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Tax Effects of the Extraordinary Management Procedure Act

In addition to all the other issues and ambiguities related to the Act on Procedure of Extraordinary Management in Companies of Systematic Importance for the Republic of Croatia (hereinafter: Extraordinary Management Procedure Act), the question of its tax effects is also raised. Namely, as explained below, it may happen that, for some taxpayers, after write-off of their debts, tax effects resulting from such write-offs may actually represent an obstacle for their further going concern. Since the Act does not specifically regulate the tax effects of the procedure under this Act, although they may be significant and affect the going concern of some taxpayers involved in this procedure, it is obvious that this was not considered when the Act was drafted. In addition, it seems that different interpretations of the following issue have arisen:

Does Agrokor and all other companies over which the extraordinary management procedure has been initiated have to close business books, prepare financial statements and corporate income tax returns as of the day preceding the day of the opening of the special extraordinary management procedure (i.e. as of 9 April 2017), and are they exempt from paying corporate income tax advances during the extraordinary management procedure?

The following text provides comments on this issue and on some other tax effects of the Extraordinary Management Procedure Act from the aspect of corporate income tax.

Application of Provisions on Legal Effects of Bankruptcy

Article 37 of the Extraordinary Management Procedure Act prescribes that provisions on legal

9. lipnja 2017.

Porezni učinci Zakona o postupku izvanredne uprave

Uz sve druge probleme i nejasnoće koji su vezani uz Zakon o postupku izvanredne uprave u trgovačkim društvima od sistemskog značaja za RH (dalje: Zakon o postupku izvanredne uprave), postavlja se i pitanje njegovih poreznih učinaka. Naime, kako se obrazlaže u nastavku, može se dogoditi da će kod nekih poreznih obveznika nakon provedenih otpisa njihovih dugova upravo porezni učinci koji proizlaze iz takvih otpisa dovesti u pitanje njihovu daljnju održivost poslovanja. Kako Zakon niti u jednom dijelu posebno ne uređuje porezne učinke postupka koji se provodi na temelju tog Zakona, iako oni mogu biti značajni i utjecati na održivost poslovanja nekih poreznih obveznika uključenih u taj postupak, očito je da se o tome nije vodilo računa prilikom donošenja tog Zakona. Osim toga, imamo saznanja o tome da su se pojavila različita tumačenja vezana za pitanje:

Trebaju li Agrokor i sva ostala društava nad kojima je pokrenut postupak izvanredne uprave s danom koji prethodi danu otvaranja posebnog postupka izvanredne uprave (tj. na dan 9. travnja 2017.) zatvoriti poslovne knjige, sastaviti financijske izvještaje te sastaviti prijave poreza na dobit, i jesu li oslobođena plaćanja predujmova poreza na dobit za vrijeme dok traje postupak izvanredne uprave?

U tekstu koji slijedi dajemo osvrt na ovo pitanje kao i na neke druge porezne učinke Zakona o postupku izvanredne uprave s aspekta poreza na dobit.

Primjena pravila o pravnim učincima stečaja

Člankom 37. Zakona o postupku izvanredne uprave propisano je da se na pravne posljedice

consequences of opening the *bankruptcy procedure* prescribed by a special act regulating the bankruptcy are adequately applied to the legal consequences of opening the extraordinary management procedure, and that the extraordinary trustee has the rights and obligations of the bankruptcy trustee in accordance with the provisions on legal consequences of opening the bankruptcy procedure under a special act regulating the bankruptcy; as long as the Extraordinary Management Procedure Act does not specify otherwise.

Although it would be possible to contemplate whether the extraordinary management procedure has characteristics similar to those of the pre-bankruptcy procedure, Article 37 of the Extraordinary Management Procedure Act indicates that the part of the Bankruptcy Act regulating the bankruptcy is subordinately applied to the extraordinary management procedure. The Bankruptcy Act in section entitled "Commercial-legal and Tax-legal Accounting" in Article 225 prescribes that commercial-legal and tax-legal liabilities of the debtor to keep the books and accounts are not disrupted by opening of the bankruptcy procedure, but this article of the Bankruptcy Act also states that a new business year begins in the moment of opening a bankruptcy procedure. In addition, it is prescribed that the period up to the reporting hearing is not to be included in statutory deadlines for preparation and publication of the statutory financial statements.

From the abovementioned provisions of both acts it can be concluded that, in the case of Agrokor, the extraordinary trustee must conclude a business year on 9 April 2017, i.e. as of the day preceding the day of the opening of the extraordinary management procedure (10 April 2017), and that he must prepare financial statements and a corporate income tax return as of that date and for the period that is concluded on that date (for the period from 1 January to, and including, 9 April 2017).

