

Dear reader,

In this issue we have reported recent developments to Albanian legal framework on commercial companies, territory planning, environment and tax. We also reported on recent legislative initiatives in Kosovo regarding industrial property rights, accounting and financial reporting requirements.

Under the editorial “Article” we have presented to you an overview of choices on the transfer pricing method in Kosovo.

RECENT DEVELOPMENTS

Albania

- *Minimum share capital of Private Joint Stock Companies to be increased*
- *Council of Ministers to introduce/adopt the new legal framework on territory planning*
- *Council of Ministers to propose a draft law on trade and supervision of non-food products market*
- *Tax ruling on appointment of tax representatives in Albania*
- *New laws to govern environment protection*
- *Albanian Supreme Court clarifies late payment interest for tax obligations as a condition precedent to filing of an appeal*

Kosovo

- *New laws on industrial property rights*
- *A new law to govern accounting and financial reporting requirements*

ARTICLE

- *Choosing the right transfer pricing method*

We hope you enjoy reading this issue, and will be glad to welcome any of your queries should they arise in relation to the topics herein contained.

RECENT DEVELOPMENTS

Albania

- *Minimum share capital of Private Joint Stock Companies to be increased*

The Albanian Parliament has adopted the law no. 10475, dated 27.10.2011 “On an Amendment to Law no. 9901 “On Entrepreneurs and Commercial Companies” (not yet in force).

This law increases the minimum share capital of joint stock companies privately held from 2 million to 3,5 million Leke. It establishes a transitory period of 1 (one) year starting from entry into force of the law for existing joint stock companies to implement the new rule and increase their share capital.

Failure to implement the above within the transitory period shall cause the dissolution of the company and its de-registration from the National Registration Center, once the liquidation procedures have been completed.

- *Council of Ministers to introduce/adopt the new legal framework on territory planning*

Starting from September 2011 a new law “On Territory Planning” is governing constructions of immovable properties in Albania. For implementing this law (law no. 10119, dated 23.04.2009, as amended) the Council of Ministers has approved two regulations on the territory development control and standard planning (upon Decision no. 502, dated 13.07.2011 “On the Approval of the Uniform Regulation on the Control of Territory Development” and Decision no. 480 dated 22.06.2011 “On the Approval of the Standard Planning Regulation”, respectively).

Through the Regulation on Control of Territory Development, it is aimed to provide for the general and specific rules on the form and structure of the national and local control of territory development.

This regulation lists those types of works that require obtaining of either development permits or construction permits or both of them as well as obtaining of infrastructure permits that are subject to issuance of the prior declaration.

As for the Regulation on Standard Planning, its scope is to stimulate planning and sustainable territorial development, serving as the sole instrument upon which the local planning authorities assess the requests for development and issue permits for the execution of works.

This regulation specifies standard rules and conditions for the development of the land or of structures therein. It mainly rules the following: (i) the existing use of the land in an area; (ii) the construction intensity and other development indicators of the existing conditions in an area; (iii) the borders of the area, where the use and the indicators are specified, according to the above mentioned points; (iv) the cases where the regulation shall apply and the specific conditions of application, and (v) the steps that need to be followed in order to develop a project within the scope of this regulation

The Regulation on Standard Planning has a limited applicability in time and space. Its effects will extend only until approval of the local planning and development control instruments, and solely for the following areas:

(i) development in urban territorial areas categorized as land for construction in the Register of Immovable Properties; (ii) development in areas with existing categories for land use (land categorized for living areas and public infrastructure); (iii) development of structures in support of living areas (e.g. family garage, retail stores, bars and restaurants).

- ***Council of Ministers to propose a draft law on trade and supervision of non-food products market***

On September 2011, the Council of Ministers has proposed to the Parliament a draft law which will rule the trade and supervision of non-food products market and will substitute the existing law no. 9779, dated 16.07.2007 “On Security, Material Requirements and Assessment of Conformity for Non-Food Products”.

