20 October 2024

The ECJ Judgment in the Croatian tax case – taxation in case when the transfer of business to a new company is deemed as abuse of tax law

For deciding on certain Croatian tax case by the ECJ, generally it is necessary that a request for such procedure is initiated by a Croatian court. Due to the slow and passive nature of Croatian courts, the ECJ has only decided in two Croatian tax cases (even though Croatia has been EU member for more than 10 years), where the second ECJ judgement is issued on 4 October 2024 (in case C-171/23).

In case C-171/23 the Administrative Court, Zagreb, Croatia decided to refer the request for a preliminary ruling to the ECJ concerning a question related to the principle of the prohibition of abusive practices, that is concerning taxation if the Croatian relevant authorities determine that the establishment of a new legal entity represents abusive practice.

In that particular case, the question referred to the ECJ related to VAT implications, but based on the analysis of this ECJ judgement it can be concluded that this judgement can have broader implications, on other taxes as well.

In the particular case the Croatian Tax Authorities rejected exemption for so called small VAT taxpayer, because they considered that a business was transferred from one legal entity to another legal entity for the abuse of tax law (i.e. to avoid losing of the status of small VAT payer who does not charge VAT). Consequently, the Croatian Tax Authorities considered that they are allowed to apply taxation which would be applicable if the business had not been transferred to a new legal entity, and administrative dispute was initiated in front of the Croatian Administrative Court.

20. listopada 2024.

Presuda Suda EU u hrvatskom poreznom predmetu – oporezivanje u slučaju kada se prijenos poslovanja na novo društvo smatra zlouporabom poreznog prava

Da bi o nekom hrvatskom poreznom predmetu presudu donio Sud EU, u pravilu je potrebno da je takav postupak iniciran od strane hrvatskog suda. Kako su hrvatski sudovi spori i pasivni, to je dovelo do toga da je Sud EU presudio tek u dva hrvatska porezna predmeta (iako je od ulaska Hrvatske u EU prošlo više od 10 godina), pri čemu je druga presuda Suda EU donesena 4. listopada 2024. godine (u predmetu C-171/23).

U predmetu C-171/23 Upravni sud u Zagrebu je uputio Sudu EU zahtjev za prethodnu odluku u vezi s pitanjem koje se odnosilo načelo zabrane zlouporabe prava, odnosno na oporezivanje u slučaju ako hrvatska nadležna tijela utvrde da osnivanje novog pravnog subjekta predstavlja zlouporabu poreznog prava.

U tom konkretnom predmetu, pitanje upućeno Sudu EU se odnosilo na PDV učinke, ali se iz analize ove presude Suda EU može zaključiti da ona može imati šire učinke, i na druge poreze.

U konkretnom predmetu hrvatska Porezna uprava je odbila izuzeće za tzv. malog PDV obveznika, jer je smatrala da je djelatnost iz jednog pravnog subjekta prebačena na drugi novoosnovani pravni subjekt radi zlouporabe poreznog prava (tj. da se izbjegne gubitak statusa malog PDV obveznika koji ne obračunava PDV). Stoga je hrvatska Porezna uprava smatrala da može provesti oporezivanje kakvo bi bilo da djelatnost nije prebačena u novi pravni subjekt, te je pokrenut upravni spor pred Upravnim sudom u Hrvatskoj.

The Administrative Court, Zagreb, Croatia sent a request to the ECJ because in the relevant period, for which the Croatian Tax Authorities determined additional tax, the Croatian General Tax Act did not contain general-anti-abusive rules, and such provisions are not included neither in the Croatian national VAT regulations nor in Directive 2006/112/EZ of 28 November 2006 on the common system of value added tax.