Since the extraordinary trustee has the rights and obligations of the bankruptcy trustee (except for the part when the Extraordinary Management Procedure Act prescribes otherwise), he is obliged not only to take into consideration the provisions of the Bankruptcy Act regulating the bankruptcy, but also the corresponding provi-

otvaranja postupka izvanredne uprave na odgovarajući način primjenjuju pravila o pravnim posljedicama o otvaranju *stečajnog postupka* propisana posebnim zakonom koji uređuje *stečaj*, te da izvanredni povjerenik ima prava i obveze stečajnog upravitelja sukladno odredbama o pravnim posljedicama otvaranja stečajnog postupka iz posebnog zakona kojim se uređuje stečaj; sve ako Zakonom o postupku izvanredne uprave nije drugačije određeno.

Iako bi bilo moguće razmatrati ima li postupak izvanredne uprave obilježja slična onima predstečajnog postupka, sam članak 37. Zakona o postupku izvanredne uprave upućuje da se na postupak izvanredne uprave podredno primjenjuje onaj dio Stečajnog zakona kojim se uređuje stečaj. Stečajni zakon u odjeljku pod nazivom „Trgovačkopravno i poreznopravno polaganje računa" u članku 225. propisuje da se trgovačkopravne i poreznopravne obveze dužnika da vodi knjige i polaže račune ne mijenjaju otvaranjem stečajnoga postupka, ali je u tom članku Stečajnog zakona također navedeno da otvaranjem stečajnoga postupka započinje nova poslovna godina. Uz to je propisano i to da se vrijeme do izvještajnoga ročišta ne uračunava u zakonske rokove za sastavljanje i objavljivanje završnoga računa.

Iz navedenih odredbi oba zakona da se zaključiti da u slučaju Agrokora izvanredni povjerenik mora zaključiti poslovnu godinu s 9. travnja 2017., dakle s danom koji prethodi danu otvaranja postupka izvanredne uprave (10. travnja 2017.), na taj datum i za razdoblje koje završava tim datumom sastaviti financijske izvještaje i prijavu poreza na dobit (za razdoblje od 1. siječnja do zaključno 9. travnja 2017.).

Kako izvanredni povjerenik ima prava i obveze stečajnog upravitelja (osim u dijelu u kojem je Zakonom o postupku izvanredne uprave drugačije propisano), dužan je osim dijela Stečajnog zakona kojim se uređuje stečaj u obzir uzeti i odgovarajuće odredbe i pravila Zakona o računovodstvu i Zakona o porezu na dobit kojima se također uređuje postupanje u slučaju stečaja.

Isto vrijedi i za sva ostala društva nad kojima je pokrenut postupak izvanredne uprave.

sions and regulations of the Accounting Act and the Corporate Income Tax Act, which also regulate the procedure in case of a bankruptcy.

The same applies to all other companies for which the extraordinary management procedure has been initiated.

Therefore, precisely because **the Bankruptcy Act (Article 225) prescribes that by opening of the bankruptcy procedure, a new business year begins**, the Corporate Income Tax Act (Article 29 paragraph 3) prescribes that the **part of a business year up to the opening of the bankruptcy represents a tax period**. In addition, it should be taken into consideration that, in accordance with the provision of Article 48 paragraph 7 of the Corporate Income Tax Ordinance, the taxpayer under bankruptcy *does not make corporate income tax prepayments*.

Consequently, the application of the provisions of the Bankruptcy Act and the Corporate Income Tax Act applicable to the companies over which the bankruptcy procedure has been opened, means that the companies over which the extraordinary management procedure has been opened have:

- **an obligation – to prepare financial statements as of 9 April 2017 and to prepare and file a corporate income tax return for the period from 1 January until 9 April 2017, but also**
- **a right – to be exempt from making corporate income tax prepayments.**

According to some informal information, it is possible for the Tax Administration to head towards the interpretation of the Act in such a way that it would not be necessary to prepare financial statements and a corporate income tax return on the date preceding the date of the opening of the extraordinary management procedure. Our position is that such interpretation, if the Tax Administration officially took such stand point, would not be based on regulations. In addition, such interpretation would not support the financial situation of some companies over which the extraordinary management procedure has been initiated (and that applies to those which have an obligation to make corporate income tax prepayments), since the companies under bankruptcy are not obligated to make corporate income tax prepayments for the period of the duration of the bankruptcy (and

Prema tome, upravo zbog toga što je **Stečajnim zakonom (čl. 225.) propisano da otvaranjem stečajnog postupka započinje nova poslovna godina**, Zakonom o porezu na dobit je (čl. 29. st. 3.) propisano **da porezno razdoblje čini dio poslovne godine do otvaranja stečaja**. Uz to, u obzir treba uzeti i to da sukladno odredbi iz čl. 48. st. 7. Pravilnika o porezu na dobit, porezni obveznik u stečaju *ne plaća predujmove poreza na dobit*.

