IMPORTANT MODIFICATIONS ON FISCAL LEGISLATION - A MAJOR IMPACT UPON PRACTICAL DECISIONS OF LEGAL PRACTITIONERS AND OTHER PARTICIPANTS ON THE MARKET

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Abstract

The end of 2020 brought some major modifications on the fiscal legislation. As we can see, the impact will be significant taking in consideration that these modifications will bring some changes which will affect not only the fiscal practitioners or the lawyers or the administrative personnel but all people involved in fiscal transactions, in a word, the whole market. This study is the first step in an analytical analyse of these modifications trying to underline the impact on the market. Also, we have to have in mind that the fiscal legislation was amended year by year which meant a fiscal instability . We will try to see if these new changes will bring more predictability for all actors involved in this process.

Keywords: *Fiscal Code, fiscal authorities, fiscal documents, VAT, independent activities*.

1. Introduction

Legislative changes have always had a rather aggressive impact on civil society, especially when they directly affect the business environment that has had and still has a something to say, perhaps harder than citizens, viewed individually. That is why the changes of the fiscal legislation always enjoy maximum attention. I really wonder if we should put the verb to rejoice in quotation marks, because what changes is not always beneficial. Not to mention the harsh impact of this business environment, quite harassed, per say, in 2020 by the medical and social crisis generated by the COVID 19 virus.

Besides the direct impact on the business decision, the changes in taxation have raised an equally controversial issue: the amendment of both the Fiscal Code and the Fiscal Procedure by an Emergency Ordinance and not by parliament procedure.

The impact of adopting this solution has not always been good because it has generated substantial changes on short term. Or, the business environment and even the citizens were not and are not always ready for such a thing. Any economic impact should be weighed, adopted by consulting with the involved factors after conducting short, medium and long term analyses and previsions.

Taxation has a contractual nature in a way that together with the monetary policy contributes considerably to the achievement of the economic policy - the proximate gender of the two institutions.[1]

Also, a measure adopted should be allowed to generate the expected effects and not be amended again and again, thus leading to unpredictability, frustration and finally to a negative reaction of the legal regulation to its applicability.

The doctrine is unanimous in stating that "This source of law (s.n. Fiscal/Tax Code) is fully present in the field of social relations governed by public fiscal and financial law, but its particularities reside not in the general legal regime of the law, Government Ordinance and Emergency Ordinance, but relative to the special legal regime applicable to certain categories of laws, Ordinances or Emergency Ordinances: ... As a rule, the amendment must be promoted in public discussions with 6 months prior to the date of its enforceability."[2]

2. Presentation of the actual situation submitted to the analysis. The incidental legal framework

The market participant affected by the tax decisions incidental in this article states that in 2019 a number of new apartments with VAT included were purchased by a natural entity from a real-estate developer, in order to resell or lease them. Starting with 2021, the acquirer desired to sell these apartments.

The natural entity is not registered for VAT purposes, but practices independent activities through an entity registered for VAT purposes.

Is the raised legal issue limited to the situation of determining the VAT treatment applied to the sale of apartments considering the quality of taxable person registered for VAT purposes for liberal activity?

How will the sale of apartments be treated from the income tax perspective, as being from personal patrimony or as an independent activity?

Can the purchase/sale of apartments be carried out in reverse charge?

Can the subsequent sale of these apartments be made for a fee or is it exempted?

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[1] Mădălin Irinel Niculeasa, *Summa fiscalis. Tratat de drept fiscal si financiar public*. Edition, reviewed and completed, Universul Juridic, Bucharest, 2014, p. 33.

[2] Mădălin Irinel Niculeasa, op. cit, p. 245.

Does a natural entity have to register for VAT purposes or does one use the same VAT code that one has for an independent activity?

Will the tax paid for each of the five apartments be 3% on the income achieved from sale, from which we deducted the non-taxable amount of 450,000 lei?

