

SEPARATION OF POWERS

National report: SERBIA

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-- Questionnaire --

1. Relationship between the Parliament and the Tax Authorities: The influence of the tax authorities on tax legislation

1.1. Does your Government have legislative competence on tax matters?

Within the Serbian legal system taxes may be introduced only through laws adopted by Parliament. This principle is based on the provision of Article 91.1 of the Serbian Constitution of 2006 (which is correspondent to the provision of Article 52 of the Serbian Constitution of 1990), stating that *the funds from which the competences of the Republic of Serbia, autonomous regions and local governments are secured from taxes and other revenues determined by the law*. The Serbian Constitutional Court has explicitly confirmed the above stated principle in its 1994 decision¹ in which it deemed unconstitutional the Government Decree dealing with the adjustment of the amounts of administrative fees for inflation.

However, the executive branch of government (the Serbian Government or the competent Ministry within it – usually the Ministry of Finance) is allowed to issue Decrees (the Serbian Government) and Regulations (the competent Ministry) whose purpose is to further clarify the provisions of the relevant Law.

1.2. Does your Government draft tax bills proposals and present them to Parliament?

Under Article 107.1 of the Serbian Constitution of 2006, the Serbian Government is one of the persons/authorities which are entitled to propose laws to the Serbian Parliament. In addition to the Serbian Government, any member of Parliament, the assembly of the autonomous regions, and at least 30.000 voters may submit legislation proposals, while the Serbian National Bank and the ombudsman may do so with respect to their particular areas of competence.

1.3. In case your answer to 1.1. and 1.2. is positive:

1.3.1 Does your Government usually exercise that competence?

The Serbian Government is predominant in drafting legislation proposals which are presented to the Serbian Parliament. For illustration purposes, out of approximately 80

¹ No. 357/93 from June 2nd 1994.

legislative proposals which are currently before the Serbian Parliament only 3 have been drafted and submitted by persons/authorities other than the Serbian Government.

With respect to draft tax bills, the Serbian Government is virtually the only source from which they are submitted to the Serbian Parliament.

1.3.2 Does your Parliament passively accept the draft bills provided by tax authorities or does it discuss them in detail and introduce changes to them?

All draft bills are discussed in detail by the Serbian Parliament, while they may be subject to changes depending on the various situations.

In general, the parliamentary majority will support the draft bill presented by the Government which it has elected. The draft bill may be subsequently altered by amendments, which if they are accepted by the Government and competent parliamentary bodies become an integral part of the proposal.

Amendments presented by the members of the opposition will be adopted usually only if the Government which proposed the draft bill accepts them. However, it happened in January 2009 that lobbyists were able to create a majority in the Parliament, encompassing votes from the opposition, as well as from some parties in the coalition Government, to vote for an amendment on the Excise Duties Law that had not been approved by the Minister of Finance. The specific excise on cigarettes was decreased by that amendment, while the *ad valorem* excise was increased, thus discriminating against the more expensive brands. The Ministry of Finance has proposed the new amendments to the Excise Duties Law to the Parliament, with an aim to eliminate such discrimination in taxation among cigarettes of different brands.

1.4. How does the literature in your country and your domestic Courts interpret the situation as you described it in 1.3. ?

This particular topic has not been the subject of particular interest in the academic community in Serbia, nor has the Constitutional Court deliberated on it so far.

2. The meaning of legal indeterminacy in tax matters

2.1. Is your domestic tax legislation vague, when defining the tax object, tax subject and/or tax base, leaving a large margin for discretion, or, is it, on the contrary, very detailed, avoiding indeterminate concepts?

