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The Apple case – reveals how the mantra of "fair taxation" actually leads to too complex, unclear and hard-to implement tax system

In July 2020 the General Court of the European Union annulled the Commission Decision (EU) 2017/1283 in the Apple case, according to which the EU Commission claimed that Apple underpaid tax in Ireland for the amount of approximately EUR 13 billion[1]. The complex and long-lasting procedure started in 2013 and, according to some sources[2], legal fees exceeded €7 million already in 2019.

The executive vice-president of the EU Commission, Margrethe Vestager, gave a statement in respect of this judgment[3] stating, inter alia, *"The Commission stands fully behind the objective that all companies should pay their **fair share of tax.**"*. This mantra of "fair share of tax" is continuously repeated as an important goal at the level of the EU.

When considering the meaning of fair taxation, usually this means that taxpayers should pay tax according to their economic wealth, and that according to that measure some taxpayers should not be taxed unfairly in comparison with some other taxpayers. However, a taxation which is based on tax law which continuously becomes more and more complex, unclear and hard to implement, producing significant uncertainties and costly and long-lasting procedures like this one, cannot be regarded as fair tax system. On one hand governments have a right to impose taxes, but on the other hand they should also have a responsibility to ensure clear and easily implementable taxation. While in the last few years the "fair taxation" mantra has been constantly repeated as one of important goals of the EU, the truth is that many tax changes, that have been introduced with an argument of fair taxation, resulted in just an opposite effect and we are getting more and more distant from fair taxation. Quite often when

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Apple slučaj – otkriva kako mantra o "pravednom oporezivanju" zapravo vodi u prekompleksan, nejasan i teško provediv porezni sustav

U srpnju 2020. godine Opći sud Europske unije je poništio Odluku Komisije (EU) 2017/1283 u predmetu Apple, prema kojoj je Europska komisija utvrdila da je Apple platio premalo poreza u Irskoj u iznosu od otprilike 13 milijardi EUR[1]. Kompleksan i dugotrajni postupak je započeo još 2013. godine te su, prema nekim izvorima[2], troškovi pravnih naknada prešli 7 mil. EUR već u 2019. godini.

Izvršna potpredsjednica Europske komisije, Margrethe Vestager, je dala izjavu vezanu za ovu presudu[3], u kojoj se, između ostalog, navodi *„Komisija u potpunosti stoji iza cilja da sva poduzeća trebaju plaćati svoj **pravedni udio u porezu**"*. Ova mantra o „pravednom oporezivanju" se kontinuirano ponavlja kao važan cilj na razini EU.

Kada se razmatra što je pravedno oporezivanje, obično se misli na to da porezni obveznici trebaju plaćati porez sukladno svojoj ekonomskoj snazi, te da prema ovom mjerilu neki porezni obveznici ne bi smjeli biti oporezovani nepravedno u odnosu na druge porezne obveznika. Međutim, oporezivanje koje se temelji na poreznom pravu koje kontinuirano postaje sve više i više kompleksno, nejasno i teško primjenjivo, te proizvodi značajne neizvjesnosti kao i skupe i dugotrajne postupke poput ovoga, ne može predstavljati pravedan porezni sustav. Države s jedne strane imaju pravo nametanja poreza, no one bi s druge strane istodobno morale imati odgovornost da osiguraju da je oporezivanje jasno i jednostavno provedivo. Iako se mantra o „pravednom oporezivanju" posljednjih godina stalno ponavlja kao jedan od bitnih ciljeva EU, istina je takva da su mnoge porezne promjene, koje su uvedene uz opravdanje da će osigurati pravednije oporezivanje, dovele upravo do suprotnog učinka i do toga da smo sve dalje i dalje od

1 https://www.internationaltaxreview.com/article/b1mhr5nzqyqhp0/apple-wins-eu-state-aid-battle-over-irish-tax-structure

2 https://www.internationaltaxreview.com/article/b1h6bwqc3b0j1d/apple-defiant-over-eu-state-aid-claim

3 https://ec.europa.eu/commission/presscorner/detail/en/statement_20_1356

complex and unclear tax regulations are introduced, this is defended with an aim of fairer taxation and such complex and long-lasting procedures are sometimes also defended with an aim of fairer taxation, but on the other hand when the European court of Justice or other court determines that responsible authority at the level of the EU or some country has incorrectly interpreted or applied some of those complex and unclear tax regulations – the following question should be raised: **is it fair that the costs of such procedures, which the relevant authority has to bear, are finally financed by all taxpayers paying taxes from which such authorities (the EU Commission in this particular case) are financed, and that commonly the responsibility for introduction of too complex and unclear regulations as well as responsibility for incorrect interpretation and application of such regulations by relevant authorities (and individuals acting on behalf of those authorities) is not questioned. There is no doubts that this is not fair!**

