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The concept of fixed establishment in the context of VAT leads to increase of legal uncertainty and decreases tax neutrality

European Commission acknowledges, in its paper issued in June 2022¹, that current provisions of VAT regulations and existing European Court of Justice case law, related to the concept of fixed establishment in the context of VAT, lead to significant legal uncertainty for some taxpayers, up to such level that this leads to breach of the neutrality principle.

However, instead of accepting that legal certainty as well as efficacy of tax system are produced by a tax system which is simple and not changed too often, and instead of undertaking steps into that direction, the above stated acknowledgment is just an excuse for the start of one more complex project which should lead to the proposal of new changes of VAT regulations.

The aim of the introduction of the concept of the fixed establishment in the context of VAT was to ensure, as much as possible, VAT collection in line with the destination principle. However, how much those provisions really contribute to that aim, and with what price, this is questionable, especially taking into account that those provisions significantly lead to increased bureaucracy both for taxpayers and for tax administrations, as well as to significant negative tax consequences for some taxpayers in terms of penalties, late payment interest and possible double taxation due to existing unclear rules and legal uncertainty.

The mentioned paper of European Commission also acknowledges that the concept of fixed establishment

lipanj 2022.

Koncept stalne poslovne jedinice u kontekstu PDV-a dovodi do povećanja pravne nesigurnosti i smanjuje poreznu neutralnost

Europska komisija u svojem radnom materijalu objavljenom u lipnju 2022¹ priznaje da postojeće odredbe PDV propisa i postojeća sudska praksa Suda europske unije, vezane za koncept stalne poslovne jedinice u kontekstu PDV-a, dovode neke porezne obveznike u situaciju značajne pravne nesigurnosti, i to do te mjere da to ugrožava poreznu neutralnost PDV-a.

Međutim, umjesto da bude prihvaćeno da pravnu sigurnost ali i efikasnost poreznog sustava daje takav porezni sustav koji je jednostavan i ne mijenja se često, i da se poduzmu koraci u tom smjeru, prethodno navedena konstatacija je tek opravdanje za početak još jednog kompleksnog projekta koji bi trebao dovesti do predlaganja novih promjena PDV propisa.

Svrha uvođenja koncepta stalne poslovne jedinice u kontekstu PDV-a je bila osigurati, u što većoj mjeri, naplatu PDV-a prema načelu mjesta potrošnje. No, upitno je u kojoj mjeri te odredbe stvarno u praksi ostvaruju taj cilj, kao i to uz koju cijenu, a posebno ako se uzme u obzir da te odredbe značajno dovode do povećane birokracije kako za porezne obveznike tako i za porezna tijela, a kod nekih poreznih obveznika dovode i do značajnih negativnih financijskih posljedica u smislu kazni, zateznih kamata pa čak i mogućeg dvostrukog oporezivanja zbog nejasnih odredbi i pravne nesigurnosti.

U spomenutom materijalu Europske komisije se priznaje i to da se koncept stalne poslovne jedinice

1. Dokument oznake: European Commission Directorate-General Taxation and Customs Union, Indirect taxation and Tax administration, Value Added Tax, VAT Expert Group, 31st meeting – 10 June 2022, taxud.c.1(2022)4464651. 2 June 2022

in the context of VAT is often incorrectly confused with the concept of permanent establishment in the context of corporate income tax, even though these two concepts are not the same. It is also stated that in some countries this confusion is enhanced by the use of the same term for these two different concepts, and this is exactly the case in Croatia.

The mentioned paper refers to some aspects, concerning fixed establishment for VAT purposes, that need to be more clearly regulated:

- human and technical presence test,
- circumstances under which an independent entity may be deemed a fixed establishment of another person,
- permanence test (permanence as regards place vs permanence as regards time),
- rationality test.

Also, the need to bring more clarity concerning certain aspects related to practical implication of this concept are specially highlighted:

- fixed establishment “intervention” rule,
- treatment of fixed establishment to headquarter transactions,
- etc.

Some practical examples of unclear business circumstances or structures that need to be resolved are also mentioned:

- can a pipeline, windfarm, a server be fixed establishment in the context of VAT,
- can a rented out-building without any human resources be a fixed establishment in the context of VAT,
- can a construction site immediately be regarded as a permanent establishment in the context of VAT,
- etc., etc., etc., etc., etc.