The Serbian domestic tax legislation contains certain provisions which leave a considerable margin for discretion. One cannot qualify the tax laws as being excessively vague, given the fact that there are many cases of elaborately defined norms prescribing the tax object, tax subject, taxable base, etc. However, there are a number of legal norms that do not represent a solid base for interpretation, which is evidenced by a considerable number of requests submitted by the taxpayers for the opinions of the Serbian Ministry of Finance on the proper interpretation of both the tax laws and by-

laws whose purpose is to clarify them. However, the opinions of the Serbian Ministry of Finance are not binding and provide only limited security for the taxpayers.²

2.2. How do you/does the literature in your country evaluate the use of both techniques in tax legislation?

One shall find certain comments, dilemmas, critiques, proposals, etc. in the domestic literature about the legislative technique employed in the Serbian tax legislation (e.g., Dejan Popović, **Tax Law**, Pravni fakultet Univerziteta u Beogradu, 2008. – thin capitalization rules; Dejan Popović and Gordana Ilić-Popov, **Taxation of capital gains in Serbian tax law: three reasons for concern of tax lawyers**, in: *Development of Serbian legal system and its harmonization with the EU law*, Pravni fakultet Univerziteta u Beogradu, Beograd 2008, pp. 51-57; Svetislav Kostić, **Tax Residence of Individuals under Serbian Tax Law**, Anali Pravnog fakulteta u Beogradu, no. 2/2008, pp. 320-340; Boris Begović, Gordana Ilić-Popov, Boško Mijatović, Dejan Popović, **Reform of Taxation System**, Center for Liberal-Democratic Studies, 2003; etc.).

2.3. Are there independent domestic Courts obliged to control the constitutionality of tax legislation?

Under Article 45 of the Serbian Constitutional Court Law, the Serbian Constitutional Court has the competence to control the constitutionality of all legislation including tax legislation. However, the Serbian Constitutional Court is not *obliged* to assess the constitutionality in cases where no such request or initiative was presented to it, although it may choose to do so.

2.4. Is legal indeterminacy considered to be unconstitutional/ has a tax rule ever been declared unconstitutional due to legal indeterminacy?

Until now no tax rule has ever been declared unconstitutional due to legal indeterminacy in Serbia, while it would be highly questionable if legal indeterminacy could be considered as basis for declaring a legal norm unconstitutional.

3. The consequences of legal indeterminacy in tax matters

3.1. In case of legal indeterminacy not considered to be unconstitutional, who has the final word regarding the interpretation of the rule – the tax authorities or the domestic Courts?

The tax authorities in Serbia apply the law within the administrative procedure and issue acts applicable to individual taxpayers and their particular situations - decisions and conclusions (Article 34 of the Serbian Tax Procedure and Tax Administration Law). The Supreme Court is competent to decide on cases brought before it against the acts of the Serbian Tax Authority, provided that no further legal protection can be sought within the administrative proceedings. Naturally, judicial decisions are mandatory for all case participants including the Tax Authority. However, as part of the civil law

² The opinions of the Serbian Ministry of Finance on the proper interpretation of the legislation may even be the cause of further dilemmas, due to the fact that there have been situations of contradictory positions taken on identical or similar issues in subsequent opinions.

family, under the Serbian legal system court decisions do not have the power of *stare decisis*, nor are the tax authorities bound to apply judicial interpretation of legal norms in cases which are not covered by a particular decision. On the other hand, consistent judicial practice may have a significant influence on the application and interpretation of the law by the tax authorities, particularly in situations where it is evident that their decisions will be overruled by the Supreme Court.

3.2. Is there a constitutional basis for either the tax authorities or the domestic Courts having the final word on interpretation of indeterminate legal rules?

See below under 3.3.

3.3. Is legal indeterminacy normally fulfilled by regulations, administrative rulings and/or case law?

In Serbia the tax laws themselves provide directions which of their particular provisions will be more closely defined by regulations issued in most cases by the Ministry of Finance, or decrees issued by the Government. Besides by-laws, legal indeterminacy in practice is mostly fulfilled by the opinions of the Serbian Ministry of Finance which are, as stated previously, non-binding. Despite being non-binding, the opinions of the Serbian Ministry of Finance are the only source in which to seek guidance on proper interpretation in most situations, as the tax jurisprudence of the Serbian Supreme Court is not very significant with respect to the scope of issues it dealt with so far.

3.4. Are administrative rulings binding to the taxpayer and/or the Courts?

Under the Serbian legal system administrative interpretative rulings are not issued. Upon their request, the taxpayers may obtain non-binding opinions from the Serbian Ministry of Finance and/or the Serbian Tax Authority, while the same institutions issue instructions for internal use which are based on the hierarchical principle.

