiscrimination principles are met, the concrete situation of a particular payer must be taken into account. Czech legislation in the field of taxation of non-residents potentially meets the criteria for competitive neutrality via worldwide taxation. Potential difficulties in this approach could arise in particular cases with unlimited foreign tax credit.

Conclusions

Based on international tax agreements no discriminatory tax policy of the participating countries might be in force. In addition, the states must adjust their national legislation if any discrepancies occur. The topicality of this issue is also noticeable from the European Commission statement which examined tax measures for cross-border workers (European Commission, 2012).

7 Further to question of tax and social security consequences Rytířová, Tepperová (2012).

We present data on Czech tax non-residents filing a personal income tax return, in which a continuous growth between the years 2004 and 2010 can be seen. There is a noticeably higher increase between 2007 an 2008, which is probably encouraged by the amendment of conditions for most of the tax credits that can be applied by Czech tax non-residents.

Even though we provided interesting data showing numbers of Czech tax non-residents in the years 2004-2010 in comparison with Czech residents, it was not our goal to analyze potential variables in construction elements of taxation causing such development. Our goal was to make a thorough research on actual legal arrangements of Czech tax non-residents in comparison with Czech tax residents and question these arrangements from the point of view of theoretical conception of tax nondiscrimination principle as well as with available court decisions.

According to results of the above analyses, Czech national legislation in the field of personal income taxation is within the relevant Court of Justice of the EU's decisions. As discussed, some discrepancies in Czech national legislation were questioned by formal requests of the European Commission in the past. The Czech Republic always responded with an amendment to relevant legislation, which removed the discriminatory provisions.

Different conditions in taxation of Czech tax non-residents compared to Czech tax residents can still be found in tax allowances and tax credits, where Czech tax non-residents must declare more than 90% of worldwide income from source in the Czech Republic to be allowed to deduct most of the allowances and tax credits. However, such treatment of tax non-residents should not be, according to the Court of Justice of the EU, challenged as discriminatory.

Another difference in taxation of non-residents can be found in tax administration, when withholding tax at source is used for Czech tax non-residents compared with standard way of taxation (via filing a tax return) for Czech tax residents with the same income. Nevertheless, also for this approach the Court of Justice of the EU decided that such treatment is not against EU law.

We also discussed the discrimination issue in Czech social security legislation, where different international treaties than for income taxation apply. Some discriminatory provisions in the field of social security contributions could be found in past, however, in present only a single provision covering the health insurance contributions can still be considered as clearly discriminatory, as it suggests a less favourable calculation of the assessment base for the health insurance contributions for employees with employment contract concluded according to another than Czech labour law.

Theoretic conception of tax discrimination provides a different view on nondiscrimination principles, when locational, leisure and competitive neutrality are in question. Even though it is difficult to generalize and each case should be judged separately with a special care, it can be said that Czech national legislation in the field of personal income taxation is fully in compliance with locational neutrality approach and is preconditioned to meet criteria of competitive neutrality via worldwide taxation.

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References

BRYCHTA, K. (2011) Assessment of Consistency of the Czech Tax Law with European Union Law with a View to Non-Residents Taxation. *ACTA VŠFS*, 5, 2011(1), pp. 074 – 092. Available at: http://www.vsfs.cz/periodika/acta-2011-01.pdf [Access 30 August 2012].

CHAMBER OF TAX ADVISORS (2010) *Některé otázky k praktické realizaci ustanovení § 36 odst. 7 ZDP (293/20.01.10)*. Zápis z jednání Koordinačního výboru s Komorou daňových poradců ČR konaného dne 16. 6. 2010. Available at http://cds.mfcr.cz/cps/rde/xbcr/cds/KVKDP160610.pdf [Access 30 August 2012].

COURT OF JUSTICE OF EUROPEAN UNION (1995) *Judgment of the Court of 14 February 1995*. Finanzamt Köln-Altstadt v Roland Schumacker. (C-279/93).
Available at: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61993J0279 [Access 30 August 2012].

COURT OF JUSTICE OF EUROPEAN UNION (2003) *Judgment of the Court of 12 June 2003*. Arnoud Gerritse v. Finanzamt Neukölln-Nord. (C-234/01). Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001J0234:EN:HTML [Access 30 August 2012].

COURT OF JUSTICE OF EUROPEAN UNION (2005) *Judgment of the Court of 12 July 2005*. Egon Schempp v. Finanzamt Munchen. (C-403/03). Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=60409&pageIndex=0&doclang=cs&mode=lst&dir=&occ=first&part=1&cid=125747 [Access 17 November 2012].

COURT OF JUSTICE OF EUROPEAN UNION (2006) *Judgment of the Court of 3 October 2006*. FKP Scorpio Konzertproduktionen GmbH v Finanzamt Hamburg-Eimsbüttel. (C-290/04). Available at: http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30db0 e9f8ad51d2f49978187dd8445fa1f0d.e34KaxiLc3qMb40Rch0SaxuKbx10?text=&docid=65389&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=250799 [Access 30 August 2012].

COURT OF JUSTICE OF EUROPEAN UNION (2008) *Judgment of the Court of 22 December 2008*. État belge – SPF Finances v Truck Center SA. (C-282/07). Available at: http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30db7adced8120444feabec8f176bc7a6626.e34KaxiLc3qMb40Rch0SaxuKaNr0?text=&docid=73212&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1561217 [Access 30 August 2012].

CZECH REPUBLIC (1992a) Zákon č. 586/1992 Sb., o daních z příjmů, ve znění pozdějších předpisů [Act No. 586/1992 Coll., Act on Income Taxes, as amended; in Czech]. In *Sbírka zákonů*. Available at: ASPI.

