TAX TREATMENT OF DIGITAL ASSETS IN SERBIA POSSIBILITIES, AND OPTIONS

PORESKI TRETMAN DIGITALNE IMOVINE U SRBIJI MOGUĆOSTI I OPCIJE

JPM | JANKOVIĆ POPOVIĆ MITIĆ

UVODNE NAPOMENE

Prošle nedelje, gotovo istovremeno, objavljena su dva dokumenta koja su poslužila kao inspiracija za ovaj tekst. Organizacija za ekonomsku saradnju i razvoj (OECD) je objavila izveštaj[1] koji daje pregled poreskog tretmana „digitalne imovine" u svojim članicama, a Ministarstvo finansija Republike Srbije je objavilo nacrt Zakona o digitalnoj imovini i pozvalo javnost na raspravu koja traje do 28. oktobra.

Republika Srbija nije jedna od država čiji poreski tretman digitalne imovine je bio predmet OECD izveštaja, a ni sam nacrt Zakona se ne bavi pitanjem poreskog tretmana. Ukratko, nacrt Zakona se bavi izdavanjem digitalne imovine i njenim trgovanjem u Srbiji, te uslovima pod kojima se mogu pružati usluge povezane sa digitalnom imovinom, kao i zalaganje digitalne imovine.

To i jeste razlog za ovaj tekst – regulisanje samo određenih aspekata digitalne imovine, bez paralelnog uređivanja i poreskog tretmana ovakve imovine, ne dobija se celokupna slika pravnog okvira poslovanja digitalnom imovinom u Srbiji.

Treba reći da poreski tretman i ne treba da bude regulisan u samom Zakonu o digitalnoj imovini, već da je mesto regulisanju poreskog tretmana digitalne imovine u odgovarajućim poreskim zakonima.

Međutim, s obzirom da paralelno sa nacrtom Zakona nisu objavljeni i nacrt izmena poreskih zakona koji bi regulisali ovo pitanje, a da je OECD izveštaj objavljen u isto vreme kada i nacrt Zakona, pogledajmo kakav bi se tretman mogao očekivati imajući u vidu postojeća rešenja u srpskim poreskim zakonima i iskustva OECD država.

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1 OECD (2020), Taxing Virtual Currencies: An Overview Of Tax Treatments And Emerging Tax Policy Issues, OECD, Paris. https://www.oecd.org/tax/tax-policy/taxing-virtual-currencies-an-overview-of-tax-treatments-and-emerging-tax-policy-issues.htm

FOREWORD

During the last week, almost simultaneously, two documents serving as inspiration for this text have been published. The Organization for Economic Co-operation and Development (OECD) has published1 the report giving the overview of the tax treatment of "digital assets" in its member states, while the Ministry of Finance of the Republic of Serbia has published the draft Law on digital assets inviting the public to discussions which will last until 28 October.

The Republic of Serbia is not one of the states in which the tax treatment of digital assets was included in the OECD report, and the draft Law also does not deal with the issue of tax treatment. In short, the draft Law regulates the issuance of the digital assets and trade thereof in Serbia, the conditions under which the services related to digital assets can be provided, as well as the pledging of the digital assets.

That precisely is the reason for this text – regulating only certain aspects of digital assets, without regulating in parallel the tax treatment of such assets, shall not shed the light on the full legal framework of operating with digital assets in Serbia.

It should be emphasized that the tax treatment is not the subject matter of the Law on digital assets, but the tax treatment of the digital assets should be regulated in appropriate tax laws.

However, as the draft Law is not accompanied with drafts of amendments of tax laws which would regulate this matter, and taking into account that the OECD report has been published at the same time as the draft Law, let us analyze the treatment that could be expected, taking into account the existing solutions in the Serbian tax laws and experiences of the OCED states.

Poreski tretman digitalne imovine u Srbiji

Pre prelaska na samu analizu da napomenemo da u ovom tekstu koristimo izraz „digitalna imovina“ s obzirom da sam nacrt Zakona uzima ovaj izraz za osnovni. OECD izveštaj se opredelio za termin „virtual currency“ kao osnovni, a i nacrt Zakona i izveštaj pominju i druge termine, uključujući i „virtuelna valuta“, „digitalni token“ i „stabilna digitalna imovina“ (nacrt Zakona sva ova tri termina posmatra kao posebne vrste „digitalne imovine“, pa „digitalna imovina“ predstavlja generičan termin).