4. Relationship between the Tax Administration and the Domestic Tax Courts:

4.1. Do your domestic Courts control application of tax law by your Tax Administration?

The Supreme Court is in charge of the judicial control of the application of the tax laws by the Serbian Tax Authority.

4.2. Do your domestic Courts, in their case law, take into account rulings and binding information emerging from your Tax Administration?

As previously explained, the Serbian Tax Authority does not issue rulings and binding information. Opinions of the Serbian Ministry of Finance do not have any legal force and only illustrate its current position on a particular issue.

4.3. Does your Tax Administration take into account the domestic courts case law and/or the ECJ case law when applying the law?

The case law of the ECJ is not taken into account by the Serbian Tax Authority as Serbia is not a member of the EU. However, the ECJ case law, particularly with respect to VAT, may have influence in resolving domestic legislation interpretation issues.

The case law of the Serbian Supreme Court would be taken into account by the Tax Authority, particularly in situations where the jurisprudence has taken firm ground on a particular issue.

4.4. Is there a principle of reciprocal observation of the interpretation of tax law by the Tax Administration and domestic Courts?

Under the Serbian legal system, there is no principle of reciprocal observation of the interpretation of tax law by the Tax Administration and domestic Courts.

4.5. Is your Tax Administration legally bound to the decisions of supreme courts and/or the ECJ?

The Serbian Tax Authority is not bound by the decisions of the ECJ as Serbia is not a member state of the EU.

Supreme Court decisions are legally binding, as any court decisions, with respect to the particular case in which they have been issued and the parties involved. In other words, despite the ruling of the Supreme Court in a similar case, the Serbian Tax Authority may take a contrary position when dealing with a new situation.

On the other hand, Constitutional Court decisions are binding *erga omnes* and permanently prevent the application of the law, or its particular provision which has been declared unconstitutional.

4.6. Does your Tax Administration circumvent your domestic courts' case law?

There is a notable example where the case law of the Constitutional Court has been circumvented. Namely, Article 38 of the Property Taxes Law which stated that the title to real-estate may not be registered unless proof of paid property transfer tax, inheritance or gift tax is provided, was declared unconstitutional by the then Federal Constitutional Court in 2002, which stopped its application. However, in late 2004 the Law on the Changes and Amendments to the Property Taxes Law introduced Article 38a which is identical to the previous Article 38 (which was declared unconstitutional).

With respect to the decisions of the Supreme Court, the most significant problem exists in cases where so-called "limited jurisdiction" is applied. In other words, when the Supreme Court finds an individual act of the Tax Authority contrary to the law and annuls it, the issue is returned to the Tax Authority which is obliged to decide upon it again. Unfortunately, situations do exist where the Tax Authority will decide in the same manner again, contrary to the legal reasoning of the Supreme Court. Should this happen, the taxpayer must go through the same appeals process again (first within the

administrative proceedings and then, if unsuccessful, file a lawsuit before the Supreme Court), while the Supreme Court will usually apply "full jurisdiction" and not only rule on the case, but also directly apply the law itself, bypassing the Tax Authority.

5. Relationship between different legal sources (legal pluralism):

5.1. How do your Parliament, Tax Administration and Courts react before the different legal sources in tax matters (tax treaties and other treaties, EC Treaty, secondary law and soft law)?

Tax treaties submitted for ratification are adopted by the Serbian Parliament without significant discussions.

The Serbian courts have so far never dealt with a case involving the proper application of a tax treaty. Therefore, it is not possible to provide an opinion on how they would react before them.

The Serbian Tax Authority in principle abides by the ratified tax treaties, while their interaction with the domestic legislation is not always given proper attention when drafting new legislative proposals. For example, the most recent proposed Law on the Changes and Amendments to the Corporate Income Tax Law (withdrawn) contained provisions which would amount to PE discrimination under tax treaties, while its current text contains no practical method of application of the right to a tax credit for taxes paid in the source state on royalties and interest.

5.2. How is the hierarchy of different tax legal sources recognized by the constitution and the different domestic powers (Parliament, Tax Administration and Courts)?

In Serbia the Constitution is the most supreme legal act of the land with which all laws, by-laws, as well as international agreements entered into by Serbia must be compatible. By-laws and any other secondary legislation must adhere to the laws on which they were based.

