THE LATEST

TAX HILIGHTS

JPM | JANKOVIĆ POPOVIĆ MITIĆ

IZDVAJAMO IZ BILTENA SLUŽBENIH OBJAŠNJENJA MF – JANUAR 2022. GODINE
- POREZI -

Među mišljenjima i službenim objašnjenjima objavljenim u najnovijem biltenu službenih objašnjenja i stručnih mišljenja za primenu finansijskih propisa za januar 2022. godine Ministarstvo finansija je izdalo nekoliko mišljenja, odnosno objašnjenja, koja su privukla našu pažnju.

Posebno izdvajamo sledeće:

- Poreski tretman prihoda koji fizičko lice ostvari po osnovu sticanja udela u privrednom društvu u kome je zaposlen, a koji udeo je stekao od, sa poslodavcem povezanog lica

(Mišljenje MF br. 011-00-863/2021-04 od 18.11.2021. godine)

Tema sticanja akcija, odnosno udela zaposlenih u pravnim licima – poslodavcima (ili sa njima povezanim licima) posebno je aktuelna od kada su izmene i dopune Zakona o privrednim društvima objavljene u Sl. glasniku RS br. 91/2019 počele sa primenom (01.04.2020. godine).

Iako je i pre pomenutih izmena, takozvani „stock option" za treća lica postojao u slučaju akcionarskih društava, kao što je praksa u većini zemalja, ovim izmenama takva praksa je omogućena i u odnosu na društva sa ograničenom odgovornošću, kao najrasprostranjeniju formu društava kapitala u Srbiji.

Izmene uvode koncept rezervisanog sopstvenog udela društva i finansijskog instrumenta koji se omogućuje na osnovu rezervisanog sopstvenog udela – pravo na sticanje udela koje se daje trećim licima (takozvani „share option").

CLIPPINGS FROM THE OFFICIAL CLARIFICATIONS NEWSLETTER OF MINISTRY OF FINANCE – JANUARY 2022
- TAXES -

In its newest newsletter of official clarifications and official opinions on the application of financial related regulations for January 2022, the Ministry of Finance issued a couple of opinions, i.e. clarifications which have caught our attention.

We single out the following:

- Tax treatment of natural person revenue accrued on the basis of acquisition of shares in the company in which the natural person is an employed, i.e. in the company that is an affiliated company of the employer

(The opinion of Ministry of finance no. 011-00-863/2021-04 dated 18 November 2021)

The matter of acquisition of stocks, i.e. shares by the persons employed in a company - employers (or their affiliated companies), has been in the spotlight since the application of amendments on the Companies Law, which commenced on 1 April 2020.

Even though the possibility of so-called "stock options" for third parties existed in regard to joint-stock companies before the mentioned amendments, which is similar to the practice in other countries, these amendments provided for this possibility also in relation to limited liability companies, as the most common form of companies in Serbia.

These amendments introduce the concept of reserved own share of the company and of the financial instrument – the right to acquire share, a financial instrument which may be granted to third parties (so-called "share option") on the basis of the reserved own share of the company.

Domašaj ovog finansijskog instrumenta je najizraženiji u kontekstu sada već rasprostranjenog modela motivacije zaposlenih – privredna društva omogućuju svojim zaposlenima da steknu akcije/udeo u društvu određenog dana (dan dospeća) po određenoj ceni, težeći da davanjem učešća u vlasničkoj strukturi motivišu zaposlene da budu još produktivniji.

The effect of these financial instruments is mostly noticeable in the context of, nowadays widely spread concept for motivation of employees – the companies enable their employees to acquire stakes/shares in the company on a specified day (due date) and for a specified price, aiming to motivate their employees to be even more productive by giving out a share in the ownership structure of the company.

Nevezano za pitanje komercijalnih efekata ovog pristupa (kako pozitivnih – efekat boljeg poslovanja društva usled veće motivacije zaposlenih da društvo ostvaruje veću zaradu čime bi se podigla vrednost akcija/udela u društvu; tako i negativnih – prevelika disperzija vlasničke strukture, mali procenat učešća u kapitalu koji onemogućuje učešće zaposlenog u donošenju odluka vezanih za poslovanje društva, kao i uostalom negativni efekti koji su na ovim prostorima poznati još iz perioda samoupravnog socijalizma), Ministarstvo finansija se ovim pitanjem bavilo sa stanovišta poreskih efekata ove prakse.