CZECH REPUBLIC (1992b) Zákon č. 592/1992 Sb., o pojistném na všeobecné zdravotní pojištění, ve znění pozdějších předpisů [Act No. 592/1992 Coll., Act on Contributions on General Health Insurance, as amended; in Czech]. In *Sbírka zákonů*. Available at: ASPI.

CZECH REPUBLIC (1996) Zákon č. 54/1956 Sb., o nemocenském pojištění zaměstnanců, ve znění pozdějších předpisů [Act No. 54/1956 Coll., Act on Sickness Insurance of employees, as amended; in Czech]. In *Sbírka zákonů*. Available at: ASPI.

CZECH REPUBLIC (2006) Zákon č. 187/2006 Sb., o nemocenském pojištění, ve znění pozdějších předpisů [Act No. 187/2006 Coll., Act on Sickness Insurance, as amended; in Czech]. In *Sbírka zákonů*. Available at: ASPI.
CZECH REPUBLIC (2009) Zákon č. 2/2009 Sb., kterým se mění zákon č. 586/1992 Sb., o daních z příjmů, ve znění pozdějších předpisů, a některé další zákony [Act No. 2/2009 Coll., Act that changes the Act No. 586/1992 Coll. On Income Taxes and some other Acts; in Czech]. In *Sbírka zákonů*. Available at: ASPI.
CZECH REPUBLIC (2010) Zákon č. 346/2010 Sb., kterým se mění zákon č. 586/1992 Sb., o daních z příjmů, ve znění pozdějších předpisů, a další související zákony. [Act No. 346/2010 Coll., Act that changes the Act No. 586/1992 Coll. On Income Taxes and other related Acts; in Czech]. In *Sbírka zákonů*. Available at: ASPI.
CZECH STATISTICAL OFFICE (2012) *Cizinci v ČR 2012*. Available at: http://www.czso.cz/csu/2012edicniplan.nsf/t/CB00457FCF/$File/141412_t3-04.pdf [Acces 16 July, 2013].
EUROPEAN COMMISSION (1993) *Commission Recommendation of 21 December 1993 on the taxation of certain items of income received by non-residents in a Member State other than that in which they are resident*. (94/79/EC). Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31994H0079:en:NOT [Access 30 August 2012].
EUROPEAN COMMISSION (2009) *Direct taxation: The European Commission requests that the Czech Republic end discriminatory taxation of non-resident taxpayers* (Press Release No. IP/09/291). Available at: http://europa.eu/rapid/pressReleasesAction.do?reference= IP/09/291&format=HTML&aged=0&language=en&guiLanguage=en [Access 30 August 2012].
EUROPEAN COMMISSION (2010) *Direct taxation: Commission requests Czech Republic and Sweden to end discriminatory treatment for pensions* (No. IP/10/1406). Available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1406 [Access 30 August 2012].
EUROPEAN COMMISSION (2012) *Commission to examine tax measures for cross-border workers* (Press Release No. IP/12/340).
Available at: http://europa.eu/rapid/pressReleases Action.do?reference=IP/12/340& [Access 30 August 2012].
EUROPEAN UNION (2000a) *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.* Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML [Access 30 August 2012].
EUROPEAN UNION (2000b) *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:HTML [Access 30 August 2012].
EUROPEAN UNION (2004) *Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems*. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0883:EN:NOT [Access 30 August 2012].
EUROPEAN UNION (2009) *Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems.* Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:284:0001:0042:EN:PDF [Access 30 August 2012].

EUROPEAN UNION (2008) Consolidated Version of the Treaty on the Functioning of the European Union – C115/47. *Official Journal of the European Union*. 9 May 2008. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:en:PDF [Access 17 November 2012].
GENERAL FINANCIAL DIRECTORATE (2012) Data on numbers of non-residents on request. *E-mail from General Financial Directorate from 17 May 2012, number 17459/12-5410-202098*.
GRAETZ, M. J.; WARREN, A. C. J. (2012) Income Tax Discrimination: Still Stuck in the Labyrinth of Impossibility. *The Yale Law Journal*, 2012(5), pp.1118-1167. Available at: http://yalelawjournal.org/the-yale-law-journal/volume-121,-issue-5,-march-2012/ [Access 30 August 2012].
MASON, R.; KNOLL, M. S. (2012) What Is Tax Discrimination? *The Yale Law Journal*, 121, 2012(5), pp. 1014-1116. Available at: http://yalelawjournal.org/the-yale-law-journal/volume-121,-issue-5,-march-2012/ [Access 30 August 2012].
MINISTRY OF LABOUR AND SOCIAL AFFAIRS (2012) *Dvoustranné smlouvy o sociálním zabezpečení*. Available at: http://www.mpsv.cz/cs/1275 [Access 30 August 2012]
NOVOTNÝ, R. (2010) Daňová (ne)diskriminace osob ze zemí EU/EHP. *Daňový expert*, 2010(3). Available at: http://www.danarionline.cz/archiv/dokument/doc-d25711v34069-danova-ne-diskriminace-osob-ze-zemi-eu-ehp/ [Access 30 August 2012].
NOVOTNÝ, R.; PECKA, J. (2011) Novela zákona o daních z příjmů z pohledu evropského práva. *Daňový expert*, 2011(1).
Available at: http://www.danarionline.cz/archiv/dokument/doc-d32058v39259-novela-zakona-o-danich-z-prijmu-z-pohledu-evropskeho-prava/ [Access 30 August 2012].
RYTÍŘOVÁ, L.; TEPPEROVÁ, J. (2012) *International Employment, Posting and Hiring out of employees* (1. ed., Vol. 2012). Olomouc: Anag.
ŠIROKÝ, J. (2012) *Daně v Evropské unii*. (5. ed.), Linde: Praha.
VOSTATEK, J. (1996) *Sociální a soukromé pojištění*. Praha: Codex Bohemia.

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