2.1. The legal framework

- G.E.O. no. 44/2008 regarding the development of economic activities by authorized natural entities, individual enterprises and family enterprises[3];
- Law no. 227/2015 on the Tax Code, with further completions and amendments[4];
- The methodological application regulation of Law no. 227/2015 on the Tax Code, approved by Government Decision no. 1/2016 with further completions and amendments, hereinafter referred to as the Methodological Regulations[5].
- Law no. 207/2015 on the Tax Procedure Code, with further completions and amendments[6].

2.2. The legal nature of VAT

The basis for tax establishment resides the need of the state to gather resources to cover the expenses it has to make in order to meet its economic and social function.

At the basis of establishing taxes in Romania, there are a series of principles:

- Neutrality of tax measures;
- Certainty of taxation;
- Fiscal equity at individual level.[7]

The European Union lawmaker, when defining value added tax (”VAT”) as a general consumption tax applicable to all transactions consisting of supplies of goods or services for consideration, does not consider transactions free of charge at their nominal value.[8]

According to art. 1 of Directive no. 2006/112, the principle of the common system of VAT presumes the application of a general consumption tax on goods and services exactly in proportion to the price of goods and services, no matter the number of operations carried out in the manufacturing and distribution process prior to the stage in which the tax is perceived.

For each transaction, VAT, calculated on the price of the goods or services at a rate applicable to the goods or services in question, becomes chargeable after deducing of the amount of VAT directly borne by the various components other than the price.[9]

2.3. Fiscal treatment

Purchasing apartments and then selling them, represents, usually, an economic activity, for which authorization is required based on the provisions of the G.E.O. no. 44/2008 regarding the development of economic activities by the authorized natural entities, the individual enterprises and the family enterprises, with further completions and amendments.

Likewise, the purchase of apartments and selling them afterwards can also be seen as a generating fact. The generating fact represents the fact by which the necessary legal conditions for the exigibility of the tax are met. This is both the national definition and the Community definition.[10]

Taxable operations in Romania represent the delivery of goods carried out for consideration on the Romanian territory by a taxable person acting as such, i.e., those economic activities that constitute or are assimilated with a supply of goods, performed by a taxable person, with payment.[11]

The exercise of an independent activity supposes its development regularly, continuously, on own account and pursuing incomes to be achieved.

In accordance with Art. 7, point 3 of the Tax Code, an independent activity represents any activity carried out by a natural entity for the purpose of achieving income that meets at least 4 of the following criteria:

- the natural entity has the freedom to choose the place and the way of carrying out the activity, as well as the work schedule;
- the natural entity has the freedom to carry out the activity for several customers;
- the inherent risks to the activity are assumed by the natural entity carrying out the activity;
- the activity is carried out by using the patrimony of the natural entity carrying out that activity;
- the activity is exercised by the natural entity using the intellectual capacity and/or one’s physical performance, depending on the specifics of the activity;
- the natural entity is part of a professional body/order with a representative function, with the profession developed being regulated and supervised, according to the special regulatory documents that rule the organization and exercise of the respective profession;
- the natural entity has the freedom to carry out the activity directly, with employed staff or through collaboration with thirds in accordance with the law.

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[3] Published in the Official Gazette, Part I under no. 328 as of April 25th, 2008.
[4] Published in the Official Gazette, Part I under no. 688 as of September 10th, 2015, as amended by Law no. 230/2020.
[5] Published in the Official Gazette, Part I sub no. 22 as of January 13th, 2016.
[6] Published in the Official Gazette, Part I sub no. 547 as of July 23rd, 2015.
[7] L. Țâțu, C. Serbănescu, D. Ștefan, D. Cataramă, A. Nica, E. Miricescu, *Fiscalitate, De la lege la practică,* C.H. Beck press, Edition IV, Bucharest, 2007, p. 1.
[8] Mădălin Irinel Niculeasa, op. cit., p. 762.
[9] Mădălin Irinel Niculeasa, op. cit., p. 763.
[10] Mădălin Irinel Niculeasa, op. cit., p. 892.
[11] Mădălin Irinel Niculeasa, op. cit., p. 811.

