SIR IUS 1/16

Revija za teorijo in prakso revizije, računovodstva, davkov, financ, ocenjevanja vrednosti in drugih sorodnih področij

SLOVENSKI INŠTITUT za REVIZIJO

Mag. Joži Češnovar

Zakonitost ukrepov v boju proti utajam in zlorabam DDV (2)

Legality of Measures in the Fight against VAT Evasion and Abuses

POVZETEK ● *Ko davčni organ odmeri DDV davčnemu zavezancu, ki utaji davek, je tak ukrep nedvomno legitimen. Drugače pa je, če davčni organ davčne prihodke zaščiti tako, da utajeni davek odmeri pri davčnem zavezancu, ki je z utajevalcem sodeloval, pa od davčne utaje ni imel finančne koristi in lahko za utajo niti ni vedel. V davčni in sodni praksi ni več dvoma, da je tudi tak ukrep zakonit, če je izveden tako, da upošteva temeljna načela, pojasnjena v prvem delu tega prispevka, in če so dokazani vsi pogoji za uvedbo ukrepa, ki jih bom pojasnila v tem delu prispevka.*

Davčni organ zaščiti davčne prihodke z ukrepi odvzema pravice do odbitka vstopnega DDV-ja, z ukrepi odvzema drugih pravic iz sistema DDV-ja, z odmero DDV-ja preko instituta solidarne odgovornosti za plačilo tujega davka oziroma z nepriznanjem pravic, uveljavljenih preko shem nezakonitega davčnega načrtovanja. Dokazno breme pogojev za ukrepe ima davčni organ, ki pa je v teh postopkih v ambivalentnem položaju; je organ, ki je zainteresiran za rezultat postopka, a hkrati tudi organ, ki mu zakon nalaga skrb za zakonito in nepristransko ugotavljanje materialnopravno pomembnih dejstev. Zato je skrb za zakonitost izvajanja ukrepov nedvomno na mestu. Sodna praksa VS RS je že pokazala, da si je davčni organ pravni standard "je vedel oziroma bi moral vedeti za utajo" razlagal preširoko. Poleg tega standarda, ki se ugotavlja za vsak primer posebej, pa ukrepi odpirajo še druga vprašanja, prikazana v zaključku prispevka, na katera pa praksa še ni odgovorila.

Ključne besede ● *DDV, davčne utaje in zlorabe, Sodišče Evropske unije, temeljna načela sistema DDV, ukrepi v boju proti utajam DDV-ja, odvzem pravice iz sistema DDV, solidarna odgovornost za plačilo tujega davka, sheme davčnega načrtovanja*

SUMMARY ● *When the tax authority assesses VAT to a taxpayer who evaded tax, such measure is undoubtedly deemed to be legitimate. The situation, however, may be different when the tax authority secures the tax revenue by assessing the evaded tax to the taxpayer who cooperated with the evader, but had no financial gain from the tax evasion and perhaps never even knew of the*

evasion. There is no doubt any more, both in tax practice and in case law, that such measure is legitimate, if carried out in such a way that it takes into consideration the basic principles explained in the first part of the present paper, and if all conditions are provided for introducing the measure, as explained herein.

Tax authority protects tax revenue with the measure of withdrawal of the right to deduct input VAT, with the measure of withdrawal of other rights from the VAT system, by assessing the VAT through the institute of joint and several liability for the payment of foreign tax, or by non-recognition of rights established through schemes of illegal tax planning. The burden of proving the conditions for measures rests of on the tax authority whose position in this procedure is rather ambivalent. On the one hand, it is a body interested in the outcome of the procedure, and on the other hand it is also a body on which the law imposes concern for lawful and impartial finding of substantively important facts. For this reason, the concern for the legality of measures taken is undoubtedly justified. Case law of the Supreme Court of the Republic of Slovenia has already shown that the tax authority interpretation of the legal standard "knew or ought to have known for the evasion" was far too broad. Apart from this standard that is being determined on a case-by-case basis, the measures open up other dilemmas presented in the conclusion of this paper, for which the practice has not yet come up with an answer.