Ratified international tax treaties are an integral part of the Serbian legal system and they derogate particular tax rules provided in domestic legislation.

Case law, academic works, comparative law and other secondary legal sources are not binding and their influence is dependant on the strength of the arguments and authority which stands behind them. The practice shows that there are cases in which academic works do influence the reasoning of the Tax Administration.

5.3. Does the taxpayer have access to different legal remedies that assure him/her effective protection of his/her rights granted by tax treaties, EC law and domestic law, or are those legal remedies in fact limited to protection of rights granted by domestic law?

As Serbia is not a member of the EU, legal remedies are limited to the protection of rights granted by domestic law. However, due to the fact that ratified tax treaties are an

integral part of the Serbian legal system, taxpayers may seek protection of their rights granted to them by tax treaties before domestic courts.

II

Please answer the following questionnaire, which aims at confirming your answers in I

1. Relationship between the Parliament and the Tax Authorities: The influence of the tax authorities on tax legislation

- 1.1. Does your Parliament control tax authorities in an efficient way? yes - **no**
- 1.2. Do tax authorities influence tax legislation to a major degree? **yes** – no
- 1.3. Does your Parliament
- a) usually accept the bills provided by tax authorities? **yes** - no
 - b) refuse the bills provided by tax authorities? **never** - sometimes - often
 - c) improve the bills provided by tax authorities? never - **sometimes** - often
- 1.4. Is your Parliament able to discuss the bills thoroughly? **yes** - no
- 1.5. Is there sufficient knowledge of tax law in Parliament? yes - **no**
- 1.6. Are tax rules often so vague, that tax authorities have to fill the gaps themselves by administrative regulations? never - **sometimes** - often
- 1.7. Have tax authorities the competence to typify and fill out the legal gaps without control by the Parliament? never - sometimes - **often**

2. Relationship between the Parliament and the Domestic Tax Courts

- 2.1. Are there independent (Tax) Courts in your country entitled to control legislation?

There are no independent tax courts entitled to control legislation in Serbia. Only the Constitutional Court has the prerogative to rule on the constitutionality of legislation passed by parliament, as well as by-laws.

- 2.2. If “yes”, do they control tax legislation: 0 ex ante or 0 **ex post**?
- 2.3. Are Courts competent to clarify whether a specific written tax rule is compatible with constitutional standards? **yes** (only the Constitutional Court) – no
- 2.4. If a high Court is convinced that a specific tax law violates constitutional standards, is the court in this case allowed to ignore the law? yes - **no**

3. Relationship between the Tax Administration and the Domestic Tax Courts

3.1. Are there independent (Tax) Courts in your country, obliged to control your Tax Administration?

There are no specialized Tax Courts in Serbia obliged to control the Tax Authority. This function is performed by the Supreme Court.

3.2. Are your domestic Courts bound to administrative regulations/orders/rulings, which are issued by tax authorities? yes - **no**

If "no", do the courts follow them in fact? never – **sometimes** (with respect to orders/rulings/etc) – often - **very often** (with respect to Regulations)

3.3. Are first instance Court decisions on a tax case, normally accepted by the Tax Administration (i.e. do they not try to appeal against the decision)? never - sometimes - often - very often

Due to the fact that tax cases in Serbia are settled before the Supreme Court, the Tax Authority may find legal remedies if a particular case is settled unsatisfactorily in only very limited situations.

3.4. Is a final judicial decision on a single tax case, followed by the Tax Administration not only in this case but also in all other similar cases? never - **sometimes** - often - very often

3.5. How does the Tax Administration react when it is convinced that the final judicial decision is wrong or not "acceptable" because, e.g., it is too expensive for the public?

a) Does it accept the (from their point of view) wrong decision? never - **sometimes** - often - very often

b) Does it try in another similar case to convince the Court to decide in a different way? never - sometimes - **often** - very often

c) Does it try to influence the Parliament to change the law? never - sometimes - **often** - very often

d) Does it make sure that the Internal Revenue Service will not follow this decision in similar cases? never - **sometimes** - often - very often

e) Does it try "to hide" such a decision, e.g., not publishing the decision with the result that the Internal Revenue Service does not know this decision? **never** - sometimes - often - very often