- ***Tax ruling on appointment of tax representatives in Albania***

The General Tax Directorate has issued on 4 November 2011 a tax ruling on the application of article 9 of law no. 9920 dated 19.05.2008 “On Tax Procedures in the Republic of Albania” as amended, and articles 15 and 55 of law no. 7928 dated 27.05.1995 “On VAT” as amended, with reference to the appointment of a tax representative in Albania by a foreign entity.

According to this tax ruling, in light of Law and Instruction of Minister of Finance On VAT, a foreign entity that is liable for VAT in Albania but does not have a location of its economic activity in Albania (e.g. an entity that supplies services related to immovable property located in Albania) should appoint a tax representative for VAT purposes.

It is important to note that the foreign company will be under this obligation even if its turnover does not exceed the VAT threshold.

Further, if the foreign entity creates a fiscal residence in Albania for the purpose of income tax (i.e. creates a permanent establishment), it is obliged to register a branch for both income tax and VAT purposes.

Appointment of a tax representative for payment of income tax is not possible.

- ***New laws to govern environmental protection***

Law on Environmental Protection (law no. 10431, dated 09.06.2011)

This law will enter into force eighteen (18) months from publication in the Official Gazette, which means on 29 December 2012.

During this transition period, it is expected that a new authority, the National Environment Agency which will evaluate the validity and accuracy of the documents to be submitted attached to the application for obtaining an environmental permit, is established and will operate under the supervision of the Minister of Environment.

According to the transitory provisions of the Law on Environment Protection, during the first three years from entrance into force of the law, the newly established National Environment Agency will carry out its activity in close cooperation with the Ministry of Environment. The law is silent on the modalities of such cooperation.

The secondary legislation enacted so far under the existing law on environmental protection (i.e. law no. 8934, dated 05.09.2002) will be replaced by new secondary legislation.

The Council of Ministers and Minister of Environment should finalize replacement of the existing secondary legislation within two (2) years from entrance into force of the said law. During this period, the existing secondary legislation will continue to be applicable.

The secondary legislation referred to herein above is focused mainly on technical criteria, data and documents necessary for the competent public authority to evaluate an application for environmental permit.

The following provisions of the existing law on environmental protection (law no. 8934, dated 05.09.2002) will survive after entrance into force of the new Law on Environmental Protection:

- Section IV (will be partially replaced by provisions of new Law on Environmental Impact Assessment described)

This section addresses issues related to rules and procedures applying to the environmental impact assessment to be conducted by entities as part of planning of the activity to be conducted, cross border environmental impact assessment, strategic environmental impact assessment, rules applicable to projects related to national security, the public authority involved in the process of examination of the request for environmental permit, bearing of costs related to environmental impact assessment and parties involved in the environmental impact assessment.

- articles (20) to (24)

The provisions of these articles address issues of the waste disposal, importation of hazardous wastes and substances, obligations of entities involved in these activities and other matters related thereto.

- articles (34) to (46) (will be replaced by the provisions of the new Law on Environmental Permits)

These articles describe: (i) the activities that might have an impact on environment and that should be subject to environmental permit and/or environmental declaration, integrated environmental permit (i.e. permit required in those cases where the activity involves several areas/fields, such as water, air etc. sensitive to environmental impact);

(ii) the documentation to be submitted by the applicant to obtain the environmental permit; (iii) timelines applicable for issuance of the environmental permit and environmental declaration; (iv) parties involved in the process of issuance of the environmental permit/environmental declaration; (v) content of the environmental permit, environmental permit format; (vi) cases when the environmental permits may be subject to amendments and transfers, fees applicable for issuance of environmental permit; (vii) activities which are subject to environmental authorization or approval, format and content of the environmental permits' registry, as well as the competent authority for its administration, general obligations of entities provided with environmental permits, obligation for the periodic environmental impact assessment etc.

