STRANO PRAVNO LICE I OGRANAK U SRBIJI
PORESKI TRETMAN

FOREIGN LEGAL PERSON AND BRANCH OFFICE IN THE REPUBLIC OF SERBIA
TAX TREATMENT

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OPŠTA ZAPAŽANJA

Ako se pođe od važećeg Zakona o privrednim društvima Republike Srbije svaki ogranak, pa i ogranak stranog pravnog lica, predstavlja izdvojeni organizacioni deo privrednog društva preko koga ono obavlja delatnost u Republici Srbiji. Ogranak nema svojstvo pravnog lica, već samo istupa u pravnom prometu u ime i za račun privrednog društva koje ga je osnovalo.

Polazeći od ove definicije moglo bi se zaključiti da ogranak kao takav ne predstavlja samostalnog subjekta, odnosno subjekta koji podleže primeni domaćih propisa kao takav, nezavisno od (stranog) privrednog društva – osnivača, već bi doslednom primenom ove definicije (strano) pravno lice – osnivač ogranka trebalo da bude subjekt prava i obaveza u Republici Srbiji koje bi mogle da se namire preko organizacione jedinice – ogranka u Republici Srbiji, a posebno u kontekstu obaveza prema subjektima javnog prava kojima je poslovanje ogranka faktički dostupno.

GENERAL NOTIONS

If one takes into account the applicable Law on Companies of the Republic of Serbia, every branch office, including a branch office of a foreign legal person, represents a separate organizational unit of a company through which such company conducts its business activities in Serbia. A branch office does not hold the status of legal person, it only acts in the name and on behalf of the company that founded it, in the respective legal transactions of the company.

Having in mind this definition, it may be determined that a branch office as such does not represent an independent entity, i.e. an entity that falls under the scope of application of domestic laws as such, independently from the (foreign) company – its founder. The diligent application of this definition would require that the (foreign) legal person – the founder of the branch office is the subject of rights and obligations in the Republic of Serbia, which obligations may be settled through its organizational unit – branch office in the Republic of Serbia, this especially in the context of obligations towards the entities in public sector, to which the business of the branch office is, in reality, available.

Dakle, bez obzira što ogranak kao takav prema Zakonu o privrednim društvima nema svojstvo pravnog lica, u slučaju ogranka stranog pravnog lica u čije ime i za čiji račun ogranak istupa u Republici Srbiji, takav ogranak predstavlja subjekat na koga se propisi Republike Srbije primenjuju direktno i neposredno, a imajući u vidu da je domaćim organima dostupan samo ogranak, dok osnivač – strano pravno lice, to nije.

So, regardless of the fact that a branch office as such does not have the status of a legal entity, in case of a branch office of a foreign company in which name and on behalf of which the branch office acts in the Republic of Serbia, such branch office still represents a subject/an entity to which the laws and regulations of the Republic of Serbia may apply directly, having in mind that only a branch office is available to domestic authorities, while the foreign legal persons is not.

Ovo je posebno vidljivo u kontekstu primene poreskih i računovodstvenih propisa, koji ogranak stranog pravnog lica definišu kao posebnog obveznika primene tih propisa, a u cilju kontrole poslovanja i ispunjavanja obaveza stranog pravnog lica na teritoriji Republike Srbije u čije ime i za čiji račun ogranak postupa i istupa u Republici Srbiji.

This is especially noticeable in the context of application of tax and accounting related rules and regulations, which define a branch office of a foreign legal entity as specific subject of application of these regulations, all in order to ensure control of business activities and due performance of obligations within the territory of the Republic of Serbia of a foreign legal person in which name and on behalf of which the branch office is acting in the Republic of Serbia.

Tako, važeći Zakon o računovodstvu propisuje da je ogranak stranog pravnog lica (i drugi organizacioni delovi stranog pravnog lica) u Republici Srbiji poseban obveznik primene tog zakona, pa se za potrebe primene ovog zakona ceni veličina i obim poslovanja samog ogranaka u Republici Srbiji i njegovo razvrstavanje kao mikro, malog, srednjeg ili velikog pravnog lica se vrši nezavisno od veličine i obima poslovanja osnivača van Republike Srbije. Sam ogranak stranog pravnog lica potpada pod obavezu pripreme i podnošenja finansijskih izveštaja u skladu sa propisima Republike Srbije.

Slično Zakonu o računovodstvu, i poresko pravni propisi se neposredno primenjuju na ogranak stranog pravnog lica u Republici Srbiji. Tako, sam ogranak je obveznik podnošenja poreskih prijava, obračuna poreza i poreskog bilansa.