If only some (not all) aspects (being in the middle of the Apple dispute) are mentioned, this already gives some insight into the complexity of this dispute. This results not only from complex model of the Apple business, but also from complex tax regulations. For example, some of the aspects which were disputable in this case are as follows:

- Whether the EU Commission had jurisdiction to investigate tax rulings under State aid rules;
- is the "arm's length principle" applicable for checking if there was a selective tax advantage;
- is the "authorised OECD approach" applicable;
- whether the EU Commission correctly applied the "authorised OECD approach";
- consideration of significant people functions, including consideration which functions are only routine with no significant added value;
- considering allocation of risks;
- considering whether the chosen transfer pricing method was adequate (questioning application of one-sided profit split method which resembled to TNM method;
- considering whether a tested party has been correctly chosen;
- considering whether a profit level indicator has been correctly chosen;
- considering a choice of the companies used in the comparability studies;
- etc.

This case provides very good picture of complexity and obscurity of tax law, producing significant legal uncertainties for taxpayers and, finally, producing significant side-costs of tax collection.

However, by looking on this judgment from a bright side, it can be concluded that this is really an important and interested judgment, as the conclusions of the Court in respect of many transfer pricing aspects can be taken into account in practice, when designing transfer pricing or when preparing a potential defence

pravednog oporezivanja. Kompleksni i nejasni porezni propisi se donose često puta uz opravdanje da je to u cilju pravednijeg oporezivanja te se ovakvi kompleksni i dugotrajni postupci također nekad opravdavaju time kako je i to u cilju pravednijeg oporezivanja, no s druge strane kada Europski sud ili neki drugi sud utvrdi da je nadležno tijelo EU ili nadležno tijelo neke države pogrešno protumačilo i primijenilo neke od tih kompleksnih i nejasnih odredbi poreznih propisa – trebalo bi postaviti pitanje: **je li pravedno da troškove takvih postupaka, koje snose ta tijela, u konačnici financiraju svi porezni obveznici koji plaćaju porez iz kojih se takva tijela (u ovom slučaju Europska komisija) financiraju, a da se u pravilu ne postavlja pitanje odgovornosti za donošenje prekompleksnih i nejasnih propisa kao ni pitanje odgovornosti za pogrešno tumačenje i primjenu takvih propisa od strane nadležnih tijela (kao i pojedinaca koji nastupaju u ime tih tijela)? Naravno da to nije pravedno!**

Ako se spomenu samo neki (ne svi) aspekti (koji su bili u srži Appleovog spora), već to ukazuje do koje mjere je taj spor kompleksan. To je rezultat ne samo kompleksnog Appleovog poslovnog modela, već i kompleksnih poreznih propisa. Na primjer, samo neki od aspekata koji su bili sporni u ovom predmetu su sljedeći:

- je li Europska komisija bila nadležna da istražuje porezna rješenja prema pravilima o državnim potporama;
- je li „načelo nepristranih tržišnih cijena" primjenjivo za provjeru postojanja selektivnog poreznog pogodovanja;
- je li „pristup odobren od OECD-a" primjenjiv;
- je li Europska komisija točno primijenila „pristupa odobren od OECD-a";
- razmatranje funkcija značajnog osoblja, uključujući razmatranje koje su funkcije rutinske bez značajne dodane vrijednosti;
- razmatranje alokacije rizika;
- razmatranje je li odabrana metoda transfernih cijena adekvatna (propitivanje primjene jednostrane metode podjele dobiti koja nalikuje metodi neto dobitka);
- razmatranje je li testirana strana ispravno odabrana;
- razmatranje je li indikator razine profitabilnosti ispravno odabran;
- razmatranje odabiran poduzeća koja su korištena u studijama usporedivosti;
- itd.

Ovaj slučaj daje vrlo dobru predodžbu o kompleksnosti i nejasnoćama unutar poreznog prava, što porezne obveznike dovodi u situaciju velike pravne nesigurnosti te, u konačnici, proizvodi i velike dodatne troškove ubiranja poreza.

Međutim, ako se na ovu presudu gleda s pozitivne strane, može se zaključiti da je to zaista značajna i interesantna presuda, jer će zaključci Suda vezani za mnoge aspekte transfernih cijena moći biti uzeti u obzir u praksi, prilikom osmišljavanja transfernih cijena ili prilikom potencijalne obrane u nekim poreznim

in some tax disputes related to transfer pricing, which can be important taking into account that "analysing transfer pricing is not an exact science" (which was taken into account by the General Court of the European Union as stated in item 455 of the judgment).

sporovima koji se odnose na transferne cijene, a što može biti bitno uzimajući u obzir da „analiziranje transfernih cijena nije egzaktna znanost" (od čega polazi i Opći sud Europske unije kako je navedeno u točki 455 ove presude).

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