S obzirom da se zakonodavac opredelio za pojam koji uključuje reč imovina, to ukazuje da bi digitalnu imovnu trebalo smatrati vrstom imovine za potrebe oporezivanja. To bi bilo u skladu i sa tretmanom u većini OECD zemalja koje su učestvovale u sastavljanju izveštaja, barem za potrebe poreza na prihod. Naime, tek nekoliko država digitalnu imovinu smatra sličnijom novcu.

Ako pretpostavimo da će se i Srbija opredeliti da digitalnu imovinu tretira kao vrstu imovine (eventualno bi „virtuelna valuta“ kao vrsta digitalne imovine predviđena nacrtom Zakona mogla da ima status novca u svakom slučaju), poreski tretman se može sagledati sa stanovišta poreza na prihod (kako fizičkih tako i pravnih lica), poreza na dodatu vrednost i poreza na imovinu.
Sve ovo u odnosu na sledeće događaje:
(i) stvaranje digitalne imovine;
(ii) njeno čuvanje, i
(iii) raspolaganje (uključujući sticanje digitalne imovine kao naknadu za rad).

U odnosu na porez na prihod i stvaranje digitalne imovine kao osnov za nastanak poreske obaveze, OECD izveštaj deli države u tri grupe. U prvoj grupi su one koje oporezuju i samo stvaranje digitalne imovine. U drugoj grupi su one koje ne oporezuju stvaranje, već poreska obaveza nastaje kod raspolaganja. Treću grupu čine države kod kojih se razlika pravi prema tome da li se, kod rudarenja, radi o rudarenju kao stalnoj (poslovnoj) aktivnosti ili o sporadičnoj (privatnoj) aktivnosti.

Za trenutno poresko zakonodavstvo Srbije bi se moglo reći da suštinski odgovara trećoj opciji, bez obzira na to što poreski tretman digitalne imovine nije izričito regulisan. Ovo iz razloga što sva privredna društva plaćaju porez na dobit pravnih lica, pa bi ga tako plaćalo i privredno društvo koje rudarenje obavlja kao poslovnu aktivnost. Isto važi i za privredno društvo koje bi digitalnu imovinu stvorilo u okviru inicijalne ponude digitalne imovine.

Tax treatment of digital assets in Serbia

Before starting with the analysis, it should be mentioned that this text is using the term “digital assets”, taking into account that the draft Law has prescribed this term as the basic. The OECD report is using the term “virtual currency” as the main term, whereby both the draft Law and the report are also mentioning other terms, including “virtual currency”, “digital token” and “stable digital asset” (the draft Law recognizes these three terms as separate types of “digital assets”, so the “digital asset” is a generic term).

As the lawmaker opted for the term which includes word assets, it indicates that the digital assets should be considered as a kind of asset for taxation purposes. This approach would be aligned with the treatment in the majority of the OECD countries that participated in the preparation of the report, at least for the purposes of income taxes. Namely, just a few countries consider digital assets as similar to currency.

Assuming that Serbia will also opt to treat the digital assets as the type of assets (potentially “virtual currency” as a type of digital asset envisaged by the draft Law could always be treated as currency), the tax treatment could be analyzed from the point of income taxes (both individual and corporate income taxes), VAT and property taxes.

All of these in relation to the following events:
(i) creation of digital assets;
(ii) storing thereof; and
(iii) acquisition and disposal of digital assets (including acquisition as reimbursement for performed work).

Concerning income taxes and the creation of digital assets as the basis for the tax obligation, the OECD report differentiates three groups of states. The first group includes those which tax the creation of digital assets. The second one includes those which do not tax creation, but the tax obligation arises at the moment of disposal of the digital assets. The third group includes states having different treatment depending on whether, in respect of mining, mining represents habitual (business) activity or occasional (private) activity.

Current tax laws of Serbia substantially fall within the third option, regardless of the fact that the tax treatment of digital assets is not explicitly regulated. This for the reason that all companies are subject to corporate income tax, so the company which performs mining as its business activity would also be subject to this tax. The same applies to the company which would create digital assets as part of the initial offering of the digital assets.