Znači, primjena onih pravila Stečajnog zakona i Zakona o porezu na dobit koja su primjenjiva na društva nad kojima je otvoren stečajni postupak, znači da društva nad kojima je otvoren postupak izvanredne uprave imaju:

- **obavezu – sastavljanja financijskih izvještaja na dan 9. travnja 2017. godine te sastavljanja i podnošenja prijave poreza na dobit za razdoblje od 1. siječnja do 9. travnja 2017. godine, ali i**
- **pravo – da ne plaćaju predujmove poreza na dobit.**

Prema nekim neformalnim saznanjima, moguće je da će Porezna uprava ići u pravcu tumačenja Zakona na način da ne bi bilo potrebno sastavljati financijske izvještaje niti prijavu poreza na dobit na datum koji prethodi datumu otvaranja postupka izvanredne uprave. Naš je stav da takvo tumačenje, ako bi Porezna uprava i službeno zauzela takav stav, ne bi bio utemeljen na propisima. Pored toga, ovakvo tumačenje ne bi išlo u prilog financijskoj situaciji nekih društava nad kojima je pokrenut postupak izvanredne uprave (i to onih koja imaju obavezu plaćanja predujmova poreza na dobit), obzirom da trgovačka društva u stečaju nisu obvezna plaćati predujmove poreza na dobit za vrijeme trajanja stečaja (a to su upravno one pravne posljedice postupka izvanredne uprave koje su izjednačene s pravnim posljedicama stečaja) te bi suprotan stav mogao značajno opteretiti likvidnost pojedinih društava.

those are exactly the legal consequences of the extraordinary management procedure which are equalized to the legal consequences of the bankruptcy) and the opposite attitude could significantly burden the liquidity of certain companies.

Tax Effects for Creditors

Neither the Extraordinary Management Procedure Act nor the Corporate Income Tax Act contain special provisions that would regulate the tax effects of a value adjustment or a write-off of amounts receivable from a debtor over which the special extraordinary management procedure was opened. However, the Extraordinary Management Procedure Act in Article 37, paragraph 1 prescribes as follows: "Rules on legal consequences of the opening of a bankruptcy procedure as prescribed by the special act applicable to bankruptcy procedures shall, as appropriate, apply to legal consequences of the opening of the extraordinary management procedure, unless otherwise prescribed by this Act." *In the context of tax effects, we believe this provision can be interpreted in a way that the tax-legal consequences of a value adjustment or a write-off of amounts receivable from a debtor over which a special extraordinary management procedure is being conducted are equal to the tax-legal consequences of a value adjustment or a write-off of a debtor which is under a bankruptcy procedure.*

Taking this into account, the following should be considered. The Corporate Income Tax Act generally prescribes that *value adjustments of receivables from buyers for the goods delivered and services provided* are recognized as a tax expense if the receivables were recognized as an income and if more than 60 days passed from the maturity of the receivables until the end of the tax period, and they were not collected until the fifteenth day before the day of filing a tax return. However, this is only a temporary tax recognition of value adjustments of receivables from customers since the amounts of value adjustments of receivables from customers that were recognized as tax-deductible expense in previous tax periods should be reported as a taxable revenue if all measures for the collection of receivables, in line with a due diligence of a prudent businessman, are not taken by the moment the collection is no longer possible due

Porezni učinci kod vjerovnika

Niti Zakon o postupku izvanredne uprave niti Zakon o porezu na dobit ne sadrže posebne odredbe koje bi regulirale porezne učinke ispravka vrijednosti ili otpisa potraživanja od dužnika nad kojim se provodi poseban postupak izvanredne uprave. Međutim, Zakonom o postupku izvanredne uprave je u čl. 37. st. 1. propisano „Na pravne posljedice otvaranja postupka izvanredne uprave na odgovarajući se način primjenjuju pravila o pravnim posljedicama o otvaranju stečajnog postupka propisana posebnim zakonom koji uređuje stečaj, osim ako ovim Zakonom nije drugačije određeno.". *U kontekstu poreznih učinaka, smatramo da se ovu odredbu može tumačiti na način da su porezno-pravne posljedice ispravka vrijednosti ili otpisa potraživanja od dužnika nad kojim se primjenjuje postupak izvanredne uprave jednake porezno-pravnim posljedicama ispravka vrijednosti ili otpisa potraživanja od dužnika nad kojim je pokrenut stečajni postupak.*