Regardless of the matter of commercial effects of this approach, both the positive ones – effect of better business running of the company due to higher motivation of the employees for their company to accrue more profit so the value of its stocks/shares would rise and, the negative ones – large dispersion in ownership structure, low percentage of participation in share capital that excludes the possibility of an employee to participate in decision making in regard to business operations of the company, as well as, after all, negative effects of such concept familiar to this region from the period of self-managing socialism, the Ministry of Finance tackled this matter from the perspective of tax-related effects of this practice.

U ovom mišljenju, Ministarstvo finansija se osvrnulo na pitanje poreskog tretmana prihoda koji zaposleni ostvaruje po osnovu sticanja udela u privrednom društvu – povezanom licu poslodavca koji je uređen Zakonom o porezu na dohodak građana („Zakon"), a koji se suštinski ne razlikuje od poreskog tretmana prihoda po osnovu sticanja udela u privrednom društvu – poslodavcu (Zakon na isti način reguliše oba slučaja).

In this opinion, the Ministry of Finance considers the matter of tax treatment of the revenue accrued by an employee on the basis of acquisition of share in a company – affiliate of the employer, which is regulated under the Personal Income Tax Law (the „Law"). This matter does not differ in its substance from the matter of tax treatment of the revenue accrued on the basis of acquisition of share in the company – employer (the Law equally treats both cases).

Polazeći od toga da se oporezivom zaradom zaposlenog, za potrebe primene Zakona, smatraju i druga primanja zaposlenog koja, između ostalog, uključuju i hartije od vrednosti koje zaposleni dobije od poslodavca ili od sa poslodavcem povezanog lica, i to u momentu sticanja prava raspolaganja na tim hartijama od vrednosti, Ministarstvo finansija posebno uzima u obzir Zakonom ustanovljen izuzetak od ovog pravila po kome se porez na zarade zaposlenog ne plaća na primanja zaposlenog od poslodavca po osnovu: (i) (sopstvenih) akcija; (ii) opcija na (sopstvene) akcije; ili (iii) (sopstvenih) udela poslodavca, ili sa poslodavcem povezanog lica koje zaposleni stekne bez naknade ili po povlašćenoj ceni od poslodavca.

Having in mind the provisions of the Law, stating that other income of the employee including, inter alia, securities received by the employee from the employer or affiliated company of the employer, becomes taxable salary of an employee at the moment when such employee becomes entitled to dispose of such securities, as the starting point of analysis, the Ministry of Finance further accounts the exception prescribed by the Law, on the basis of which the salary tax is not due on income received by an employee from the employer on the basis of (i) (own) stocks; (ii) (own) stock options; or (iii) (own) shares of the employer or its affiliate, which are received by the employee from the employer, without remuneration or for discount price.

U skladu sa gore opisanim, Ministarstvo finansija potvrđuje stav da se za ovakva primanja zaposlenog ne plaća porez na zaradu (dakle samo na zaradu, ne uključujući potencijalne druge vidove poreza na dohodak građana, kao na primer godišnji porez na dohodak građana), naravno pod uslovima propisanim Zakonom – pored uslova koji suštinski uslovljavaju ovo oslobođenje doslednom primenom odredaba Zakona o privrednim društvima (procedura i forma određivanja rezervisanog sopstvenog udela i davanje, odnosno ostvarivanje prava na sticanje udela), to su uslovi koji se tiču odnosa zaposlenog prema poslodavcu i/ili stečenom udelu, a kojima se teži da se obezbedi određeni kontinuitet u odnosu zaposleni – poslodavac, odnosno zaposleni – udeo. Ovi uslovi podrazumevaju da radni odnos ne prestane, odnosno da zaposleni ne otuđi ovako stečen udeo najmanje dve godine, kao i da poslodavac/povezano lice ne otkupe sopstvene akcije od zaposlenog. Iako Zakon (i Pravilnik o ostvarivanju prava na poresko oslobođenje za primanja zaposlenog po osnovu sopstvenih akcija koje stekne bez naknade ili po povlašćenoj ceni) u ovom delu govori isključivo o akcijama, činjenica da se Ministarstvo finansija u ovom mišljenju poziva na pomenute uslove implicira stav Ministarstva da se ove odredbe shodno primenjuju i na udele u društvu sa ograničenom odgovornošću

In accordance with the above, the Ministry of Finance confirms the stand that for such income of the employee salary tax is not due (meaning only salary tax, not including other potential taxes such as, for example, annual income tax), naturally, provided that the conditions stipulated by the Law are met – besides the conditions which, in substance, condition the application of this exemption by mandatory proper application of the provision of the Company law (the procedure and form for determining the reserved own share and granting, i.e. exercising the right to acquire share), these are the conditions that regard the relation of the employee towards its employer and/or acquired share, which conditions aim to secure certain continuity in such relation. These conditions assume that the employment relationship is not terminated, i.e. that an employee does not sell this share for the period of at least two years, as well as that the employer/its affiliate does not buy back (own) shares from such employee. Even though the Law (and the Rulebook on exercising the right to tax exemption for income of the employee on the basis of own stocks acquired without remuneration or for a discounted price) speaks exclusively about stocks in this part, the fact that the Ministry of Finance makes a reference to these conditions in this opinion implies that the Ministry takes the stand that these provisions equally apply to shares in a limited liability company.