Key words ● *VAT; tax evasion and abuses, European Court of Justice, fundamental principles of the VAT system, measures in the fight against VAT evasion; withdrawal of a right from VAT system, joint and several liability for the payment of foreign tax, tax planning schemes*

Karmen Demšar

DDV pri črpanju nepovratnih sredstev

VAT issues in connection to subsidies

POVZETEK ● *Pojem nepovratnih sredstev oz. subvencij v DDV-zakonodaji ni opredeljen. Sodišče EU je subvencije opredelilo kot plačilo v denarju ali stvareh države za pomoč podjetju, ne pa kot plačilo kupca ali naročnika za blago ali storitev, ki jo izdeluje. V praksi se je udomačila delitev na prave in neprave subvencije. Prave subvencije niso predmet obdavčitve z DDV-jem, saj niso plačilo za opravljeno dobavo blaga ali storitev. Prejete neprave subvencije pa so namenjene pokrivanju dela prodajne cene zavezanca in so zato predmet DDV-*

ja, pri čemer obveznost obračuna DDV-ja nastane ob dobavi blaga oziroma storitev kupcu, in ne ob prejemu subvencije.

Ko je subvencionirana le dejavnost, od katere davčni zavezanec obračunava DDV ali pa zanjo velja prava oprostitev (na primer izvoz), prilagoditve pravice do odbitka niso potrebne, saj se zaradi prejete subvencije ne spremeni razmerje med odbitnim in neodbitnim DDV-jem. Financiranje poslovnih subjektov, ki hkrati opravljajo oproščeno in obdavčeno dejavnost, s subvencijami, ki niso neposredno povezane s ceno, pa od prejemnikov subvencij zahteva upoštevanje subvencij pri določitvi odbitnega deleža.

Ključne besede ● *subvencija, DDV, obveznost obračuna DDV-ja, odbitek DDV-ja, odbitni delež*

SUMMARY ● *The VAT legislation does not define the concept of subsidies. The EU Court of Justice defined a subsidy as a payment in cash or in kind made in support of an undertaking other than the payment by the purchaser or consumer for the goods or services which it produces. In practice, the differentiation between real and quasi subsidies is common. Real subsidies are not subject to VAT, since they do not represent payment for goods or services. On the other hand, received quasi-subsidies are intended to cover part of the selling price of the taxable person and are therefore subject to VAT, whereby VAT becomes chargeable on the supply of goods or services to the customer, and not when receiving the subsidy. When the taxable person only performs taxed activity or exempted activity with the right to deduct (e.g. export), there is no need for an adjustment of the input VAT due to the subsidy, as the relation between the deductible and non-deductible VAT does not change. Financing taxable persons who perform both taxed and exempted activities however requires them to consider subsidies in the determination of the deductible proportion.*

Key words ● *subsidy, VAT, chargeable event, input VAT, deductible proportion*

Marko Mehle

Vpliv vključenosti neopredmetenih sredstev pri določanju transfernih cen

The impact of intangible assets on transfer pricing

POVZETEK ● *Neopredmetena sredstva so po eni strani tista, ki prispevajo največjo dodano vrednost pri doseganju dobička podjetja oziroma lahko povzročijo tudi znatno izgubo, po drugi strani pa jih je včasih težko prepoznati in še težje primerno ovrednotiti. To pa lahko v nekaterih primerih povzroča velike probleme davčnim zavezancem in davčnim upravam, če so taka sredstva*

vključena v čezmejne transakcije povezanih oseb[1] oziroma gospodarskih družb v okviru mednarodnega podjetja. Regulacijo o načinih obravnavanja transakcij z vključenimi neopredmetenimi sredstvi je mogoče v manjši meri najti tudi v slovenski zakonodaji, več pa se temu posvečajo Smernice OECD-ja[2], za katere pa so v okviru poročila BEPS[3] za akcijo 8–10 že vključene obsežnejše spremembe in dopolnitve, ki se nanašajo na neopredmetena sredstva.

Z vidika komercialne uporabe neopredmetena sredstva lahko razvrstimo v tri stopnje, in sicer v najširšem pojmovanju kot intelektualni kapital, v srednjem pojmovanju kot neopredmetena sredstva in v najožji stopnji kot intelektualno lastnino. OECD loči med neopredmetenimi sredstvi, ki so samostojno lahko vključena v povezano transakcijo, in tistimi, ki samostojno ne morejo biti predmet povezane transakcije. Razumevanje vključenosti neopredmetenih sredstev v povezanih transakcijah je odvisno tudi od dobrega razumevanja lastništva neopredmetenih sredstev s pravnega in ekonomskega vidika.

