ZAKON O UTVRĐIVANJU POREKLA IMOVINE I POSEBNOM POREZU

LAW ON DETERMINING THE ORIGIN OF PROPERTY AND THE SPECIAL TAX

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UVODNE NAPOMENE

12. marta počinje da se primenjuje Zakon o utvrđivanju porekla imovine i posebnom porezu, zakon koji privlačni dosta pažnje u javnosti iz dva razloga. Pažnju opšte javnosti privlači iz razloga što su ovaj zakon najavljivale različite političke strane koje su bile na vlasti u prethodnih 20 godina, dok pažnju stručne javnosti privlači zbog svojih rešenja.

Zakon je usvojen i stupio je na snagu još početkom 2020. godine, ali je njegova primena bila odložena na godinu dana. U tom periodu je bio predmet kritike stručne javnosti, a njegove manjkavosti je Ministarstvo finansija pokušalo da otkloni izmenama i dopunama koje su usvojene od strane Narodne Skupštine Republike Srbije prošle nedelje.

FOREWORD

Law on Determining the Origin of Property and the Special Tax, the law which attracts a lot of public attention for two reasons, begins to apply on 12 March. General public attention is attracted given that this law was announced from time to time by various political parties which were in power during the last 20 years, while attention of competent public is attracted given the solutions provided for in the law.

The Law was adopted and entered into force in the beginning of 2020, but its application was postponed for one year. During this period, law was subject to critics of the competent public, and the Ministry of finance tried to remedy its deficiency through amendments which have been adopted by The National Assembly of the Republic of Serbia last week.

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Osnovni razlog za kritiku ovog zakona je što deluje da je zamisao predlagača prvobitno bila usmerena na to da bi ovaj zakon trebalo da reguliše dva slična i povezana koncepta, koja ipak imaju svoje razlike, da bi se tokom njegove izrade zakonodavac fokusirao samo na jedan od njih, ali bez doslednog i potpunog izbacivanja drugog koncepta iz rešenja predviđenih zakonom.

Prvi koncept jeste ustanovljavanje mehanizma za proveru da li imovinsko stanje određenog fizičkog lica odgovara prihodima koje je to lice ostvarivalo u prethodnom periodu imajući u vidu poreske prijave koje je podnosilo. Dakle, cilj je provera da li je dolazilo do neprijavljivanja određenih prihoda, odnosno, do poreske evazije.

Drugi koncept jeste ustanovljavanje mehanizama da se kroz poresku proveru usklađenosti imovine i prijavljenih prihoda određenog lica dođe do informacija i dokaza za potrebe vođenja eventualnog krivičnog postupka protiv tog lica, ukoliko se ispostavi da je to lice do prihoda i imovine došlo obavljanjem nezakonitih aktivnosti, tj. vršenjem krivičnih dela.

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Main reason for the critics of this law is that it seems that intention of proponent was initially directed to regulate two similar and connected concepts, which still have differences. However, while drafting the law, the lawmaker has focused on only one of them, without consistently and completely excluding other concept from the solutions envisaged by the law.

First concept is establishing mechanisms for control whether material situation of a certain natural person corresponds to realized income of that person in the previous period taking into account submitted tax returns. Therefore, goal is to check whether some of income were not reported, i.e., whether tax evasion occurred.

Second concept is establishing mechanism through tax control of comparability of assets and reported income of a certain person, to obtain information and evidence for the need of conduction of eventual criminal procedure against that person, if it is established that such person realized income and acquired assets through illegal activities, i.e., by committing criminal offences.

U pogledu prvog koncepta, potrebno je primetiti da Zakon o poreskom postupku i poreskoj administraciji već skoro 20 godina poznaje i u svom članu 59 predviđa tzv. „unakrsnu procenu poreske osnovice“, te nije najjasnije zbog čega je bilo potrebno doneti poseban zakon koji bi uredio suštinski isto pitanje, odnosno, zbog čega to isto nije bilo moguće urediti izmenama Zakona o poreskom postupku i poreskoj administraciji. Jedina suštinska razlika između ovog zakona i Zakona o utvrđivanju porekla imovine i posebnog poreza je u posebnoj stopi poreza od 75% na neprijavljene prihode predviđenoj novim zakonom. S tim u vezi se možemo podsetiti i na Zakon o ekstra profitu koji je bio donet 2001. godine sa sličnim ciljem – naplatom potrebnog poreza, ali čiji rezultati su ocenjeni kao skromni.