Na ovom mestu bi trebalo pomenuti i ranije mišljenje Ministarstva finansija br. 011-00-588/2020-04 od 13.11.2020. godine, objavljeno u biltenu za novembar 2020. godine, koje se bavi poreskim tretmanom sa druge (obrnute) strane – poreskim tretmanom besteretnog prenosa dela udela od strane jedinog člana društva – fizičkog lica društvu, a radi formiranja rezervisanog sopstvenog udela za potrebe izdavanja finansijskog instrumenta – prava na sticanje udela. Ovim mišljenjem je potvrđeno da, imajući u vidu činjenicu da je reč o besteretnom prenosu, u ovakvom slučaju ne postoji prihod oporeziv porezom na kapitalni dobitak.

We should also mention herein the opinion of the Ministry of finance no. 011-00-588/2020-04 dated 13 November 2020, published in the newsletter for November 2020, which tackles the matter of tax treatment from other (opposite) direction – the tax treatment of free-of-charge transfer of a portion of share by the sole shareholder – natural person to the company in order to create a reserved own share for the purpose of issuance of financial instrument – right to acquire a share. This opinion confirms that, since this is a transfer that is free of charge, no capital gain that would be taxed by capital gain tax exists.

Naravno, ovo ne utiče na poreski tretman prihoda koje društvo kasnije eventualno ostvari prodajom takvog rezervisanog sopstvenog udela trećem licu kome je prethodno odobren finansijski instrument - pravo na sticanje udela, a koji se reguliše u skladu sa odredbama Zakona o porezu na dobit pravnih lica..

Naturally, this does not affect the tax treatment of revenue that the company potentially accrues in the later stage by selling such reserved share to a third party granted with the financial instrument – right to acquire share, which revenue falls under the scope of application of Corporate Income Tax Law.

Imajući sve navedeno u vidu, odredbama Zakona, i njihovim tumačenjem od strane Ministarstva finansija, Republika Srbija, čini se, i sama daje svoj podstrek upravo konceptu motivisanja zaposlenih kroz tzv. „share options“ mehanizam, tako što je prihode ostvarene na osnovu sticanja udela u skladu sa finansijskim instrumentom – pravom na sticanje udela oslobodila poreza na dohodak građana, ali konkretno u kontekstu zaposlenih, tj. u kontekstu poreza na zarade.

Having the above in mind, the Republic of Serbia seeks to make its own contribution to the concept of motivating employees through the so-called „share options“ mechanism by means of the above provisions of the Law and the interpretation thereof by the Ministry of Finance, by exempting the income accrued on the basis of shares acquired through the financial instrument – the right to acquire share from the personal income tax obligation, but only in relation to the employees, i.e. only in the context of salary tax.

- Da li poreski obveznici čiji su računi u trenutku plaćanja blokirani radi izvršenja prinudne naplate kod organizacije nadležne za prinudnu naplatu, mogu međusobne novčane obaveze izmirivati i ugovaranjem promene poverilaca, odnosno dužnika u određenom obligacionom odnosu?

- Can the taxpayers whose accounts are blocked in the moment of payment, due to enforced collection by the organization for enforced collection, settle mutual pecuniary rights and obligations by agreeing on change of creditor, i.e. debtor in certain contractual relation?

(Mišljenje MF br. 011-00-00045/2021-04 od 22.12.2021. godine)

Ovim mišljenjem, Ministarstvo finansija dovodi u međusobnu vezu relevantne odredbe Zakona o obavljanju plaćanja pravnih lica, preduzetnika i fizičkih lica koja ne obavljaju delatnost („Zakon o obavljanju plaćanja“) i Zakona o poreskom postupku i poreskoj administraciji („Zakon o poreskom postupku“).

Naime, iako Zakon o obavljanju plaćanja zabranjuje izmirivanje međusobnih novčanih obaveza između pravnih lica i/ili preduzetnika, između ostalog, ugovaranjem promene poverioca, odnosno dužnika u određenom obligacionom odnosu (dakle putem asignacije, cesije, preuzimanjem duga i slično), u slučaju kada su njihovi računi blokirani radi izvršenja prinudne naplate, isti zakon predviđa mogućnost izuzetka – ukoliko je drugačiji pristup propisan zakonom kojim se uređuje poreski postupak.