Ključne besede ● *neopredmetena sredstva, intelektualna lastnina, intelektualni kapital, transferne cene, metode za določanje transfernih cen, BEPS*

SUMMARY ● *Intangible assets or intangibles can valuably contribute to high profits or lead to substantial loses of multinational enterprises on the one hand, and on the other hand, it is sometimes difficult to identify all intangibles included in associated transactions or even more ambitious to determine its arm's length value accordingly. In some cases, these facts can present big issues for tax authorities and for taxpayers who perform cross-border intercompany transactions with significant intangibles included. Slovene transfer pricing legislation contains few rules regarding intangibles involved in intercompany transactions, but much more about that can be learned from the existing OECD transfer pricing guidelines and the extensive Revisions to Chapter VI of these guidelines, which were published by OECD in October 2015 within the final report on BEPS Actions 8–10.*

Intangibles of economic relevance can be encountered in a variety of manifestations, which can be categorized in three groups based on their degree of intangibility from a commercial perspective. Such categorisation comprises intellectual capital as the broadest category, intangible assets, and intellectual property as the most narrow group from the commercial perspective. The OECD approach distinguishes between intangibles that can be separately included in intercompany transactions and intangibles that cannot be separate items of such transactions. In order to get comprehensive understanding of related transactions with the significant intangibles included, it is essential to

1 Povezana oseba je oseba, ki je povezana na podlagi kriterijev 16. ali 17. člena ZDDPO-2 oziroma na podlagi 9. člena Vzorčnega sporazuma OECD.

2 Smernice OECD-ja za določanje transfernih cen za mednarodna podjetja in davčne uprave, 2010.

3 Base Erosion and Profit Shifting (koncept OECD-ja za zmanjšanje erozije davčne osnove v posameznih državah z normalno davčno obremenitvijo na dohodek).

understand the ownership concept related to intangibles and intellectual property in transfer pricing context from both the legal and the economic perspective

Key words ● *intangible assets, intellectual property, intellectual capital, transfer pricing, transfer pricing methods, BEPS*

Ddr. Marian Wakounig

Ureditev finančnih sodišč v republiki Avstriji

Regulation of financial court in the Republic of Austria

POVZETEK ● *Leta 2012 je bila v Avstriji sprejeta novela avstrijskega upravnega sodstva. To je bila pravna podlaga za največjo upravno reformo v zgodovini Republike Avstrije.*

Avtor predstavlja bistvene sestavine avstrijske zakonodaje na področju organizacije in pristojnosti avstrijskega zveznega finančnega sodišča.

To sodišče je v Avstriji od leta 2014 pristojno za davčne, carinske ter finančno-kazenske pritožbe. Namen prispevka je prikaz ureditve finančnega sodišča v Avstriji.

Ključne besede ● *Avstrijski ustavni zakon, Zakon o zveznem finančnem sodišču, Zakon o zveznih dajatvah, odločba, pritožba, odločitev o pritožbi*

SUMMARY ● *In 2012, Austria adopted the amendment to the Austrian Administrative Jurisdiction. That was the legal basis for the biggest administrative reform in the history of the Republic of Austria.*

The author presents the main elements of the Austrian legislation on the organization and jurisdiction of the Austrian Federal Financial Court.

Since 1st January 2014, the Austrian Federal Financial Court has been in place to handle appeals-procedures in fiscal matters regarding taxes, customs, penal proceedings.

The intention of the article is to show the appeals-procedures in fiscal matters in Austria.

Key words ● *Austrian federal constitutional law, Austrian federal finance court law, Austrian federal fiscal code, decision, appeal, appeal decision*

Dr. Peter Podgorelec

Novela Zakona o gospodarskih družbah (ZGD-1I) – 2. del: Omejitve v zvezi z ustanavljanjem družb in druge novosti v korporacijskem pravu

The Act Amending the Companies Act (ZGD-1I) – Part 2: Limitations Pertaining to Establishing Companies And the Other Novelties in Company Law