S obzirom na to, u obzir treba uzeti sljedeće. Zakonom o porezu na dobit je općenito propisano da se *ispravci vrijednosti potraživanja od kupaca za isporučena dobra i obavljene usluge* priznaju kao porezno priznati rashod ako je potraživanje bilo priznato kao prihod i ako je od dospijeća potraživanja do kraja poreznog razdoblja proteklo više od 60 dana, a ista nisu naplaćena do petnaestog dana prije dana podnošenja porezne prijave. Međutim, to je tek privremeno porezno priznavanje ispravaka vrijednosti potraživanja od kupaca jer je iznose ispravaka vrijednosti potraživanja od kupaca koji su u prethodnim poreznim razdobljima bili iskazani kao porezno priznati rashod potrebno iskazati kao oporezivi prihod ako do trenutka nastupa zastare prava na naplatu nisu obavljene sve radnje za osiguranje naplate potraživanja pažnjom dobrog gospodarstvenika. Isto bi vrijedilo i ako se prije nastupa zastare prava na naplatu izvrši otpis potraživanja. Pri tome, Zakon o porezu na dobit navodi kako se pod takvim

to the statute of limitation. The same would apply if a write-off is done before the statute of limitation. In this context, the Corporate Income Tax Act prescribes that such actions (which are sufficient for final tax recognition) include the following: if a lawsuit is filed in relation to receivables or if they are subject to enforcement procedure, *if they are reported in a bankruptcy procedure over a debtor* or *if a settlement is reached with a debtor, where the debtor is a corporate income taxpayer which is* *__an unrelated person__*, *in accordance with special regulations in the case of a bankruptcy, arbitration or mediation* (hereinafter: general rule on taking measures for collection). However, this general rule on taking measures for collection should be considered in the context of the specific circumstances of each individual case, as there may exist certain cases when it may be questioned whether the taking of any of the above-mentioned actions is sufficient for a tax recognition of expenses (e.g. the existence of guarantors where appropriate measures were not undertaken for the collection of receivables from guarantors).

Also, while for receivables from customers which had initially been recognized as revenues, value adjustments of such receivables may be temporarily recognized as a tax-deductible expense (as stated above), *these rules on the possibility of temporary tax recognition of value adjustments do not apply to claims on the principal amount of a loan for which rules on value adjustments of financial assets are applied*. However, if, based on a completed bankruptcy procedure, the inability to collect such financial assets is final, its write-off shall anyway be tax-recognized.

Furthermore, certain specifics apply to banks. These specifics are primarily related to the corporate income tax provision according to which *bank provisions* for risks on potential losses are recognized as an expense in the calculated amount, but up to the amount determined by CNB regulations. This provision has been included in Croatian corporate income tax regulations for many years. In practice, this provision is interpreted quite broadly, in a sense that, typically, value adjustments on receivables that banks recognize in accordance with the CNB regulations are recognized as tax-deductible expenses.

radnjama (koje su dovoljne za konačno porezno priznavanje) smatra: ako su potraživanja utužena ili se zbog njih vodi ovršni postupak, *ako su prijavljena u stečajnom postupku nad dužnikom* ili *ako je postignuta nagodba s dužnikom, obveznikom poreza na dobit* *__koji nije povezana osoba__*, *prema posebnom propisu u slučaju stečaja, arbitraže ili mirenja* (dalje: opće pravilo o poduzimanju mjera za naplatu). Ipak, ovo opće pravilo o poduzimanju mjera za naplatu potraživanja treba sagledati u kontekstu konkretnih okolnosti svakog pojedinog slučaja jer mogu postojati i određeni slučajevi kada može biti dovedeno u pitanje je li poduzimanje neke od gore navedenih radnji dovoljno za porezno priznavanje rashoda (npr. u slučaju postojanja jamaca prema kojima nisu poduzete odgovarajuće mjere za naplatu).

Također, dok kod potraživanja od kupaca koja su inicijalno bila priznata kao prihod ispravak vrijednosti takvih potraživanja može privremeno biti iskazan kao porezno priznati rashod (kako je gore navedeno), *ova pravila o mogućnosti privremenog poreznog priznavanja ispravaka vrijednosti ne vrijede za potraživanja po osnovi glavnice zajma na koja se primjenjuju pravila o ispravcima vrijednosti financijske imovine*. Međutim, ako je temeljem provedenog stečaja utvrđena konačna nemogućnost naplate takve financijske imovine, njezin otpis će biti ipak porezno priznat.

Nadalje, određene specifičnosti vrijede za banke. Ove specifičnosti su prvenstveno vezane za odredbu propisa o porezu na dobit prema kojoj se *rezerviranja kod banaka* za rizike od potencijalnih gubitaka priznaju kao rashod u obračunanoj svoti, ali najviše do visine koju određuju propisi HNB-a. Ova je odredba već dugi niz godina uključena u hrvatske propise o porezu na dobit, a u praksi se ova odredba tumači dosta široko, i to na način da se u pravilu i ispravci vrijednosti potraživanja koja banke provode u skladu s propisima HNB-a priznaju kao porezno priznati rashodi.