Zakon o poreskom postupku upravo predviđa takav izuzetak , odnosno dozvoljava izmirenje međusobnih novčanih obaveza putem promene poverioca, odnosno dužnika i kada su računi blokirani radi prinudne naplate, ali samo radi ispunjenja obaveza po osnovu javnih prihoda na koje se Zakon o poreskom postupku primenjuje – dakle radi izmirenja poreskih obaveza.

U skladu sa navedenim, preporučljivo je da se u odgovarajućem osnovu promene – na primer, ugovoru kojim učesnici dogovaraju promenu ugovorne strane, izričito i jasno navede za koje potrebe i sa kakvim domašajem se vrši promena ugovorne strane.

(The opinion of Ministry of finance no. 011-00-00045/2021-04 dated 22 December 2021)

In this opinion, the Ministry of Finance inter connects relevant provisions of the Law on payments by legal persons, entrepreneurs and natural persons who do not perform business activities (the „Law on Payments“) and the Law on Tax Procedure and Tax Administration (the „Law on Tax Procedure“.)

Namely, even though the Law on Payments prohibits its settling of mutual pecuniary obligations between the legal persons and/or entrepreneurs, inter alia, by virtue of agreeing on change of creditor, i.e. debtor in certain contractual relation (i.e. through assignation, assignment, dept assumption and similar), in cases when their accounts are blocked due to enforced collection, the same law provides for the possibility of the exemption – provided that different approach is envisaged by the law that regulated tax procedure.

The Law on Tax Procedure prescribes such exemption, i.e. allows for settling of mutual pecuniary obligations by virtue of the change of creditor, i.e. debtor even when the accounts are blocked due to the enforced collection. However, this only applies in a case such change is performed for the purpose of fulfillment of public revenue-related obligations that fall under the application of the Law on Tax Procedure.

In accordance with the above, it is recommendable to explicitly stipulate in the appropriate ground – e.g. agreement under which the parties agree to the change of a party, the purpose and effects of such change of the contracting party.

Navedene zakonske odredbe, odnosno izuzetak predviđen Zakonom o poreskom postupku, jasno ukazuje na preferencijalni tretman potraživanja koje Poreska uprava ima prema dužnicima, u odnosu na tretman potraživanja drugih (neobezbeđenih) poverilaca – zaposlenih, poslovnih partnera i slično.

These provisions of the law i.e. the exemption set out in the Law on Tax Procedure, clearly shows that the receivable of the Tax Administration towards debtors have preferential treatment in relation to the treatment of receivables of other (unsecured) creditors – employees, business partners, and similar.

Ovaj pristup kojim se implicitno daje prednost potraživanjima Poreske uprave, nije u potpunosti dosledan sistemu „vrednovanja" prioriteta potraživanja koje propisuje srpsko pravo u drugim propisima, prvenstveno u kontekstu primene Zakona o stečaju, gde se prednost daje nekim potraživanjima zaposlenih, dok su potraživanja po osnovu javnih prihoda tek na drugom mestu, i to samo za period od tri meseca (odnosno koja su dospela u poslednja tri meseca) pre otvaranja stečajnog postupka, dok ona koja su dospela ranije nemaju prednost čak ni u odnosu na ostala neobezbeđena potraživanja.

Such an approach that indirectly favors the receivable of the Tax Administration, is not completely in line with the manner of determining the priority rank of claims generally accepted in other Serbian regulations, mainly in relation to the application of the Bankruptcy Law. This law gives an advantage to certain claims of employees, while the public revenue related claims come second, and this only for the period of three months before the opening of the bankruptcy proceedings (i.e. in regard to claims that become due in that period), while the public revenue related claims that became due at an earlier time do not have the advantage even in relation to remaining unsecured claims.

Imajući u vidu da se dužnici čiji su računi u blokadi neretko suočavaju upravo sa rizikom stečaja, i primenom Zakona o stečaju, nejasno je zašto se i na pitanje izmirenja međusobnih novčanih obaveza putem promene poverioca, odnosno dužnika nije primenio isti pristup.

Having in mind that debtors whose accounts are blocked are often faced with the risk of bankruptcy, and application of the Bankruptcy Law, accordingly, it is not clear why the same principle does not apply to the matter of settling mutual pecuniary obligations through the change of creditor, i.e. debtor.


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