POVZETEK ● *V članku je analiziran drugi sklop pomembnejših novosti v slovenskem korporacijskem pravu, uveljavljenih z novelo Zakona o gospodarskih družbah – ZGD-1I. Po avtorjevem mnenju je večina sprememb in dopolnitev potrebnih in ustreznih, razen nadaljnjih omejitev v zvezi z ustanavljanjem družb z omejeno odgovornostjo in pridobivanjem deležev v teh družbah. S tem povezane novosti so po avtorjevem mnenju neustrezne, zato se zavzema za povsem drugačne rešitve. Enako velja za dopolnitev pravil o ohranjanju kapitala pri družbi z omejeno odgovornostjo. Dopolnitev prvega odstavka 495. člena ZGD-1 je po njegovem mnenju nejasna, nesistemska in tudi nepotrebna.*

Ključne besede ● *Novela Zakona o gospodarskih družbah – ZGD-1I, omejitve ustanavljanja družb, družba z omejeno odgovornostjo, delniška družba, prekrški*

SUMMARY ● *This paper analyses the second set of significant novelties in Slovenian corporate law implemented by the Act Amending the Companies Act – ZGD-1I. According to the author, most amendments are needed and appropriate, with the exception of further limitations pertaining to establishing private limited liability companies and acquiring a holding therein. In the opinion of the author, the latter are inadequate, and he advocates for completely different solutions. The same also applies to the amendments to the rules pertaining to capital maintenance in private limited liability companies. According to the author, the amendment of paragraph 1 of Article 495 of ZGD-1 is unclear, non-systemic and, last but not least, superfluous.*

Key words ● *The Act Amending the Companies Act – ZGD-1I, limitations pertaining to establishing companies, private limited liability company, public limited liability company, minor offences*

Milan Jagrič

Usmeritve za povečanje prodornosti notranjega revidiranja

Policies for better penetration of internal audit

POVZETEK ● *Notranje revidiranje lahko doseže ustrezno prodornost le na podlagi izbire in izvedbe posameznih poslov, ki bodo visoko na prednostni lestvici poslovodstva. Takšen izbor bo zahteval njegovo vključevanje v poslovodske odločitve v povezavi s postavitvijo okvira sprejemljivega tveganja. Glede na skromne zmogljivosti notranjega revidiranja v posamezni organizaciji bo ta zahteva pogojevala prepoznavanje in prehod na tisto raven dozorelosti notranjega revidiranja, ki jo je možno v trenutnih razmerah tudi doseči. Šele ob takšnem izkoriščanju obstoječih virov bo možno izvesti primerno prednost revidiranja ter tudi izbrati ustrezne strokovne rešitve pri izvedbi posla, ki bodo poudarjale vsebino pred obliko revizijskega procesa. Možna bo proaktivna obravnava perečih tekočih tveganj v sodelovanje s poslovodstvom in s tem primerno zapiranje vrzeli negotovosti s strateškimi, taktičnimi in operativnimi rešitvami. To bo dejansko pomenilo, da bo morala notranja revizija iz procesa obvladovanja tveganj vstopiti v ostale procese delovanja organizacije. Register tveganj bo postal opomnik in ne končni namen, področja revidiranja bodo sledila tekočim potrebam, in ne zgolj preteklim izkušnjam.*

Ključne besede ● *ravnanje s tveganji, pripravljenost prevzemanja tveganj, meje dopustnega tveganja, lestvica prednosti revidiranja, sprejemljivo tveganje, raven dozorelosti notranjega revidiranja, zapiranje vrzeli negotovosti*

SUMMARY ● *Internal auditing can achieve adequate penetration only on the basis of the selection and execution of individual engagements that will be high on the scale of the management's priorities. Such selection will require the inclusion of internal auditing in the management's decisions regarding the frame of acceptable risk. Given the current modest capacity of the internal audit in an organization, such tasks will require the recognition and appropriate positioning of internal audit at a level of maturity that can be achieved in the given situation. Only with such utilisation of the existing resources, internal audit will be able to implement the appropriate priority of auditing, and to choose the adequate professional solutions in the performance of engagements, which will emphasize substance over form in the audit process. This will also enable proactive addressing of current pressing risks in the cooperation with management, and appropriate closing of the gaps of uncertainty with strategic, tactical and operational solutions. This will actually mean that internal audit will not only deal with the process of risk management, but will rather enter into all the processes of the organization's operations. The risk register will become a reminder and not the ultimate purpose, the scope of auditing will follow the current needs and not just previous experience.*