Accordingly, the applicable Law on Accounting prescribes that a branch office of a foreign legal person (and other organizational units of a foreign legal person) in the Republic of Serbia is the subject of application of this law. So, for the purposes of application of this law, the size and volume of business activities of the branch office in the Republic of Serbia is evaluated and branch offices are categorized as micro, small, medium or large legal person, regardless of the size and volume of business activities of their founders which are outside of the Republic of Serbia. A branch office of a foreign legal person is directly obliged to prepare and submit financial statements in accordance with the laws of the Republic of Serbia.

Similar as the Law on Accounting, the tax related laws and regulations also apply directly to the branch office of a foreign legal person in the Republic of Serbia. Accordingly, the branch office is directly obliged to submit tax returns, tax calculations and tax balances.

Sa stanovišta Zakona o porezu na dobit pravnih lica, ogranak stranog pravnog lica predstavlja stalnu poslovnu jedinicu tog pravnog lica u Republici Srbiji, gde to pravno lice, a preko stalne poslovne jedinice, podleže oporezivanju dobiti koju ostvari poslovanjem na teritoriji Republike Srbije.

Međutim, kada je reč o tumačenju i primeni poreskih propisa na ogranak stranog pravnog lica, posebno u odnosima, odnosno transakcijama između matičnog društva – stranog pravnog lica i njegovog ogranka, i pitanja priznavanja troškova koji proizilaze iz ovog odnosa, situacija nije toliko jasna i u praksi se može javiti više nedoumica.

From the perspective of the Law on Corporate Income Tax, a branch office of a foreign legal person represents a permanent business unit of that legal person in the Republic of Serbia, whereby such legal person falls under the scope of application of corporate income tax for the corporate income accrued from the business activities in the Republic of Serbia, through its branch office.

However, when it comes to the interpretation of tax related rules and regulations and their application in regard to a branch office of a foreign legal person, especially in regard to relations, i.e. transactions between the mother company – a foreign legal person and its branch office, and the matter of recognition of expenses that occur in connection with these relations, the situation is not all that clear and various dilemmas may arise in practice

PITANJE TROŠKOVA KOJI SE MOGU PRIZNATI OGRANKU STRANOG PRAVNOG LICA U REPUBLICI SRBIJI

Imajući u vidu da je strano pravno lice koje posluje preko ogranka u Republici Srbiji poreski obveznik u Republici Srbiji za dobit koju ostvari od poslovanja na teritoriji Republike Srbije, postavlja se pitanje koji sve troškovi vezani za poslovanje u Republici Srbiji mogu biti priznati stranom pravnom licu (odnosno ogranku) za potrebe utvrđivanja oporezive dobiti.

Na generalnom nivou, nesporno je da su to troškovi koji nastanu na teritoriji Republike Srbije (npr. troškovi dobavljača/pružaoca usluga u Republici Srbiji, troškovi radne snage angažovane na teritoriji Republike Srbije, i slično), kao i troškovi koji su nastali u vezi sa nabavkom dobara i usluga u inostranstvu, a koje su inostrani dobavljači, odnosno pružaoci usluga, fakturisali direktno ogranku, odnosno uopšte koja su direktno i isključivo nabavljena za potrebe obavljanja delatnosti u Republici Srbiji.

THE MATTER OF RECOGNIZABLE EXPENSES OF A BRANCH OFFICE OF A FOREIGN LEGAL PERSON IN THE REPUBLIC OF SERBIA

Having in mind that a foreign legal person that conducts business activities in the Republic of Serbia through its branch office is a tax payer in the Republic of Serbia in regard to the profit (corporate income) accrued through its business within the territory of the Republic of Serbia, the question arises: which expenses connected with the business operations in the Republic of Serbia may be recognized in favor of a foreign legal person (i.e. its branch office) for the purposes of determining taxable corporate income?

On the general level, it is undisputable that these would be the expenses incurred in the Republic of Serbia (e.g. costs of suppliers/service providers in the Republic of Serbia, costs of personnel engaged in the Republic of Serbia, and similar), as well as the costs incurred in connection with procurement of goods and services abroad, which the foreign suppliers/service providers invoiced directly to the branch office, or which were procured directly and exclusively for the purposes of conducting business in the Republic of Serbia.

Međutim, pored ovih troškova, u poslovanju ogranka nastaju i troškovi poslovanja u vezi sa kojima se javljaju nedoumice u praksi, odnosno za koje nije u potpunosti jasno da li se mogu priznati kao trošak ogranka, i u kom delu.