Posebno treba spomenuti i to, da je od 2017. godine u Pravilnik o porezu na dobit uključena i odredba koja propisuje da kada porezni obveznik, *u skladu s uvjetima i postupcima koje Zakon o porezu na dobit propisuje za potraživanja od kupaca*, utvrdi *gubitak s osnove* *__otpisa__* nenaplativih kredita, zajmova i druge financijske imovine *__uz pošti-__*

In particular, it should be mentioned that since 2017, the Corporate Income Tax Ordinance includes a provision that prescribes that when a taxpayer, *in accordance with the terms and procedures established by the Corporate Income Tax Act for receivables from customers,* establishes *a loss based on a write-off* of uncollectible credits, loans and other financial assets *subject to compliance with special regulations*, except in the case of financial assets by which proprietary rights are acquired, it is considered that the conditions for tax recognition of expenses on the basis of impairment of such financial asset are met. This provision is in fact unlawful because by this provision, the Corporate Income Tax Ordinance prescribed that certain rules of the Act also apply to those cases for which the Act did not so foresee – so, the legal foundation of this provision is problematic. However, if this is ignored, the question is still raised as to who can apply this provision, and different interpretations are possible in that regard. *We are of the opinion that this provision can only be applied by those taxpayers which are obliged to comply with special regulations (e.g. financial institutions) in respect to write-offs of credits, loans and other financial assets (other than the financial assets by which proprietary rights are acquired).*

The bankruptcy procedure and the procedure of a pre-bankruptcy settlement are regulated by the same act – that is the Bankruptcy Act. However, these are still different procedures. It should be noted that the Corporate Income Tax Act as a basis for the tax recognition of write-offs recognizes the write-off resulting from the debtor's bankruptcy procedure (provided that the creditor has taken the necessary actions), but that the Corporate Income Tax Act does not even mention the write-off based on a pre-bankruptcy settlement. However, *the Bankruptcy Act explicitly prescribes that, in case of a pre-bankruptcy settlement, the amount of a creditor's write-off is recognized as a tax-deductible expense, provided that this is done in compliance with a confirmed pre-bankruptcy plan.* This was required to be specifically prescribed by the Bankruptcy Act, since the Corporate Income Tax Act did not recognize the write-off within the pre-bankruptcy settlement as a tax-deductible expense.

As introductory stated, when it comes to write-offs of amounts receivable from a debtor over

vanje posebnih propisa, osim u slučaju financijske imovine kojom se stječu vlasnička prava, smatra se da su ispunjeni uvjeti za porezno priznavanje rashoda s osnove smanjenja vrijednosti takve financijske imovine. Ova odredba je zapravo nezakonita jer je tom odredbom Pravilnik o porezu na dobit propisao da se određena pravila iz Zakona primjenjuju i na one slučajeve za koje to Zakon nije predvidio – tako da je pravna utemeljenost ove odredbe problematična. No, ako se to zanemari, dodatno se postavlja pitanje tko sve može primijeniti ovu odredbu te su u tom dijelu moguća različita tumačenja. *Smatramo da se ova odredba može primijeniti samo od strane onih poreznih obveznika koji kod otpisa kredita, zajmova i druge financijske imovine (osim one kojom se stječu vlasnička prava) imaju obavezu poštivati posebne propise (npr. financijske institucije).*

Stečajni postupak i postupak predstečajne nagodbe su regulirani istim zakonom, a to je Stečajni zakon, no to su ipak različiti postupci. S obzirom na to, treba uočiti da Zakon o porezu na dobit kao osnovu za porezno priznavanje rashoda otpisa prepoznaje otpis do kojeg dolazi po osnovi stečajnog postupka dužnika (naravno, uz uvjet da je vjerovnik poduzeo potrebne radnje), ali da Zakon o porezu na dobit uopće ne spominje otpis do kojeg dolazi po osnovi postupka predstečajne nagodbe. Međutim, *Stečajnim zakonom je izričito propisano da se u postupku predstečajne nagodbe vjerovniku, koji u skladu s potvrđenim predstečajnim planom, otpisuje tražbinu od dužnika, iznos otpisane tražbine utvrđuje kao porezno priznati rashod.* Ovo je bilo potrebno posebno propisati Stečajnim zakonom jer Zakon o porezu na dobit otpis u okviru predstečajne nagodbe nije prepoznao kao porezno priznati rashod.