The ECJ concludes that the question referred by the Administrative Court, Zagreb, Croatia does not relate to some specific provision of EU law, but rather to the general principle within the EU that no one may benefit from the rights stemming from the Union's legal system for abusive or fraudulent ends. As also stated in paragraph 36 of the judgment in case C-171/23, „the rules of of EU law cannot be relied on for abusive ends as the application of those rules cannot be extended to cover abusive practices". The ECJ also concludes that, based on that general principle, **taxation is allowed if abusive practice is determined, even in the absence of special provision in this respect in VAT regulations.**

In respect of determination of abusive practice, the ECJ stress that this assumes:
- achieving a tax advantage the grant of which would be contrary to the objectives intended by the provisions of tax regulations, and
- **that the essential aim of certain transaction is to obtain that tax advantage**, meaning the relevant transaction lacks any other non-tax adequate justification, other than the mere attainment of tax advantages.

Even though this ECJ judgement refers to VAT, when explaining the principle of the prohibition of abusive practices, the ECJ refers to other ECJ's judgements which imply **that this principle is applicable in the context exceeding VAT** (e.g. judgement in case C-251/16 which refers to other judgments relevant for the interpretation of the principle of the prohibition of abusive practices which refer to different fields of EU law).

This particular ECJ judgement is noteworthy

Upravni sud u Zagrebu je uputio zahtjev Sudu EU zbog toga što u relevantnom razdoblju, za koje je hrvatska Porezna uprava utvrdila dodatni porez, u hrvatskom Općem poreznom zakonu još nisu bile uvedene opće odredbe koje imaju za cilj spriječiti zlouporabu poreznog prava, a takve odredbe nisu sadržane niti u hrvatskim nacionalnim PDV propisima kao niti u Direktivi 2006/112/EZ od 28. studenoga 2006. o zajedničkom sustavu poreza na dodanu vrijednost.

Sud EU zaključuje da se pitanje upućeno od strane Upravnog suda u Zagrebu ne odnosi na konkretnu odredbu prava Unije, već da se odnosi na opće načelo primjenjivo unutar EU o tome da nitko ne smije ostvariti koristi od EU pravnog sustava temeljem zlouporabe ili utaje. Kao što je također navedeno u točki 36. Presude u predmetu C-171/23, da se „nitko ne može pozivati na odredbe prava Unije u svrhu zlouporabe, s obzirom na to da se njihova primjena ne može proširiti na pokrivanje zlouporabe". Sud EU također zaključuje da je, temeljem tog općeg načela, **oporezivanje dozvoljeno ako se utvrdi postojanje zlouporabe prave, čak i onda ako posebne odredbe o tome nema u PDV propisima.**

U vezi s utvrđenjem postojanja zlouporabe prava, Sud EU ističe da to pretpostavlja:
- ostvarenje porezne pogodnosti čije bi dodjeljivanje bilo u suprotnosti s ciljem koji se želi postići odredbama poreznih propisa te
- **da je glavni cilj neke transakcije ostvarenje porezne pogodnosti**, odnosno da relevantna transakcija nema drugo neporezno odgovarajuće opravdanje, osim samog ostvarenja porezne pogodnosti.

Iako se ova presuda Suda EU odnosi na PDV, prilikom obrazlaganja načela zabrane zlouporabe Sud EU poziva se i na druge presude Suda EU koje upućuju na primjenu tog načela u kontekstu koji prelazi okvire PDV-a (npr. presuda u predmetu C-251/16 koja se poziva na druge presude relevantne za tumačenje načela zabrane zlouporabe koje se odnose na različita područja prava EU).

Ova presuda Suda EU je istaknuta jer pokazuje

because it highlights that in case of transferring certain business activities from one legal entity to another legal entity it should be adequately considered if there is a risk that the relevant tax authorities may consider this as abusive practice and that this result in taxation. If this aspect is not considered timely and adequately, it can subsequently result in adverse implications and risks.

da kod prijenosa određenih poslovnih aktivnosti s jednog pravnog subjekta na drugi pravni subjekt treba adekvatno sagledati ima li rizika da bi nadležna porezna tijela mogla smatrati da postoji zlouporaba prava i da to dovede do oporezivanja. Ako se taj aspekt ne razmotri pravovremeno i adekvatno, može naknadno dovesti do neželjenih posljedica i rizika.

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