

Dear reader,

We are delighted to introduce you “**In Focus**”, our periodical publication, a contribution of our professionals covering the firm’s areas of practice. Keeping our clients focused to legal, tax and accounting developments that would affect their business in Albania and Kosovo, is one of our prime commitment to clients.

In this first issue, we have reported recent developments in Albania on Consumers Protection, Concession, and Tax, and Intellectual Property in Kosovo.

Under the editorial “Article” we have presented to you an overview of software’s VAT treatment under the Albanian law.

RECENT DEVELOPMENTS

- *Consumers Protection Commission implements Consumers Protection Law: Suppliers of goods and services for final consumers to pay attention to the law provisions during advertisement and invoicing of their supplies.*
- *Claimants of an irregular bidding concession process to address their claims to Public Procurement Commission.*
- *Use of state-owned land by commercial companies: taxation or privatization?*
- *Kosovo: New fees for filings of patents, trademarks and industrial design applications with Kosovo Intellectual Property Office.*

ARTICLES

- *“Software, good or service?”*

We invite you to “**In Focus**” and hope you enjoy reading this new feature, and will be glad to welcome any of your queries should they arise in relation to the topics herein contained.

RECENT DEVELOPMENTS

- ***Consumers Protection Commission implements Consumers Protection Law: Suppliers of goods and services for final consumers to pay attention to the law provisions during advertisement and invoicing of their supplies***

The Consumers Protection Commission (“Commission”), as the supervising authority under the Consumers Protection Law (law no. 9902, dated 17 April 2008) (the “Law”), has been playing an active role of “consumers’ advocate”.

In a recent administrative proceeding during April 2010, the Commission was focused in implementing two of the provisions of the Law on advertisement and publication by business operators of the product price as well as invoicing procedure.

The Commission clarified that an advertisement campaign where the advertised product price is missing indication whether value added tax (VAT) is included or not, is caught by article 15/1 and article 15/4 (c) of the Law.

Subject to the Commission’s clarification, depending to the circumstances of the case, the offer must also indicate all additional expenses for transportation, mail delivery or other, if charged, in case such expenses may not be reasonably and preliminary calculated.

The Commission’s opinion is that an advertisement which fails to specify the above will be treated as “an unfair business practice, misleading the consumers and influencing its decision on such offer”.

Under article 15/1 of the Law, a misleading trade practice is established in cases where subject to all circumstances and restrictions of communication tools, the information needed by the average consumer enabling the decision making process on that trade, is missing and the average consumer takes a decision which would have not been otherwise taken.

According to article 15/4 (c) of the Law, in the context of an offer, the following is considered as material information: the final price payable by the consumer or the manner of calculation of the price, including an indication whether the price includes taxes or not.

As for the invoicing procedure, the Commission finds that constitutes a breach of article 40 of the Law, the non delivery of the invoice at the customer’s address not later than 15 calendar days before the term of payment.

Subject to paragraph 5 of the said article, the invoice should be delivered by mail or handed over personally to the customer at its address and within the above term.

The infringement to article 15 and article 40 of the Law is subject to a penalty of Leke 70,000 (approx. EUR 520).

- ***American Chamber of Commerce in Albania shall address to the General Tax Directorate a request for the extension of the deadline for filing VAT purchase and sale ledgers, on the 10th day of the following month instead of the current deadline (5th day of the following month)***

For more information on the said request, visit www.amcham.com.al. Detailed information on the matter, can be found at http://bogalaw.com/pdf/Tax_Alert_02-10.pdf.

- ***Claimants of an irregular bidding concession process to address their claims to Public Procurement Commission***

The Council of Ministers approved on 5 May 2010 the normative act (having the effects of a law approved by the Parliament) “On Some Amendments to Law no. 9663, dated 18.12.2006 “On Concessions” (“the Act”). The said Act, which constitutes the second amendment to the Concession Law in less than 6 months, was approved by the Parliament on 20 May 2010.

According to the provisions of the Act, the authority in charge for the supervision of the concession procedures shall be the Public Procurement Agency (the “PPA”). Claims of disqualified bidders seeking administrative revision of the bidding concession procedures should be addressed to the Public Procurement Commission (the “PPC”).

Under the old provisions of the Concession Law (as introduced by law no. 10157, dated 15.10.2009) the authority in charge for supervising the concession procedure and reviewing the claims for administrative revision of the bidding process was the Concession Agency (“the CA”). In fact, the CA never became operative since the Council of Ministers had not adopted the regulatory framework providing for the rules on organization and functioning/operation of the agency. This led to confusion as regards the authority in charge with such matters and several claims were in practice filed with the PPA.

Upon entry into force of the Act, PPC shall act as “one stop shop” authority as concerns the administrative revision of the concessions bidding and public procurement procedures, considering that PPC is the highest body in the public procurement sector (law no. 9643, dated 20.11.2006 “On Public Procurement”).

One of the conditions precedents for the PPC to take into examination the claims for administrative revision of a concession bidding procedure is payment by the claimant of a fee equal to 10% of the bid security. The amount of this fee is different from that applicable in cases of administrative revision of the procurement procedure (which is 0.5% of the value of the limited procurement fund as per Decision of the Council of Ministers no. 261, dated 17.3.2010).

The PPC decision constitutes a final administrative decision. Afterwards, the claimant may file its claims (should the claimant be not satisfied by the decision) with the court, within 30 days after receipt of the notification of PPC decision.

Additionally, all claims for administrative revision addressed to the CA or PPA, prior to the entry into force of the Act, shall be examined by PPC and the term of examination of the claims shall begin upon submission/forwarding of the file to PPC.