Kako je uvodno navedeno, kada je u pitanju otpis od dužnika nad kojim je otvoren postupak izvanredne uprave, smatramo da bi porezni učinci trebali biti jednaki onima kao da je nad dužnikom otvoren stečajni postupak. Međutim, *kada je u pitanju stečajni postupak nad dužnikom, odredbe iz Zakona o porezu na dobit su sročene na način da ostavljaju mjesta različitim tumačenjima u slučaju kada su u pitanju potraživanja između povezanih osoba.* Tako, može se postaviti pitanje zbog čega Zakon o porezu na dobit (prilikom navođenja radnji koje se načelno smatra-

which an extraordinary management procedure has been opened, it is our opinion that tax effects should be the same as those in case of a debtor which is under a bankruptcy procedure. However, *when it comes to a bankruptcy procedure over a debtor, the provisions of the Corporate Income Tax Act are set out in a way that leaves some room for different interpretations in case of claims between related parties.* Thus, the question may arise as to why the Corporate Income Tax Act (when listing actions that are generally considered to be sufficient for tax recognition of write-offs) states the reporting of claims in a bankruptcy procedure and also a settlement in case of a bankruptcy, but the condition of debtor being an unrelated party is only required in case of a settlement. We consider that it would be purposeless for a tax treatment of write-offs in case of a bankruptcy (e.g. if the write-off is based on the concluded bankruptcy plan) to be less favorable than in the case of a pre-bankruptcy settlement, so it should be taken into account that, in the case of a pre-bankruptcy settlement, it is clearly prescribed that a write-off can be tax-recognized even when the debtor is a related party, and this may indicate the legislator's intention. *In view of this, we consider that the unclear provision of the Corporate Income Tax Act regarding write-offs in case of a bankruptcy should be interpreted in such a way that neither in bankruptcy nor in pre-bankruptcy settlement, tax recognition of write-offs is limited solely to claims of unrelated parties. Of course, this is true provided that the procedures are conducted in accordance with the provisions of a special regulation, but certain risks of a different interpretation might exist if the procedures are implemented under circumstances which might indicate that they were implemented in such a way that favors the related parties.*

Of course, it should be considered that just reporting claims in a bankruptcy procedure and the fact that the bankruptcy procedure has been opened in some cases will not be sufficient for tax recognition of expenses (e.g. this may be questionable if there are guarantors against which appropriate measures were not undertaken for the collection of receivables, etc.).

Also, depending on the basis under which two parties are related, it may happen that two parties that were considered to be related until the

ju radnjama dovoljnim za porezno priznavanje otpisa potraživanja) navodi prijavu potraživanja u stečajnom postupku a također i nagodbu u slučaju stečaja, ali pri tome uvjet da dužnik nije povezana osoba navodi samo za nagodbu. Smatramo da ne bi imalo smisla da porezni tretman otpisa potraživanja u slučaju stečaja (npr. ako se otpis temelji na usvojenom stečajnom planu) bude manje povoljan od onoga u slučaju predstečajne nagodbe, pa treba uzeti u obzir da je u slučaju predstečajne nagodbe jasno propisano da otpis može biti porezno priznat i onda kada je dužnik povezana osoba, te to može ukazivati na to što je bila namjera zakonodavca. *S obzirom na to, smatramo da nejasnu odredbu Zakona o porezu na dobit koja se odnosi na otpise potraživanja u slučaju stečaja, treba tumačiti na način da niti kod stečaja niti kod predstečajne nagodbe porezno priznavanje otpisa potraživanja nije ograničeno samo na potraživanja od nepovezanih osoba. Naravno, to vrijedi uz uvjet da su postupci provedeni u skladu s odredbama posebnog propisa, a određeni rizici od drugačijeg tumačenja bi mogli postojati ako bi postupci bili provedeni pod okolnostima koje bi mogle upućivati na to da su provedeni na način da su time pogodovane povezane osobe.*

Naravno, treba voditi računa o tome da sama prijava potraživanja u stečajni postupak i provedba stečajnog postupka u nekim slučajevima ipak neće biti dovoljni za porezno priznavanje rashoda (npr. to može biti upitno ako postoji mogućnost naplate od jamca prema kojem nisu poduzete mjere naplate, itd.).

Također, ovisno o tome po kojoj osnovi su dvije osobe povezane, može se desiti da dvije osobe koje su se do trenutka otvaranja stečajnog postupka smatrale povezanima, to više nisu od trenutka otvaranja stečajnog postupka, pa i o tome treba voditi računa.

Prema tome, otpisi do kojih će doći zbog situacije u Agrokoru i društvima koja su uz njega vezana mogli bi biti porezno priznati na razini vjerovnika u obračunu poreza na dobit, no treba voditi računa da vjerovnik na vrijeme poduzme sve potrebne radnje vezane za naplatu potraživanja (uključujući prijavu tražbine sukladno odredbama ovog posebnog Zakona do 9. lipnja 2017.) i da o

moment of opening the bankruptcy procedure, are no longer related as of this moment, so this should also be kept in mind.