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Za trenutno poresko zakonodavstvo Srbije bi se moglo reći da suštinski odgovara trećoj opciji, bez obzira na to što poreski tretman digitalne imovine nije izričito regulisan. Ovo iz razloga što sva privredna društva plaćaju porez na dobit pravnih lica, pa bi ga tako plaćalo i privredno društvo koje rudarenje obavlja kao poslovnu aktivnost. Isto važi i za privredno društvo koje bi digitalnu imovinu stvorilo u okviru inicijalne ponude digitalne imovine.

S druge strane, da bi fizičko lice bilo oporezovano u slučaju rudarenja potrebno bi bilo da to bude izričito propisano. Zakon koji uređuje porez na dohodak građana sadrži i jednu opštu odredbu koja kaže da se porezom na ostale prihode oporezuju „svi drugi prihodi koji nisu oporezovani po drugom osnovu ili nisu izuzeti od oporezivanja ili oslobođeni plaćanja poreza po ovom zakonu“, ali prihod po svojoj prirodi mora da dođe od nekog (pravnog ili fizičkog) lica a kod rudarenja to lice praktično ne postoji (ili veza između tog lica i fizičkog lica koje je steklo digitalnu imovinu rudarenjem nije skroz evidentna ili dovoljno jaka), pa bez izmena zakona ne bi bilo moguće citiranu odredbu tumačiti u cilju naplate poreza za rudarenu digitalnu imovinu.

Na kraju ovog pasusa se može dodati i to da nacrt Zakona izričito isključuje primenu Zakona na rudarenje, ali da to ne bi trebalo da bude razlog da se poreski tretman rudarenja ne uzme u obzir (što u ovom tekstu, što od strane zakonodavca u budućnosti).

Current tax laws of Serbia substantially fall within the third option, regardless of the fact that the tax treatment of digital assets is not explicitly regulated. This for the reason that all companies are subject to corporate income tax, so the company which performs mining as its business activity would also be subject to this tax. The same applies to the company which would create digital assets as part of the initial offering of the digital assets.

On the other hand, to be able to tax an individual in the case of mining, such tax basis must be explicitly regulated. The law regulating the individual income tax contains one very general provision stating that the tax on other income is due on “all other income that are not taxed on another basis or exempted from taxation pursuant to this law”. However, the income by its nature must arrive for some legal entity or individual while in the case of mining such entity/person does not practically exist (or the connection between such entity/person and the individual acquiring the digital asset by mining is not clearly evident or strong enough). Therefore, without amendments to the law, the cited provision could not be used to collect tax for the mined digital asset.

We can add at the end of this paragraph that the draft Law explicitly excludes the application of the Law to mining. However, this should not be the reason not to take into account the tax treatment of the mining (in this text and in the future by the lawmaker).

Čuvanje digitalne imovine ne predstavlja osnov za oporezivanje, pa ćemo sa stanovišta poreza na prihod odmah preći na raspolaganje digitalnom imovinom. Većina zemalja koje su učestvovale u OECD izveštaju oporezuju raspolaganje i to po pravilu oporezuju sve tri mogućnosti, razmenu jedne digitalne imovine za drugu, razmenu digitalne imovine za robu ili usluge i razmenu za valutu.

U Srbiji bez izmena zakona ne bi bilo moguće oporezovati raspolaganje digitalnom imovinom porezom na kapitalnu dobit, kako u slučaju fizičkog tako i u slučaju pravnog lica. Raspolaganje od strane pravnog lica bi moglo, i bez izmena zakona, da bude tretirano kao običan prihod. Ovo iz razloga što i zakon koji uređuje porez na dobit pravnih lica i zakon koji uređuje porez na dohodak građana sadrže listu imovine čije raspolaganje se oporezuje porezom na kapitalnu dobit i liste se ne mogu proširivati analogijom, već je potrebna izričita zakonska odredba.

S druge strane, sticanje digitalne imovine kao naknada za izvršeni rad bi možda moglo biti predmet oporezivanja porezom na zarade odnosno porezom na ostale prihode (kada je osnov naknade ugovor o delu i sl. ugovori). Naime, zakon koji uređuje dohodak građana propisuje da se pod zaradom smatraju i primanja u obliku bonova, hartija od vrednosti (osim akcija stečenih u postupku svojinske transformacije), novčanih potvrda, robe, kao i primanja ostvarena činjenjem ili pružanjem pogodnosti, opraštanjem duga, kao i pokrivanjem rashoda obveznika novčanom nadoknadom ili neposrednim plaćanjem. Odredba koja predviđa oporezivanje ugovora o delu se ni ne bavi vrstom naknade koje se ostvaruje, pa bi u tom smislu podlegala porezu na ostale prihode i naknada ostvarena u digitalnoj imovini.