The paper issued in June 2022. specially highlights some questions concerning how do the need or no need for human resources, quantity and/or location of human resources, terms under which human resources are used, etc. impact on the existence of fixed establishment in the context of VAT. However, some of those questions were identified in 2019 (as mentioned in earlier paper of European Commission issued in 2019²), in relation to warehouses only, but now three years later similar questions are identified again (even though now in the broader context of doing business).

u kontekstu PDV-a često puta pogrešno brka s konceptom stalne poslovne jedinice u kontekstu poreza na dobiti, iako se radi o konceptima koji su različiti. Ističe se da u nekim državama toj konfuziji doprinosi korištenje istih termina za ova dva različita koncepta, a upravo je to slučaj i u Hrvatskoj.

U spomenutom materijalu se navode neki aspekti koje je vezano za stalnu poslovnu jedinicu u kontekstu PDV-a potrebno jasnije urediti:

- test postojanja ljudske i tehničke prisutnosti,
- okolnosti pod kojima neovisan entitet može biti smatran stalnom poslovnom jedinicom druge osobe;
- test trajnosti (lokacijski aspekt trajnosti vs vremenski aspekt trajnosti),
- test racionalnosti.

Uz to, posebno se ističe i potreba da se jasnije urede neki aspekti vezani za praktične implementaciju ovog koncepta u praksi:

- pravilo „sudjelovanja“ stalne poslovne jedinice u nekoj transakciji,
- tretman transakcija između stalne poslovne jedinice i sjedišta,
- itd.

Navode se i neki praktični primjeri nejasnih poslovnih situacija i struktura, koje bi trebalo razriješiti:

- mogu li cjevovod, vjetroпарк, server itd. biti stalna poslovna jedinica u kontekstu PDV-a,
- može li iznajmljena zgrada bez ljudskih resursa činiti stalnu poslovnu jedinicu u kontekstu PDV-a,
- može li gradilište odmah činiti stalnu poslovnu jedinicu u kontekstu PDV-a,
- itd., itd., itd., itd., itd.

Materijal iz lipnja 2022. posebno ističe neka pitanja vezana za to kako postojanje ili nepostojanje potrebe za ljudskim resursima količina i/ili alokacija ljudskih resursa, uvjeti po kojima se ljudski resursi koriste, itd. utječu na postojanje stalne poslovne jedinice u kontekstu PDV-a. Međutim, neka od tih pitanja su identificirana 2019. (kako je navedeno u ranijem materijalu Europske komisije²), vezano samo za skladišta, no sada se nakon tri godine identificiraju slična pitanja (iako sada u nešto širem kontekstu poslovanja).

2. Dokument oznake: European Commission Directorate-General Taxation and Customs Union, Indirect taxation and Tax administration, Value Added Tax, taxud.c.1(2019)3533969 – EN, 15 May 2019

Now, the new paper issued by European Commission in June 2022 proposes implementation of new provisions, on fixed establishment in the context of VAT, in the VAT Implementing Regulation, or at least the issuance of some guidelines by the VAT Committee. However, this is proposed just as a first step, because further overall development of this concept would take more time.

Consequently, concerning the concept of fixed establishment in the context of VAT, it is important to note:

- that the concept of fixed establishment in the context of VAT should be differed from the concept of permanent establishment in the context of corporate income tax, i.e. these are different concepts,
- that the concept of fixed establishment in the context of VAT is not adequately defined by VAT regulations,
- that the applicable definition of fixed establishment in the context of VAT is contained in VAT Implementing Regulation (which is directly applicable in EU, including Croatia),
- that ECJ case law, as well as considerations of some expert services at the level of EU, should be taken into account, up to such level that may be relevant in a particular concrete case.

Sada, novi dokument koji je Europska komisija objavila u lipnju 2022 predlaže uključivanje novih odredbi o stalnoj poslovnoj jedinici u kontekstu PDV-a u PDV Provedbenu uredbu, ili barem donošenje nekih smjernica od strane PDV Odbora. No, to se predlaže tek kao prvi korak, jer da će daljnji cjelovitiji razvoj ovog koncepta zahtijevati više vremena.

Prema tome, vezano za koncept stalne poslovne jedinice u kontekstu PDV-a bitno je uzeti u obzir:

- da koncept stalne poslovne jedinice u kontekstu PDV-a treba razlikovati od koncepta stalne poslovne jedinice u kontekstu poreza na dobit, tj. to su različiti koncepti,
- da koncept stalne poslovne jedinice u kontekstu PDV-a nije adekvatno uređen PDV propisima,
- da je primjenjiva definicija stalne poslovne jedinice u kontekstu PDV-a sadržana u PDV Provedbenoj uredbi (koja se izravno primjenjuje na razini EU uključujući i Hrvatsku),
- da treba uzeti u obzir i sudsku prasku Suda Europske unije, kao i razmatranja određenih stručnih službi na razini EU, u mjeri u kojoj bi to moglo biti relevantno u određenom konkretnom slučaju.

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