Accordingly, the write-offs that will take place due to the situation in Agrokor and its related companies, could be tax-recognized at the level of creditors in the calculation of corporate income tax, but it should be kept in mind that the creditor must take all the necessary actions related to payment of receivables in time (including the reporting of claims pursuant to the provisions of this special Act as of 9 June 2017), and to keep evidence of these actions, and any other circumstances that may affect the tax treatment should also be taken into account (e.g. whether will and when a settlement be reached, the possibility of collection from guarantors, etc.).

tim radnjama sačuva dokaze, a uz to treba voditi računa i o eventualnim ostalim okolnostima koje bi mogle utjecati na porezni tretman (npr. hoće li i kada biti sklopljena nagodba, mogućnost naplate od jamaca, itd.).

Tax Effects for Debtors

As already mentioned above, the Extraordinary Management Procedure Act in Article 37, paragraph 1 prescribes as follows: "*Rules on legal consequences of the opening of a bankruptcy procedure as prescribed by the special act applicable to bankruptcy procedures shall, as appropriate, apply to legal consequences of the opening of extraordinary management procedure, unless otherwise prescribed by this Act.*" As also already mentioned, in the context of tax effects, we believe this provision can be interpreted in a way that the tax-legal consequences of opening a special extraordinary management procedure are equal to the tax-legal consequences of opening a bankruptcy procedure, and this should be applicable to tax-legal consequences in the context of how corporate income tax is calculated, reported and paid. *Consequently, given the above-mentioned provision of Article 37, paragraph 1 of the Extraordinary Management Procedure Act, and taking into consideration Article 225 of the Bankruptcy Act and Article 29 paragraph 3 of the Corporate Income Tax Act, all persons over which the extraordinary management procedure is opened in 2017, should have, for corporate income tax purposes, two tax periods in 2017, i.e. one for the period from 1 January 2017 until the day of the procedure opening and the other for the period from the day of the procedure opening until 31 December 2017.*

Porezni učinci kod dužnika

Kako je prethodno već istaknuto, Zakonom o postupku izvanredne uprave u čl. 37. st. 1. propisano je: „*Na pravne posljedice otvaranja postupka izvanredne uprave na odgovarajući se način primjenjuju pravila o pravnim posljedicama o otvaranju stečajnog postupka propisana posebnim zakonom koji uređuje stečaj, osim ako ovim Zakonom nije drugačije određeno.*". Kako je također prethodno već istaknuto, u kontekstu poreznih učinaka, smatramo da se ovu odredbu može tumačiti na način da su porezno-pravne posljedice u slučaju otvaranja postupka izvanredne uprave jednake porezno-pravnim posljedicama koje bi postojale u slučaju otvaranja stečajnog postupka, te bi to trebalo vrijediti i na porezno-pravne posljedice u kontekstu načina obračuna, prijavljivanja i plaćanja poreza na dobit. Prema tome, s obzirom na gore navedenu odredbu iz čl. 37. st. 1. Zakona o postupku izvanredne uprave, a uzimajući u obzir i članak 225. Stečajnog zakona te članak 29. st. 3. Zakona o porezu na dobit, *sve osobe nad kojima je u 2017. godini otvoren postupak izvanredne uprave bi trebale za potrebe obračuna poreza na dobit u 2017. godini imati dva porezna razdoblja, jedno razdoblje od 1.1.2017. do dana otvaranja postupka i drugo razdoblje od dana otvaranja postupka do 31.12.2017. godine.*

This means that these taxpayers should be obliged to file two corporate income tax returns for 2017, namely:

- tax return for the period of up to the day of extraordinary management procedure opening - within four months after the expiration of that period, and
- tax return from the day of extraordinary management procedure opening until the end of the year – under regular deadlines for filing of tax applications, i.e. until the end of April 2018.

These deadlines are valid for those whose regular tax periods are equal to the calendar year, and the conclusion may be different in the case of those whose tax period differs from the calendar year.

However, in relation to this, it should also be taken into account that according to Article 48, paragraph 7 of the Corporate Income Tax Ordinance, a taxpayer over which a bankruptcy procedure is opened *does not pay corporate income tax prepayments*.