Odgovor na ovo pitanje postaje još značajniji iz razloga što ni samim Zakonom o utvrđivanju porekla imovine i posebnog poreza nisu detaljnije definisani načini na koji će se utvrđivati vrednost imovine, prihoda i izdataka za privatne potrebe, već je članom 11 ostavljeno Vladi da uredi ove mehanizme, što ona još nije učinila, iako je članom 26 za donošenje podzakonskih akata bio predviđen rok od šest meseci od stupanja na snagu zakon, zbog čega se i u ovom smislu postavlja pitanje kada će se i kako će se tačno primenjivati ovaj zakon.

Regarding the first concept, it should be noted that the Law on Tax Procedure and Tax Administration recognizes it for almost 20 years and in its Article 59 envisages the so-called "cross-assessment of the tax base", and it is not clear why it was necessary to pass a special law that would regulate essentially the same issue, i.e., why it was not possible to regulate the same issue by amending the Law on Tax Procedure and Tax Administration. The only essential difference between this law and the Law on Determining the Origin of Property and the Special Tax is the special tax rate of 75% on reported income provided by the new law. In this regard, we can recall the Law on Extra Profit, which was rendered in 2001 with a similar goal - the collection of special tax, but whose results were evaluated as modest.

Answer to this question is more important from the reason that Law on Determining the Origin of Property and the Special Tax did not in detail define manner on establishing the value of the assets, income and expenditures for private needs, but by Article 11 it is prescribed that the Government should regulate these mechanisms, which was not done so far, although Article 26 prescribes deadline of six months from the entering into force to render bylaws. Having this in mind, questions arise when and how exactly this law will be applied.

U odnosu na drugi koncept, naročito nakon izmena i dopuna, u zakonu su ostale uglavnom sporedne odredbe čiji se smisao može razumeti samo pod pretpostavkom da je drugi koncept prvobitno koegzistirao sa prvim kao razlog za donošenje zakona. Dodatno, nedosledno brisanje drugog koncepta kroz izmene i dopune zakona svakako jeste bolje nego da su ostali delovi koji su dovodili do različitih nedoumica i nelogičnosti. Ipak, čak se da se i u ovom smislu zakon i nakon izmena i dopuna može kritikovati, jer su ove sporedne, preostale odredbe tek sada postale dodatno besmislene.

Primera radi, iako je pojam „nezakonito stečena imovina“ zamenjen pojmom „imovina na koju se utvrđuje poseban porez“, to kroz zakonski tekst nije učinjeno dosledno, pa tako članovi 3 i 14 zakona i dalje govore o zakonitosti sticanja imovine, pri čemu, kod činjenice da se, sa stanovišta opštih pravnih normi, ovaj termin može različito tumačiti, zakon ne daje definiciju šta bi se, u smislu tog zakona, imalo smatrati zakonitim sticanjem imovine. Čak ni sam naziv zakona više ne odgovara njegovom predmetu, imajući u vidu to da se na osnovu ovog zakona neće utvrđivati poreklo imovine, već samo to da li vrednost imovine nekog lica ukazuje na to da je to lice ostvarivalo prihode koje nije prijavilo i na koje nije platilo porez.

Regarding the second concept, especially after amendments, law contains auxiliary provisions whose sense may be understood only through assumption that second concept has initially coexisted with the first as a reason for rendering the law. Additionally, inconsistent deleting of second concept through amendments of the law is better than to keep parts which lead to various doubts and illogicality. However, it seems that in this sense law even after amendments may be criticized again, given that such auxiliary, remaining provisions become additionally purposeless.