Tako, na primer, postavlja se pitanje da li bi ogranak trebalo da obračuna amortizaciju na stalno sredstvo koje je strano pravno lice – matično društvo isporučilo na teritoriju Republike Srbije za potrebe poslovanja u njoj putem ogranka. Obzirom da se u ovakvom konkretnom slučaju stalno sredstvo koristi u Republici Srbiji, za potrebe obavljanja delatnosti u Republici Srbiji, ovakav trošak bi trebalo da može da bude priznat u Republici Srbiji za potrebe utvrđivanja poreske obaveze ogranka.
U slučaju da se stalno sredstvo koristi u Republici Srbiji tokom dela relevantnog poreskog perioda, onda bi i trošak amortizacije trebalo srazmerno podeliti prema trajanju perioda u kome je stalno sredstvo korišćeno u Republici Srbiji

However, besides these expenses, there are other business-related expenses that occur in the course of business operations of the branch office, in regard to which dilemmas arise in practice, i.e. for which it is not completely clear whether they may be recognized as the expense of the branch office, and if so, in which portion.

For example, it is questionable whether the branch office should calculate and apply amortization in regard to fixed asset that is delivered by the foreign legal person – mother company to the Republic of Serbia for the purposes of conducting business operations there. Having in mind that in this specific case the fixed assets is used in the Republic of Serbia, for the purposes of conducting business activities in the Republic of Serbia, such expense should be eligible to be recognized in the Republic of Serbia for the purposes of determining of tax obligations of the branch office. In case that a fixed asset is used in the Republic of Serbia only during one part of the relevant tax period, than the amortization cost should be divided proportionately with the duration of period in which the fixed asset was used in the Republic of Serbia.

Drugo pitanje koje se postavlja u vezi sa ovim, jeste da li matično društvo može da naplaćuje bilo kakvu naknadu ogranku za isporučeno stalno sredstvo (van samih troškova isporuke i dovođenja na lokaciju) i kakav bi bio poreski tretman tako naplaćene naknade?

Ukoliko pođemo od osnovnog postulata da strano pravno lice – matično društvo i njegov ogranak u Republici Srbiji ne predstavljaju odvojene subjekte, već su deo jednog pravnog lica, onda je koncept naknade (cene) za usluge matičnog društva svom ogranku suprotan prirodi ovog odnosa.

U vezi sa tim, ukoliko je naknada (cena) ipak naplaćena od strane matičnog društva ogranku, postavlja se pitanje da li bi takav trošak ogranka mogao, i da li bi trebalo, da bude priznat za potrebe utvrđivanja poreske obaveze u Republici Srbiji.

Another question that arises in this regard would be the following: may the mother company charge any kind of fee to its branch office for the delivered fixed asset (apart from the actual costs of delivery and bringing the fixed asset to the location), and what would be the tax treatment of such charged fee?

If we consider the basic rule that a foreign legal person – mother company and its branch office in the Republic of Serbia are not separate subjects/entities, but represent parts of one legal person, then the concept of fee (price) for the services of mother company to its branch office is in contradiction to the very nature of this relation.

In connection with this, if the fee (price) is still charged by the mother company to the branch office, the question is whether such expense of the branch office could, and whether it should, be recognized for the purposes of determining of tax obligation in the Republic of Serbia.

Prema istom principu, šta činiti sa aktivnostima koje je preduzelo matično društvo u vezi sa poslovanjem u Republici Srbiji? Da li je u tom slučaju opravdano određeni trošak zaračunat ogranku od strane matičnog društva na ime tih aktivnosti priznati za potrebe utvrđivanja poreske obaveze u Republici Srbiji, i ako jeste, na koji način ga utvrditi?

Using the same principle, what is to be done with activities carried out by the mother company in connection with business operations in the Republic of Serbia? Is it justifiable to recognize in this case certain expense calculated to the branch office by its mother company on behalf of such activities for the purposes of determining the tax obligation in the Republic of Serbia, and if so, how to determine the amount of recognizable expense?

Primera radi, ogranak ne mora imati svoj informacioni sistem, već može (i često i jeste tako) koristiti informacioni sistem uspostavljen na nivou celog društva.

For example, the branch office does not need to have its own informational system, but it may (moreover, this is usually the case) use the informational system organized on the level of the entire company.

U tom slučaju, npr. trošak održavanja informacionog sistema predstavlja zajednički trošak matičnog društva i njegovih ogranaka (i eventualno drugih formi prisustva u različitim zemljama) i bilo bi opravdano priznati deo ovog troška ogranku prilikom utvrđivanja poreske obaveze u Republici Srbiji.