- articles (49) and (51/1)

Article 49 governs issues related to prevention of industrial accidents in the context of activities involving hazardous substances. Article 51/1 provides for the concept of integrated prevention and control of pollution and integrated environmental permit.

These surviving provisions will continue to operate until replaced by provisions of the respective new laws to be passed by the Parliament addressing issues and areas which are actually covered by these provisions.

Law on Environmental Impact Assessment (law no. 10440, dated 07.07.2011)

This law is expected to enter into force on 31 January 2013 repealing entirely the law no. 8990, dated 23.01.2003, as well as secondary legislation enacted under this law.

The Law on Environmental Impact Assessment sets out the rules and procedures applying on the process of environmental impact assessment in the framework of activities which have or might have an environmental impact. As part of the development of a certain project/activity which might have an impact on environment, the developer should also perform the environmental impact assessment which is reflected in the report on environmental impact assessment.

Pursuant to the law the report on environmental impact assessment may be (i) preliminary report or (ii) in depth report on environmental impact assessment depending on the kind of activity intended to be conducted by the developer and impact that such activity might have on environment.

The law makes a clear distinction between activities being subject to the preliminary report and those being subject to the in depth report on environmental impact assessment by dividing them in annexes.

The completion of the in depth environmental impact assessment is followed by the issuance of the environmental declaration, which is one of the documents to be submitted to the competent authority that will issue the permit for development of the project being assessed (i.e development permit under the Law on Territory Planning).

Law on Environmental Permits (law no. 10448, dated 14.07.2011)

This law is expected to enter into force on 4 February 2013 and will repeal and replace:

- articles 34 to 46 of the new Law on Environmental Protection;
- articles 11 and 17 of law no. 8897, dated 16.05.2002 “On Protection of Air from Pollution” as amended;
- article 18 of law no. 9115, dated 24.07.2003 “On Environmental Treatment of Polluted Waters”;
- articles 31, 33 and 34 of the law no. 8093, dated 21.03.1996 “On Water Reserves” as amended.

This law describes: (i) the activities that might have an impact on environment and that should be subject to environmental permit and/or environmental declaration, integrated environmental permit (i.e. permit required in those cases where the activity involves several areas/fields, such as water, air etc. sensitive to environmental impact); (ii) the documentation to be submitted by the applicant to obtain the environmental permit; (iii) parties involved in the process of issuance of the environmental permit; (iv) content of the environmental permit, environmental permit format; (v) cases when the environmental permits may be subject to amendments and transfers, fees applicable for issuance of environmental permit; (vi) classification of environmental permits in three levels, respectively A, B and C depending on the type of activity to be performed the environmental impact; (vii) content of the environmental information registry, as well as the competent authority for its administration, general obligation of entities provided with environmental permits; (viii) obligations for the periodic monitoring and reporting etc.

In addition the law has centralized the list of all activities subject to environmental permit that were earlier listed in different laws (i.e. those listed herein above).

According to the transitory provisions of this law, the holders of environmental permit conducting activities classified under the categories A and B mentioned above should comply with the provisions of such law not later than eight (8) years after entrance into force of the law. In any case, within two (2) years from entrance into force of the law the permit holder should apply with the National Environment Agency (through the National Licensing Center) for the revision of the terms and conditions of the existing environmental permit.

- *Albanian Supreme Court clarifies late payment interest for tax obligations as a condition precedent to filing of an appeal*

Upon decision dated 30 May 2011, the Supreme Court has provided clarifications on one of the conditions precedent of filing an appeal against tax obligations: payment of tax principal amount and the late payment interest.

According to law no. 9920, dated 19.05.2008 “On Tax Procedures in the Republic of Albania”, appeals against tax obligations are accepted for examination if the tax principal amount and related interests are paid and the appeal is filed within 30 days.

Once a tax audit carried out near a taxpayer reveals tax obligations, the tax office issues a notification for tax liabilities where is indicated the amount of tax principal due. Such notification does not indicate the amount of interests for late payment but makes reference to the computerized system of tax authorities.