Natural entities can carry out economic activities, opting for one of the following possibilities:

- as a self-employed person;
- as a sole proprietor of an individual enterprise;
- as a member of a family business.

The natural entities are authorized at the Trade Register Office and are registered at the competent tax body by submitting the form (070) Statement of fiscal registration / Statement of trades / Statement of deregistration for natural entities who carry out economic activity independently or exercise free professions.

The activities carried out by a natural entity must be analysed from the VAT perspective as a whole, as it results from the provisions of art. 266 p. (1) point 4 of the Tax Code. Therefore, for all economic activities carried out by a natural entity as a taxable person, a single registration code is assigned by the competent tax body for VAT purposes.

We state that neither art. 316 of the Tax Code, regarding the registration of taxable persons for VAT purposes, nor the methodological regulations for the application of Title VII of the Tax Code, do not provide obligations regarding a new registration for VAT purposes of taxable persons who have already registered for VAT purposes as natural entities and which are subsequently registered at the Trade Register Office based on Government Ordinance no. 44/2008.

Likewise, according to art. 82 para. (1) of the Tax Procedure Code, "any person or entity that is the subject of a fiscal legal report is fiscally registered receiving a fiscal identification code", the purpose of the fiscal registration being the assignment for each taxpayer of a single fiscal identification code.

Under the circumstance where the natural entity has registered for value added tax purposes and subsequently is authorized according to G.E.O. no. 44/2008, the competent fiscal body will notify the Trade Register Office with the registration code already assigned to the respective natural entity, because as we showed above, a subject of fiscal law, regardless of the number of activities, must be identified with a single tax identification code.

From the VAT perspective, the sale of apartments is a taxable operation in Romania either by applying the standard rate of 19% or by applying the reduced rate of 5%, if the conditions imposed by law for home sales in the Romanian social policy are met.

Even if the natural entity is registered for VAT purposes, the operation is not within the scope of VAT, if the respective apartment is from the personal patrimony of the natural entity, without being an apartment from the business patrimony, for example an apartment built by the natural entity as a real estate developer.

If the apartment to be sold is part of the personal patrimony (for example, it is the home residence of the natural entity), the operation does not have an economic character because it is considered that it is part of the personal patrimony and not of the business patrimony. The real estate would be considered from the patrimony of the business if it had not been used for personal purpose, either as a home or as a holiday home.

In this case, the provisions of art. 269 of the Tax Code application regulations, point 4, p (2): "In applying the provisions of paragraph (1), natural entities are not considered to carry out an economic activity in the scope of tax application when they achieve income from sale of personal property or other property, which has been used by them for personal purposes. The category of property used for personal purposes includes construction and, where appropriate, the land related to them, personal property of natural entities who have been used as homes, including holiday homes, any other property used for personal purposes by the natural entity, as well as property of any kind inherited or acquired as a result of remedial measures provided by the laws on the reconstitution of property rights".

If the real estate has not been used for personal purposes by the natural entity or has been purchased for resale, the operation falls within the scope of VAT, in which case it can be sold by applying the exemption regime regulated by art. 292 p. (2) letter f), but only if the respective apartment is not a new construction.

The new construction is defined by regulations, at point 55 p. (5) of the Application Regulations of art. 292 p. (2) letter f) of the Tax Code: "If the delivery of a construction takes place before the date of the first occupation, as the first occupation is defined in paragraph (3), the delivery of a new construction shall be considered to take place".

The definition of the new construction can also be found in p. (3), (4) of the Application Regulations of art. 292 p. (2) letter f) of the Tax Code:

"(3) The date of the first occupation, in case of a construction or of a part of the construction that has not undergone transformations of the nature provided in art. 292 p. (2) letter f) point 4 of the Tax Code is considered to be the date of signing by the beneficiary of the final acceptance report of the construction or of a part of the construction. The final acceptance report means the acceptance report at the end of the works, concluded according to the current legislation made under own management, the date of the first occupation is the date of the document on the basis of which the construction or the part of the construction registered in the accounting records as a fixed tangible asset.