For example, although the term "illegally acquired property" has been replaced by the term "property subject to special tax", this has not been done consistently throughout the legal text. Therefore, Articles 3 and 14 of the law still speak of the legality of acquiring of property, whereby, the fact that this term can be interpreted differently from the point of view of general legal norms, the law does not give a definition of what, in the sense of this law, would be considered as lawful acquiring of property. Even the name of the law no longer corresponds to its subject, having in mind that the origin of assets will not be determined on the basis of this law, but only whether the value of a person's property indicates that such person earned income that he did not report and for which did not pay taxes.

Sporno je i rešenje iz pomenutog člana 3 po kome je na Poreskoj upravi teret dokazivanja uvećanja imovine fizičkog lica u odnosu na njegove prijavljene prihode, dok je na tom fizičkom licu teret dokazivanja činjenica da je na zakonit način steklo imovinu u delu u kome njeno uvećanje nije u skladu sa prijavljenim prihodima, pri čemu ostaje nedefinisano šta se pod zakonitošću sticanja imovine tačno podrazumeva. Ukoliko bi se u praksi i od strane Poreske uprave ova odredba tumačila tako da bi se od konkretnog fizičkog lica zahtevalo da dokazuje da njegova uvećana imovina ne potiče iz krivičnog dela, ovo bi bilo drastično odstupanje od ustavne garancije pravne sigurnosti u kaznenom pravu.

The decision from the mentioned Article 3 is also disputable, according to which the Tax Administration bears the burden of proof that the increase of the assets of a natural person in relation to his reported income, while such natural person has the burden of proof that he legally acquired property in the part where increase thereof does not correlate with the reported income, whereby it remains undefined what exactly is meant by the legality of the acquiring of property. If this provision is interpreted in practice by the Tax Administration as obligation of a natural person to prove that his increased property does not originate from a criminal offense, this would be a drastic deviation from the constitutional guarantee of legal certainty in criminal law.

Pored toga, i nakon izmena i dopuna ostali su članovi 9 i 19. Član 9 sadrži najgeneralniju odredbu da će se obavestiti tužilaštvo i drugi nadležni organi ako se u postupku primene ovog zakona utvrdi da činjenice ukazuju na osnove sumnje da je izvršeno krivično delo, što je obaveza koju Poreska uprava, kao organ državne uprave, svakako ima i po već postojećoj krivično-pravnoj legislativi.

Apart from that, even after amendments the Articles 9 and 19 remain. Article 9 contains general provision that public prosecution and other competent bodies shall be notified if during procedure of application of this law is determined that facts indicate existence of basic suspicion that criminal offence is committed, which obligation Tax Administration, as a body of state administration, already has in the existing criminal legislation.

Posebnu nedoumicu izaziva apsurdni član 19 zakona koji sadrži nalog krivičnom sudu da u iznos imovinske koristi pribavljene krivičnim delom koji je utvrđen pravosnažnom presudom uračuna i iznos posebnog poreza plaćenog po ovom osnovu. Potpuno je neshvatljivo kako je zakonodavac zamislio da se pravosnažna presuda u bilo kom delu, pa i u onom u kome je njom eventualno utvrđena imovinska korist pribavljena krivičnim delom, menja ili može menjati nakon njene pravosnažnosti na bilo koji način.

Mogućnost uračunavanja posebnog poreza u iznos imovinske koristi pribavljene krivičnim delom, čak i da ovo uračunavanje nije predviđeno kao potpuno nemoguće i neprimenljivo kao što je učinjeno članom 19 ovog zakona, sporna je i u nesaglasju sa većim brojem odredaba kako krivičnog materijalnog, tako i procesnog prava, naročito sa onima koje se odnose na vraćanje oštećenom imovinske koristi koju je učinilac nekog krivičnog dela stekao njegovim izvršenjem na štetu tog oštećenog, ali je komentar ovih neusklađenosti suvišan kod činjenice potpune neprimenljivosti ovakve odredbe člana 19.

S obzirom da se od drugog koncepta po svemu sudeći odustalo, naročito ostaje kao sporno to što izmenama i dopunama nije izbrisana mogućnost predviđena članom 12 zakona da se prethodni postupak za utvrđivanje osnova za utvrđivanje posebnog poreza pokrene po osnovu prijave nekog fizičkog ili pravnog lica. Ovakvo rešenje ostavlja i otvara mogućnosti za klasične denuncijacije, tj. za to da neko lice prijavljuje drugo lice iz svojih ličnih, a ne javnih interesa.