Bez obzira na navedeno, i u pogledu poreza na kapitalnu dobit i pogledu poreza na zarade, neophodno je da se, ukoliko se zakonodavac odluči da oporezuje digitalnu imovinu u ovim slučajevima, propišu detaljne odredbe o načinu utvrđivanja nabavne odnosno prodajne cene digitalne imovine za potrebe poreza na kapitalnu dobit odnosno načina utvrđivanja osnovice za obračun poreza na zaradu isplaćenu u digitalnoj imovini. Ovo pitanje – izražavanje vrednosti digitalne imovine u zvaničnoj valuti jedne države, jeste jedno od važnijih problema sa kojima se poreske vlasti različitih država susreću u vezi sa oporezivanjem digitalne imovine.

Storing digital assets does not represent the basis for taxation, so we shall forward with the disposal of the digital assets from the point of view of income taxes. The majority of countries participating in the OECD report do tax disposal of the digital assets, as a rule taxing all three possibilities, exchange of one digital asset for another, exchange of a digital asset for goods or services, and exchange for fiat currency.

Without amendments to the laws, Serbia would not be entitled to tax disposal of the digital assets by the capital gain tax, both in respect to individuals and legal entities. Disposal of by a legal entity could be treated, even without amendments of the law, as regular income. This for the reason that both the law regulating the corporate income tax and the law regulating the individual income tax contains a list of assets the disposal is taxed by the capital gain tax and the lists cannot be extended by analogy, so the explicit provision in the law is required.

On the other hand, acquisition of the digital assets as reimbursement for performed work might be subject to taxation by salary tax or tax on other income (when the basis for the reimbursement is service agreement or similar agreement). Namely, the law regulating individual income tax sets out that income in the form of vouchers, securities (excluding shares given in the process of ownership transformation), pecuniary confirmations, goods, as well as income realized by acting or providing certain benefits, waiving the debt or covering the expenses by pecuniary reimbursement or direct payment are considered as the salary. Also, the provision envisaging the service agreement does not deal at all with the kind of reimbursement that is realized, so the reimbursement paid in the digital asset would be subject to tax on other income.

Notwithstanding the stated above, it is necessary, both in respect to the capital gain tax and the salary tax, should the lawmaker decide to tax digital assets in those cases, that detailed provisions on the manner of determining the acquisition/sale price of digital assets for the purpose of the capital gain tax i.e. on the manner of determining the tax base in the case of salary paid in digital assets must be prescribed. This issue – determining the value of the digital asset in the fiat currency of one state, is one of the most important issues the tax authorities of different countries are facing in relation to taxation of digital assets.

Kada već govorimo o raspolaganju digitalnom imovinom, treba navesti i tretman digitalne imovine sa stanovišta PDV. Dok je nesporno da se PDV najnormalnije obračunava na robu odnosno usluge, bez obzira da li se oni plaćaju u običnoj valuti ili digitalnom imovinom, pitanje da li sama razmena digitalne imovine za robu i usluge takođe predstavlja poseban osnov za oporezivanja je nešto komplikovanije.

Drugim rečima, pitanje je da li u navedenom slučaju postoje dva posebna prometa, promet robe odnosno usluge kao jedan promet na koji se obračunava PDV i promet same digitalne imovine date za primljenu robu/uslugu kao drugi promet na koji se obračunava PDV.

OECD izveštaj je u ovom delu podeljen na PDV tretman u EU (koji u dobroj meri proizlazi iz presude Evropskog suda pravde u predmetu Skatteverket v Hedqvist) i na PDV tretman u ostalim zemljama. Kako je Srbija u postupku usklađivanja svog zakonodavstva sa propisima EU, verovatno ima najviše smisla da Srbija u tom smislu prati rešenje u EU. Ovo rešenje podrazumeva da se digitalna imovina sa stanovišta PDV tretira kao novac, pa stoga u opisanom slučaju imamo samo jedan promet, a ne dva posebna. Isto važi i u slučaju razmene za drugu digitalnu imovinu odnosno za valutu, u kojim slučajevima onda nema PDV obaveze uopšte.