As a consequence the calculation and payment of these interests before filing an appeal becomes an issue.

The Supreme Court decision states that considering the progressive nature of interests, it is impossible to specify a definitive figure of the interest in the notification of tax liabilities. In light of accounting principles, interests run from the day the tax obligation is due until effective payment of the principal amount.

Therefore, according to the Supreme Court, the taxpayer should make itself the calculation of interests due. The court highlights that this is possible to the taxpayer considering that, in light of the legislation in place, it may obtain information, at any time, on the value of the tax liabilities in general and that of the interests in particular.

Kosovo

- *New laws on industrial property rights*

Law on trademarks

On 29 July 2011 the Kosovo legislator enacted a new law on trademarks (04/L-026). Signs of a distinctive character likely to be graphically represented such as words, personal names, designs, letters, numbers etc., are eligible to register as a trademark for goods and services in the Republic of Kosovo.

The applicant either natural or legal person for obtaining rights over the trademark should file an application with the Office for Industrial Property, body organized under the Ministry of Trade and Industry. The application sustains a first exam from formal point of view (i.e. duly filled in application form and regular accompanying documents) which is followed by the publication of the application with the office’s bulletin.

Upon publication and for a period of 3 months interested parties might submit their claims to the registration of the trademark based on absolute/relative grounds.

Registration of the trademark is made for 10 years indefinitely renewable. The registration of the trademark entitles the owner to take measures against infringers via administrative and judiciary procedures.

The rights attached to the registered trademark might be subject to exclusive and non-exclusive license.

The law on trademarks provides for the possibility of international registration of trademarks as per the Madrid Agreement and related protocol as well as for registration of Community trademarks, provisions that will enter into force with regard to the international registration of trademarks upon signature of the international treaties by the country and for the Community trademarks with the Republic of Kosovo being member of the European Union.

Law on patents

Law 04/L-029 dated 29.07.2011 “On Patents” sets out the legislative framework on patentability of inventions. Patent is granted to inventions in the field of technology, being a novelty, an innovative step and applicable to industry.

Nonetheless, patentability is excluded for processes regarding the cloning of human beings, inventions aiming to use human embryos for industrial and commercial purposes, etc. The application is filed with the Office for Industrial Property and the duration of registration is valid for 20 years starting from the moment of application, entitling by this way the patent owner to pursue its rights through administrative and judiciary proceedings.

Commencing on the third year a progressive fee is payable for the maintenance of patent’s rights.

To the patent owner along with economic rights the legislator recognizes the so-called moral rights, which by letter of law are inalienable.

The license on the patent might be granted on exclusive or non-exclusive basis. Compulsory license is awarded through legal proceedings initiated by interested parties, on the grounds that the patent is not sufficiently or not used at all by the owner. Moreover, the court might rule that a compulsory license is to be awarded for emergency cases such as for national security matters, protection of the public interest in the healthcare system, food supply, or in case where the pharmaceuticals covered by patent are intended to export in countries facing healthcare problems.

Nevertheless, as regards the compulsory license the legislator has postponed the application of the provisions of law to the entrance of the Republic of Kosovo in the European Union.

- *A new law to govern accounting and financial reporting requirements*

Starting from 10 September 2011, accounting, financial reporting requirements of business entities, audit requirements, qualifications for professional accountants, licensing of individual auditors and audit firms in Kosovo are governed by Law no. 04/L-014, dated 10.09.2011 “On Accounting, Financial Reporting and Audit” (the “New Law”).

The New Law introduces also Kosovo Financial Reporting Council (“KFRC”) a body similar to the previous Kosovo Board on Standards for Financial Reporting.

Overview of requirements applicable to preparation of the financial statements

Under the New Law, International Financial Reporting Standards (“IFRS”) as issued from International Accounting and Assurance Standard Board (“IAASB”) and approved by KFRC are obligatory for large, medium and small companies during the preparation of the “general purpose financial statements”.