Further, *a special problem is the fact that the Extraordinary Management Procedure Act did not regulate the tax treatment of write-offs at the level of debtors, i.e. these write-offs would lead to taxable revenues.*

This problem has been noticeable within the framework of pre-bankruptcy settlement practice, so it would be logical that this was taken into consideration when drafting the Extraordinary Management Procedure Act. As write-offs of receivables due to the pre-bankruptcy settlement, bankruptcy procedure or Extraordinary Management Procedure are generally a tax-deductible expense at the level of creditors, including such write-offs to taxable revenues of debtors may seem a justifiable solution at first glance. However, economic justification and final tax effects of such a solution are very questionable. Thus, it should be taken into account that these procedures are carried out under specific regulations in a situation where the debtor is in significant difficulty and that by taxation of the income that the debtor will recognize on the basis of the write-off, it shall actually be taxed on something that has no economic substance or has insignificant economic substance. Although it is true

To znači da bi ove osobe za 2017. godinu trebale predati dvije prijave poreza na dobit, i to:

- prijavu za razdoblje do dana otvaranja postupka izvanredne uprave - u roku od četiri mjeseca od isteka tog razdoblja, te
- prijavu od dana otvaranja postupka izvanredne uprave do kraja godine - unutar redovnih rokova za predaju poreznih prijava, odnosno do kraja travnja 2018. godine.

Spomenuti rokovi naravno vrijede za one osobe čija su redovna porezna razdoblja jednaka kalendarskoj godini, a zaključak može biti drugačiji u slučaju osoba čije je porezno razdoblje različito od kalendarske godine.

Međutim, povezano s time, u obzir treba uzeti i to da sukladno odredbi iz čl. 48. st. 7. Pravilnika o porezu na dobit, porezni obveznik u stečaju *ne plaća predujmove poreza na dobit*.

Nadalje, *poseban problem predstavlja činjenica da Zakon o postupku izvanredne uprave nije uredio porezni tretman otpisa kod dužnika, odnosno ovi otpisi bi doveli do oporezivih prihoda*.

Ovaj se problem iskristalizirao u okviru prakse predstečajnih nagodbi, pa bi bilo logično da se je prilikom donošenja Zakona o postupku izvanredne uprave o tome vodilo računa. S obzirom da su otpisi potraživanja do kojih dolazi zbog postupka predstečajne nagodbe, stečajnog postupka ili postupka izvanredne uprave u pravilu porezno priznati rashod kod vjerovnika, uključivanje takvih otpisa u oporezive prihode dužnika se na prvi pogled može činiti pravednim rješenjem. Ipak, ekonomska opravdanost i konačni porezni učinci takvog rješenja su vrlo upitni. Tako, treba uzeti u obzir da su to postupci koji se provode prema posebnim zakonskim pravilima u situaciji u kojoj je dužnik u značajnim poteškoćama te da se oporezivanjem prihoda koji će dužnik proknjižiti po osnovi otpisa zapravo oporezuje nešto što nema ili nema značajnu ekonomsku supstancu. Iako je točno da dužnik od takvog otpisa ima određene koristi, upitno je u kakvoj korelaciji je vrijednost i trenutak ostvarenja stvarne koristi u odnosu na vrijednost koja se oporezuje i trenutak u kojem dolazi do oporezivanja. U situaciji kada postoji određeni potencijal za opstanak dužnika, takvi

that the debtor has certain benefits from such a write-off, the correlation of its value and the moment of realization of an actual benefit compared to the value that is being taxed and the moment in which the taxation is incurred is questionable. In a situation where a certain potential for the debtor's survival exists, such write-offs are generally conducted only to the extent necessary for the debtor to continue to operate, so, the taxation of such write -offs may be a threat to the debtor's recovery. Namely, *when such write-offs are recognized as revenues, whereby a debtor is obliged to pay a corporate income tax on such revenues, that income tax can be an obstacle for debtor's recovery and the beginning of ordinary business operations. Sometimes debtors have enough tax losses carried forward that can neutralize or at least reduce this negative tax effect of taxation of revenues resulting from write-offs, but this is not always the case. It seems that this has not been taken into account when introducing the Extraordinary Management Procedure Act.*

** Note: The comment provided above is based on regulations effective as of 8 June 2017.*

se otpisi u pravilu provode samo do razine koji su nužni da bi dužnik nastavio poslovati, pa upravo njihovo oporezivanje može biti prijetnja za oporavak dužnika. Naime, *kada se po osnovi takvih otpisa iskaže prihod, na koji onda dužnik mora platiti porez na dobit, upravo taj porez na dobit može dovesti do toga da dužnik ne uspije izaći iz poteškoća i započeti s normalnim poslovanjem. Ponekad dužnici imaju dovoljno prenesenih poreznih gubitaka kojima uspiju neutralizirati ili barem umanjiti ovaj negativan porezni učinak oporezivanja prihoda od otpisa, no to nije uvijek slučaj. Čini se da se o ovome nije vodilo računa prilikom donošenja Zakona o postupku izvanredne uprave.*

** Napomena: Prethodni osvrt se temelji na propisima koji su na snazi 8. lipnja 2017. godine.*

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Miramarska 24, 10000 Zagreb
Phone: +385 1 4699 555
www.sigmabc.eu
info@sigmabc.eu