Speaking about the disposal of digital assets, the VAT treatment of the digital assets should be discussed as well. While it is indisputable that the VAT is due to the sale of goods and provision of services regardless of the fact whether paid in fiat currency or by the digital asset, the question of whether the exchange of the digital asset for goods and services represent a separate basis for taxation is a more complex one.

In other words, the question is whether the stated situation creates two separate sales, sale of the goods/service as one sale subject to VAT and sale of the digital asset given as consideration for received goods/services as a second sale subject to VAT.

OECD report is in this part separated into VAT treatment in the EU (which is primarily affected by the European Court of Justice decision in the case Skatteverket v Hedqvist) and to the VAT treatment in other countries. As Serbia is in the process of harmonization of its laws with the EU legislation, it is probably reasonable for Serbia to follow the solution existing in the EU. This solution assumes that the digital assets is, from the point of view of VAT, treated as currency, meaning that in the described case there is only one sale and not two separate. The same applies in cases of exchange of one digital asset for other and for fiat currency, so VAT is not due at all in these cases.


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Govoreći o PDV tretmanu digitalne imovine bitno je konstatovati da bi usluga čuvanja digitalne imovine (od strane pružalaca usluge digitalnog novčanika) i druge usluge, prema trenutnim PDV propisima u Srbiji, podlegale obavezi obračunavanja PDV, naročito imajući u vidu da ih sam nacrt Zakona definiše kao usluge porezane sa digitalnom imovinom. U EU postoje različita rešenja, pa neke države oporezuju sve ove usluge, neke su ih izuzele od oporezivanja, a neke oporezuju pojedine usluge, a druge ne.

Najzad, kao poslednje pitanje u vezi sa raspolaganjem možemo konstatovati da trenutna rešenja u Zakonu o porezima na imovinu ne daju mogućnost da se oporezuje nasleđivanje odnosno poklon digitalne imovine, iz istog razloga iz koga se bez izmena zakona raspolaganje ne bi moglo oporezovati porezom na kapitalnu dobit. Isto tako se raspolaganje ne bi moglo oporezovati ni porezom na prenos apsolutnih prava, pa ni samim porezom na imovinu. OECD izveštaj navodi tek nekoliko država koje su izdale uputstva u vezi sa porezom na nasleđe odnosno poklon, po pravilu predviđajući da i digitalna imovina spada u predmet oporezivanja ovim porezima.

Discussion on the VAT treatment of the digital assets should also include the conclusion that the service of storing digital assets (by providers of digital wallets services) and other services would be subject to VAT taking into account current VAT laws of Serbia and especially taking into account that the draft Law defines those services as services related to digital assets. EU countries have different solutions in this respect, whereby some tax all of these services, some have exempted them from taxation, and some tax certain services while do not tax others.

Finally, as the last question related to the disposal of digital assets, it can be mentioned that the current solutions in the Law on property taxes do not provide the possibility to tax inheritance or gift of digital assets, for the same reason for which the capital gain tax could not be applied to the disposal of digital assets without amendments to the law. The same applies to the taxation of disposal by the tax on the transfer of absolute rights and by property tax. The OCED report mentions only a few countries that have published instructions with respect to inheritance and gift taxes, which as a rule envisage that the digital assets are subject to taxation by these taxes.

Nikola Đorđević

Nikola is a Partner at JPM specialising in complex corporate, tax, M&A and energy law matters.

Nikola joined the firm in 2006. His practice concentrates on corporate, tax, M&A, banking & insurance and energy law advisory work.

He graduated from the Faculty of Law at the University of Belgrade in 2005. Nikola is well recognised by his special expertise in various industries and consistently provides clients with sound and commercially-minded legal advice.

Among Nikola's portfolio of clients are leading international and Serbian companies.

He is recommended by clients in the Legal 500 EMEA and IFLR 1000 for corporate and M&A law and Projects and energy.

JPM | JANKOVIĆ POPOVIĆ MITIĆ

6 Vladimira Popovića,
NBGP Apartments
11070 Belgrade, Serbia
T:+ 381/11/207-6850
E: office@jpm.rs

www.jpm.rs