In described case, e.g. cost of maintenance of informational system represents common expense of mother company and its branch offices (and potentially other forms of presence of the company in various countries) and it would be justifiable to recognize a portion of this expense in favor of the branch office when determining the tax obligation in the Republic of Serbia.

Pri tome treba imati u vidu da ovakvi troškovi (u konkretnom primeru, trošak održavanja sistema) može nastati kao iznos plaćen trećem licu za pruženu uslugu, a može biti i internog karaktera – matično društvo samo održava svoje sisteme, ali to održavanje podrazumeva određeni utrošak materijala, energenata, zaposlenih, itd.

Međutim, u ovom slučaju, kao i u drugim slučajevima zajedničkih troškova koji se ne mogu egzaktno raspodeliti između matičnog društva i ogranka, postavlja se pitanje kako utvrditi deo troška koji je u tom slučaju opravdano priznati ogranku, odnosno kako rešiti pitanje adekvatnog dokumentovanja takvih troškova u Republici Srbiji.

It should be also taken into account thereof that this kind of expenses (in the specific example expenses of system maintenance) may occur as amounts paid to a third party for its provided service, but may also occur internally – the mother company itself maintains its systems, but such maintenance assumes certain use of materials, energy, employees, etc.

However, in this case, same as in many other cases of common expenses that cannot be distributed precisely between the mother company and its branch office, the question is how to determine the portion of expense that should be recognized in favor of the branch office, i.e. how to resolve the issue of adequate documentation for such expenses in the Republic of Serbia.

U praksi se ova pitanja mogu pojaviti kao prilično značajna, imajući u vidu da ista stvaraju nedoumice u poslovanju i obračunima troškova poslovanja, a da sami privredni subjekti funkcionišu u stanju permanentne nesigurnosti u pogledu toga da li su ispravno izvršili vrednovanje i dokumentovanje troškova, i da li bi im isti bili osporeni u slučaju poreske kontrole.

Dodatni problem koji se javlja, a koji je proistekao iz nekoliko Mišljenja Ministarstva finansija, jeste da li ogranak ima obavezu plaćanja poreza po odbitku u slučaju kada matičnom društvu plaća određene iznose koji se mogu podvesti pod neki od osnova propisanih čl. 40 Zakona o porezu na dobit pravnih lica. Stav Ministarstva finansija je da ogranak u ovim slučajevima ima obavezu obračunavanja i plaćanja poreza po odbitku, što je suprotno izričitoj zakonskoj odredbi na koju se i samo Ministarstvo finansija poziva, a koja nam govori o prihodu koje nerezidentno pravno lice ostvari od rezidentnog pravnog lica.

These questions may arise in practice as rather significant, having in mind that they create dilemmas in business running and calculation of business-related costs, whereby the commercial subjects are doing business in the atmosphere of permanent insecurity in terms of wondering whether they have properly evaluated and documented their expenses, and whether the same would be rejected in case of tax control.

Additional issue that emerged, and that arouse due to several opinions of the Ministry of Finance, regards the question whether the branch office is obliged to pay tax on reverse charge mechanism in situations when it pays to its mother company certain amounts that may be subsumed under one of the grounds prescribed by Art. 40 of the Law on Corporate Income Tax. The stand taken by the Ministry of Finance is that the branch office is obliged to calculate and pay tax under reverse charge mechanism in such cases, which is in contradiction to the explicit legal provision quoted by the Ministry itself, which provision regards the matter of income accrued by a non-resident legal person from a resident legal person.

Naime, ovde nedostaje jedna od osnovnih pretpostavki za primenu čl. 40 – u konkretnom odnosu matičnog društva i ogranka ne postoji rezidentno pravno lice, već samo nerezidentno pravno lice i njegova stalna poslovna jedinica.

Ovakav stav Ministarstva finansija je još više nejasan, ako se ima u vidu da Zakon o porezu na dobit pravnih lica vrši izričitu diferencijaciju odnosa rezidentnih i nerezidentnih pravnih lica (regulisan čl. 40. ovog zakona), sa jedne strane, i odnosa nerezidentnih pravnih lica i njihovih stalnih poslovnih jedinica u Republici Srbiji (čl. 20. ovog zakona), sa druge strane.

Namely, our case lacks one of the basic premises for application of Art. 40 – in particular relations between the mother company and its branch office, a resident legal person does not exist, but only the non-resident legal person and its permanent business unit.

This stand of the Ministry of Finance is even more confusing if one takes into the account the fact that the Law on Corporate Income Tax makes explicit differentiation of relations between resident and non-resident legal persons (regulated by Art. 40 of this law), on one hand, from the relations between non-resident legal persons and their permanent business units in the Republic of Serbia (Art. 20 of the same law), on the other hand.