Key words ● *risk treatment, risk appetite, risk tolerance, scale of priorities of audit, acceptable risk, the appropriate level of capability of internal audit, closing the gaps of uncertainty*

Mateja Pivk, Samo Peterlin, Roman Gomboc, mag. Črtomir Časar

Teoretični in praktični izzivi pri ocenjevanju tržne vrednosti terjatev do kupcev

Theoretical and practical challenges in estimating the market value of accounts receivables

POVZETEK ● *Predstavili smo dve najpogosteje uporabljeni metodi pri ocenjevanju vrednosti terjatev, prikazali način izračuna tržne vrednosti terjatve na dveh primerih ter opozorili na morebitne dodatne elemente ocenjevanja, ki so potrebni pri izračunu likvidacijske vrednosti terjatev. V zadnjem delu smo predstavili ključne elemente ocene kakovosti terjatev z vidika družb za odkup terjatev in ugotovili, da je metodologija ocenjevanja podobna metodologiji, ki se uporablja v okviru ocenjevanja vrednosti terjatev pri ocenjevanju vrednosti podjetij.*

Ključne besede ● *ocenjevanje vrednosti terjatev, tržna vrednost, terjatev, ocenjevanje, likvidacija, družbe za odkup terjatev*

SUMMARY ● *The paper explains the two most commonly used methods for estimating the market value of accounts receivables, presents the calculation of the market value of accounts receivables for two different examples and highlights additional elements of valuation, which are necessary when calculating the liquidation value of accounts receivables. In the last part, the key elements in the assessment of the quality of receivables are presented from the viewpoint of factoring companies; it is found that the assessment method is similar to the methodology used in the valuation of accounts receivable for measuring the value of companies.*

Key words ● *valuation of accounts receivable, market value, accounts receivable, valuation, liquidation, factoring companies*

JEL: M 42

Dr. Igor Pšunder

Kaj pove analiza najgospodarnejše uporabe?

What does the highest and best use analysis tell us?

POVZETEK ● *Mednarodni standardi ocenjevanja vrednosti (2013) navajajo, da mora tržna vrednost nepremičnine odražati najgospodarnejšo uporabo. Prav tako analizo največje in najboljše uporabe pri merjenju poštene vrednosti sredstva nalagata Mednarodni standard računovodskega poročanja 13 (2011) in Slovenski računovodski standard 16 (2016).*

Analiza najgospodarnejše uporabe je največkrat prezrt, izpuščen ali pomanjkljivo izveden postopek pri ocenjevanju vrednosti pravic na nepremičninah. Napake in pomanjkljivosti pri ocenah vrednosti pogosto izvirajo prav iz napak in pomanjkljivosti pri izvedbi analize najgospodarnejše uporabe.

Članek podrobneje obravnava pomen analize najgospodarnejše uporabe pri ocenjevanju vrednosti pravic na nepremičninah. Posebej je obravnavana analiza najgospodarnejše uporabe hipotetično nepozidanega zemljišča in obstoječe pozidave. V članku so podane smernice za izvedbo analize najgospodarnejše uporabe, posebna pozornost pa je namenjena tolmačenju rezultatov analize najgospodarnejše uporabe v povezavi s funkcionalno in ekonomsko zastarelostjo nepremičnine.

Ključne besede ● *analiza najgospodarnejše uporabe, nepremičnine, funkcionalna zastarelost, ekonomska zastarelost*

SUMMARY ● *International Valuation Standards (2013) state that the market value of an asset will reflect its highest and best use. In addition, International Financial Reporting Standard 13 and Slovene Accounting Standard 16 (2016) likewise require a highest and best use analysis for fair value measurement.*

The highest and best use analysis is most often an ignored, omitted or inadequately carried out procedure in the valuation of real properties. Mistakes and deficiencies in the valuation often result from mistakes and deficiencies in the highest and best use analysis.

The article elaborates on the importance of a highest and best use analysis in assessing the value of real properties. It deals specifically with the analysis of highest and best use of, hypothetically, land not built on and of existing buildings. The article provides guidance for carrying out the analysis of highest and best use, with special attention devoted to interpreting the results of the analysis in connection with the functional and economic obsolescence of the real property.

Key words ● *highest and best use analysis, real properties, functional obsolescence, economic obsolescence*