(4) The date of the first use of a construction refers to constructions that have undergone transformations of the nature of those provided in art. 292 p. (2) letter f) point 4 of the Tax Code.

The date of first use means the date on which the beneficiary signs the final acceptance report of the transformation works of the construction in question or of a part of the construction. The final acceptance report means the acceptance report at the end of the works, concluded according to the legislation in force. In the case of transformation works of a construction or part of the construction in own management, the date of the

first use of the asset after the transformation is the date of the document based upon which the value of the construction or part of the construction is increased by the value of the respective transformation.

According to art. 292 p. (2) letter f) of the Tax Code the following are specified "2) The following transactions shall also be exempt from duty:

f) delivery of buildings / parts of buildings and of the lands on which they are built, as well as of any other lands. By way of exception, the exemption does not apply to the delivery of new construction, parts of that or new build-up lands.

For the purposes of this article, the following are defined:

- buildable land represents any arranged or unarranged land, on which constructions can be carried out, according to the legislation in force;
- construction means any structure fixed in or on the ground;
- the delivery of a new construction or part of it means the delivery made no later than December 31st of the year following the first occupation or use of the construction or part of it, as the case may be, following the transformation;
- a new construction also includes any transformed construction or transformed part of a construction, if the cost of transformation, excluding tax, amounts to at least 50% of the value of the construction or part of the construction, excluding the value of land, after transformation, respectively the value recorded in accounting in the case of taxable persons who are required to keep accounting records and who do not apply the cost-based assessment method in accordance with International Financial Reporting Standards, or the amount expertise/assessment report, in the case of other taxable persons. If only a part of the construction is alienated, and its value and the related improvements cannot be determined based on the accounting data, they will be determined based on an expertise/assessment report ".

In conclusion, if the sale of the apartment is made by the natural entity, in his capacity as an authorized natural entity/self-employed, in addition to VAT, one owes income tax for independent activities, contribution for social insurance and contribution for social health insurance, as follows:

- according to art. 148 p. (1-4) of the Tax Code, natural entities who achieve income from independent activities from one or more sources and/or income categories, owe the social insurance contribution, if they estimate for the current year net income whose cumulative value is at least equal to 12 minimum gross salaries per country, in force at the deadline for submitting the sole statement provided in art. 120 of the Tax Code.

The inclusion in the annual threshold of at least 12 minimum gross salaries per country, in force at the deadline for submitting the sole statement provided in art. 120 of the Tax Code, is carried out by cumulating the net incomes from independent activities that are estimated to be achieved in the current year.

The annual basis for calculating the social security contribution, in the case of persons earning income from independent activities and intellectual property rights, is the income chosen by the taxpayer, which cannot be lower than the level of 12 minimum gross salaries per country, in force at the deadline for submitting the sole statement provided in art. 120 of the Tax Code.

According to art. 150 p. (1) of the Tax Code, regarding the specific exceptions regarding the incomes from independent activities, specifies the following:

"(1) Natural entities insured in their own social insurance systems, who do not have the obligation to insure in the public pension system according to the law, as well as the persons who have the quality of pensioners do not owe the social insurance contribution for Ct' incomes foreseen at art. 137 p. (1) letters b) and b1)."