Instead, for micro enterprises IFRS are not applicable but other accounting and reporting rules should apply (to be issued by KFRC).

In case of consolidated financial statements, they should be prepared in accordance with EU Directive 78/660/EEC.

The New Law defines the time limit for the preservation of the accounting documents. Payrolls should be preserved permanently, financial statements and supporting books are to be maintained up to ten years and supporting accounting evidences should be stored at least six years.

Accounting records are maintained in the official languages of the Republic of Kosovo and in Euro currency. Large and medium enterprises may keep the accounting records in English language as well, to the extent that the financial statements are translated in the official languages of the Republic of Kosovo.

The New Law requires the business entities to verify at least once a year, the existence and evaluation of assets, liabilities, and capital through the inventory process of these items supported with proper evidence.

Management of the business entity is held responsible for fairness and truthfulness of the financial statements.

The “general purposes financial statements” of the business entities should be filed with KFRC [with a copy to be submitted to the Ministry of Trade and Industry (MTI)], not later than 30 April of the following year. Consolidated financial statements should be filed with KFRC (with a copy to be submitted to the MTI), not later than 30 June of the following year. Failure to follow these deadlines will be subject to a penalty varying from Euro 5,000 to Euro 25,000.

Overview of requirements applicable to audit of the financial statements

Statutory audits in Kosovo should be carried out in accordance with the International Standards of Auditing (“ISA”) and related interpretations, guidance and pronouncements of IAASB.

ARTICLE

Choosing the right transfer pricing method

Contributed by Andi Pacani

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When related persons are transacting with each other, they must take into consideration Article 27 of the Corporate Income Tax Law, which deals with transfer pricing. The price applied by them will be examined by the tax authorities; therefore, in order to avoid reassessments and penalties, the legal requirements must be fulfilled.

The transfer price (i.e. the price applied by related persons) should be compared with the market value. Article 27.3 of the law provides that “the open market value shall be determined under the comparable uncontrolled price method and, when this is not possible, the resale price method or the cost-plus method or any other method as defined by sub-legal act may be used”.

Naturally, difficulties arise when implementing these methods in practice, especially in a recently developed legal environment, such as that of Kosovo.

In contrast to the “best method” approach of the Organization for Economic Cooperation and Development (OECD) and the United States, Kosovo legislation requires the taxpayer to determine the method according to a predetermined hierarchy.

Financial statements of large business entities should be audited by auditing firms, while those of medium business entities should be audited by auditing firms or individual auditors. Small business entities are not required to carry out the audit of their statutory financial statements.

Failure to submit the audited financial statements and maintain the accounting books within the deadlines prescribed by the New Law shall be subject to a penalty varying from Euro 5,000 to Euro 10,000. Penalties are also imposed in case of failure to apply the required accounting and auditing standards.

Specifically, the taxpayer should first assess if the comparable uncontrolled price can be used. If it cannot, the open market value should be determined by using the resale price method (which is more appropriate for entities engaged in the distribution sector) or the cost plus method (which is more appropriate for manufacturers).

When a taxpayer has grounds to believe that neither of these methods can be used, tax authorities may allow use of the profit split method and then the transactional net margin method. Short descriptions of each method are given in the relevant Tax Administration Law Instruction, but this is not exhaustive.

The use of each of the above methods must be documented; unfortunately, the documentation required to show that a method produces an arm's-length result is not specified.

These uncertainties, as well as the low number of transfer pricing cases handled by the tax authorities and the lack of consistency with OECD guidelines, have led to general confusion for taxpayers.

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Boga & Associates

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The practice maintains its commitment to quality through the skills and determination of a team of attorneys and advisors with a wide range of skills and experience. The extensive foreign language capabilities of the team help to ensure that its international clientele have easy access to the expanding Albanian and Kosovo business environment.

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