- ***Use of state-owned land by commercial companies: taxation or privatization?***

According to law no. 10270 passed by the Parliament of Albania on 22 April 2010 (effective from 6 June 2010), individuals and legal entities that use state-owned land shall be bound to pay an annual tax on use of the state-owned land. The lease payments performed so far for the use of state-owned land will not be anymore applicable. The tax rate is 10 percent of the value of the land. The value shall be the one determined by the Council of Ministers’ decision implementing the Law on Return and Compensation of Property.

Within 1 month from entry into force of law no. 10270, the entities subject to this law are required to report the data of the property and its use to the Regional Tax Directorates. Nevertheless, the user of state-owned land is entitled to exercise the right of purchase of entire or part of the used land.

Law no. 10270 is not applicable to the state-owned land used for purposes of investment, touristic land or land in process of legalization.

- ***Kosovo: New fees for filings of patents, trademarks and industrial design applications with Intellectual Property Office***

Persons seeking to protect patents, trademarks and industrial designs in Kosovo have to apply for registration with the Intellectual Property Office (“IP Office”).

The said Office started its activity by mid 2007, and since then its operations show improvements, specially in the number of registration certificates or revalidation certificates of trademarks issued by the Office, so far. Data base of the Office is still under construction.

As a consequence of the day-to-day dealing with several applications and requirements of applicants for new services of the IP Office, for which specific tariffs were not officially established, amendment of the relevant Instruction of Minister of Finance became necessary.

The amendments were approved by the Minister of Trade and Industry of the Republic of Kosovo on 23 September 2009 (Administrative Instruction no. 2009/19 amending Instruction no. 2007/19).

Instruction no. 2009/19 establishes the tariffs for new services of IP Office and in some cases, has reduced the existing fees (English version of Annexes of the Instruction as published by the Ministry of Trade and Industry of Kosovo can be found at <http://www.bogalaw.com/repository/Fees%20-%20Intellectual%20Property%20Office%20Kosovo.pdf>)

Fees for services provided by the IP Office not listed in the Instruction will be approved by the Minister of Trade and Industry upon proposal of the head of the IP Office.

The Instruction no. 2009/19 has entered into force upon its signature by the Minister (as of 23 September 2009). To be noted that the amendments do not apply to those fees already paid for applications or other filings made as per the previous Instruction no. 2007/19.

- ***Government of Kosovo approves the draft laws “On Labor” and “On Environmental Impact Assessment”***

Both the said draft laws approved by the Government on 30 April 2010 have been submitted to the Parliament of the Republic of Kosovo for examination and approval.

ARTICLE

“Software: good or service?”

Contributed by Andi Pacani

All the companies in the course of their business are making use of information technology, computers and software. Fiscal treatment of computers and hardware is easy task and the practice is already established. On the other hand, the fiscal treatment of software is still a grey area and for the time being there is no consolidated practice in Albania. This situation derives as a consequence of different types of software and different ways of supplying such products.

There are software supplied as incorporated in hardware (Original Equipment Manufacturer license) and their treatment is very straight. The value of software is incorporated in the value of the hardware and is taxed accordingly.

In other cases, software is supplied in standard forms (off the shelf) which are mass produced items, freely available to all customers and usable by them, independently, after installation.

They are made up of a coherent set of programs and support material and often include the service of installation, training and maintenance. Personal computer software, home computer software and game packages are part of this category. Customized/specific software that are developed to comply with the requirements of the purchaser are another form of software supplied.

There are different ways of supplying software. Generally, the software is supplied through a medium (CD, DVD, USB or hard drive) or can be supplied electronically (downloaded from internet).

The primary question arising at the moment of purchase of the software is: is it a supply of services or of goods?

The answer to this question will clarify to some extent the fiscal treatment of foreign supply of software in Albania.

If classified under the category of goods, the software will be imported following the custom procedures. Instead, should it be treated as service, the reverse charge mechanism would be applicable in order to include such supply in the VAT system and avoid any distortion of competition.

According to Albanian VAT law (law no. 7928, dated 27.04.1995), supply of goods means a transfer of the title of the ownership on movable or immovable property.

EU Directive on VAT 112/2006 (as amended) defines the supply of goods as the transfer of the right to dispose of tangible property as owner.

Both definitions do not clarify the treatment since:

- purchase of software does not imply *per se* an automatic alienation right over the software (i.e. right to resell);
- in some cases the software has a tangible form (i.e. prepackaged software).

Usually, the buyer purchases only the right to use the software and not to alienate such right.

Due to complexity and diversity of the software supplies, it would be helpful if taxpayers and tax authorities may make reference to guidelines of EU VAT Committee.

In particular, EU VAT Committee issued on 25 May 1993 its guideline no. 38, which suggested that the standard software be considered as import of goods and the taxable amount on importation will be the whole value (medium and the data) except when:

- the transfer of the right to dispose of the property cannot be established;
- the goods are not tangible as there is no support or when the subject of the contract is the transfer of the copyright.

Therefore, if the Albanian tax authorities would follow the above guideline, software supplied electronically (i.e. considered as intangible and falling under the above second exemption) and software customized according to the needs of the purchaser will be treated as services; therefore, for VAT purposes, their supply will be subject to application of the reverse charge mechanism.

For clarification, in the case of customized software, the medium would be treated as an accessory to the data and both elements would be taxed as a single supply of services.

Considering the technicality of the matter and lack of experience of local tax officers for evaluation of such technical aspects of the supply of software, adoption of guidelines by the Albanian General Tax Directorate through a tax ruling on the matter becomes necessary.

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Boga & Associates

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