Čak se može postaviti pitanje smisla i člana 23, pošto nije potpuno jasno zašto bi se vršile posebne bezbednosne provere zaposlenih u jedinici Poreske uprave zaduženoj za primenu ovog zakona (posebne u odnosu na eventualne bezbednosne provere državnih službenika predviđene drugim propisima), kad je već svrha zakona jedino to da se utvrdi poseban porez.

Special doubt causes absurd Article 19 of the law which contains order to criminal court that in the amount of material gain acquired by criminal offence, which amount is determined by final and binding verdict, calculate amount of special tax paid on this basis. It is completely unclear how lawmaker intends that final and binding verdict in any part, including the one determining material gain acquired by criminal offence, is amended or can be amended in any manner after verdict become final and binding.

The possibility of including a special tax in the amount of material gain acquired by criminal offence, even if this calculation is not envisaged as completely impossible and inapplicable as done in Article 19 of this law, is disputable and inconsistent with a numerous provisions of both criminal material and procedural law, especially with those relating to the return to the damaged party material gain which offender acquired by committing criminal offence to the detriment of that damaged party. However, comment on these inconsistencies is superfluous given the fact that such provision of Article 19 is completely inapplicable.

Having in mind that from second concept is given up, it is especially disputable that by amendments and supplements is not deleted possibility envisaged by Article 12 of the law that previous procedure for determining the base for determining special tax is initiated upon report of natural person or legal entity. Such solution opens possibility for classic denunciations, i.e., that one person files criminal complaint against another person from his personal, and not public interests.

Even the question of the meaning of Article 23 may be raised, since it is not entirely clear why special security checks of employees in the unit of the Tax Administration competent for the application of this law would be performed (special in terms of security checks of civil servants provided by other regulations), when the purpose of the law alone is to establish a special tax.

Najzad, posebno problematično pitanje jeste rešenje iz člana 18 kojim je propisano da se u postupku primene ovog zakona supsidijarno primenjuje Zakon o poreskom postupku i poreskoj administraciji, osim u pogledu odredaba o zastarelosti. Nejasno je šta se time želelo postići i da li se ovim otvara mogućnost da se poseban porez utvrđuje za neograničeni vremenski period unazad. Ovo ne bi bilo ni ustavno, ni zakonito čak i da se radi o vršenju krivičnih dela, s obzirom na to da Krivični zakonik poznaje jasne rokove zastarelosti, što za vođenje krivičnog postupka, što za izvršenje krivičnih sankcija, a svakako ne može biti ustavno i zakonito za jednostavno naplaćivanje poreza, pa ni takvog koji je predviđen kao poseban.

Imajući u vidu sve navedeno, već uočena sporna rešenja iz Zakona o utvrđivanju porekla imovine i posebnom porezu ostavljaju nedoumice u pogledu toga kako će se u praksi pristupiti njihovom rešavanju i da li će kroz primenu samog zakona zaista moći da se ostvari njegova svrha i onaj cilj koji je zakonodovaca rukovodio kao razlog za njegovo donošenje.

Finally, a particularly problematic issue is the solution from Article 18, which prescribes that in the procedure of application of this law, the Law on Tax Procedure and Tax Administration is applied in a subsidiary manner, except with regard to the provisions on statute of limitation. It is unclear what was intended to be achieved and whether this opens the possibility for a special tax to be determined for an unlimited period of time in past. This would be neither constitutional nor legal even if it is a matter of committing criminal acts, considering that the Criminal Law knows clear statute of limitation deadlines, both for conducting criminal proceedings and for executing criminal sanctions, and it certainly cannot be constitutional and legally for the simple collection of taxes, even those provided as special.

Taking into account all the above, already detected problematic solutions from the Law on Determining the Origin of Property and the Special Tax leave uncertainties in respect to the practical solution of these issues and whether the application of the law will contribute to fulfilment of its purpose and the goal set out the proponent as the reason for adoption of the law.


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