- in what regards the social health insurance contribution, the Tax Code provides in art. 170 that natural entities owe the contribution of social health insurance if they achieve cumulative annual incomes at least equal to 12 gross minimum basic salaries per country from one or more sources of income in the following categories:

"a) net/gross income or income norm from independent activities, established according to art. 68, 681 and 69, as appropriate;

b) the net income from intellectual property rights, established after granting the share of flat-rate expenses provided in art. 72 and 721, as well as the net income from intellectual property rights determined according to the provisions of art. 73;

c) net income distributed from associations with legal entities, taxpayers according to title II, title III or Law no. 170/2016, determined according to the provisions of art.125 p. (8) - (9);

d) net income or income norm, by case, for the incomes from the transfer of the use of the assets, established according to art. 84 - 87;

e) the net income and/or revenue from investments, established according to art. 94 - 97. In the case of interest income, the amounts received are considered, and in the case of dividend income, the dividends received are considered distributed starting with 2018;

f) the net income or the income norm, as the case may be, for the incomes from agricultural activities, forestry and fish farming, established according to art. 104 - 106;

g) gross income and/or taxable income from other sources, established according to art. 114 -116."

The share of the social health insurance contribution is 10% and is due by the natural entities for whom there is the obligation to pay the social health insurance contribution, according to the Tax Code.

The natural entity registered for VAT purposes who achieves incomes from the sale of real estate, even

if one is not registered according to G.E.O. no. 44/2008, but carries out an activity regularly, continuously, on its own account and following the achievement of incomes, one has the obligation to observe own rules of incomes from independent activities.

In the situation where the natural entity carries out an activity that meets the criteria that mainly define the existence of an independent activity, then this natural entity obtains income from independent activities, whose fiscal treatment is provided in Title IV "Income tax", Chapter II "Income from independent activities" of the Tax Code.

According to the provisions of art. 14 p. (1) - (3) of the Tax Procedure Code [12]:

"(1) Incomes, other benefits and patrimonial elements are subject to tax legislation regardless of whether they are obtained from acts or deeds that meet or do not meet the requirements of other legal provisions.

(2) The relevant factual situations from the tax perspective are assessed by the tax body in accordance with their economic reality, determined on the basis of the evidence administered under the conditions of the hereby code. When there are differences between the fund or the economic nature of an operation or transaction and its legal form, the tax body assesses these operations or transactions, respecting their economic fund.

(3) The tax body establishes the fiscal treatment of an operation considering only the provisions of the tax legislation, the fiscal treatment not being influenced by the fact that the respective operation meets or does not meet the requirements of other legal provisions."

From the above legal provisions, it results that the incomes, other benefits and patrimonial elements achieved by the natural entities who purchase real estate that they subsequently alienate are subject to the tax legislation regardless of whether they are achieved from acts or deeds that meet or do not meet the requirements of other legal provisions.

Thus, natural entities who bought apartments for the purpose of resale, without being registered according to G.E.O. no. 44/2008, and which, following the reanalysis of the activity carried out, the criteria that mainly define the existence of an economic activity have been met, as it is defined in art. 2 letter a) of the G.E.O. no. 44/2008, and from the tax perspective this economic activity generates incomes from independent activities, they have the obligation to regularize their tax situation by submitting the statements regarding the income achieved according to the legal provisions, for the previous years in which they carried out this activity, must give efficiency to art. 14 of the Tax Procedure Code and to charge the stated incomes.

Likewise, we state that, at art. 2 letter j) of the G.E.O. no. 44/2008 the meaning of the term patrimony of affectation is presented and which represents the patrimonial mass within the patrimony of the entrepreneur, representing the totality of the affected rights and obligations, by written statement or, as the case may be, by the constitution agreement or by an additional document to it, exercise an economic activity.

According to the provisions of art. 111 of the Tax Code, the notaries public calculate and collect the tax related to the incomes from the transfer of the real estate's only in the situation in which the transfer of some real estates from the personal patrimony takes place.

At the same time, in accordance with the provisions of point 33 p. (2) of the Methodological Regulations, given in application of art. 111 of the Tax Code, an exception is made to the transfer of the property right or its dismemberments for the real estate properties from the business patrimony, defined according to point 7 p. (8) of the methodological regulations given in the application of art. 68 of the Tax Code, these being included in the income categories for which the annual net income is determined based on the accounting data.

3. A different example on the same topic

On December 24th, 2020, Law no. 296/2020[13] for the amendment of the Law no. 227/2015 regarding the Tax Code.

One of the amendments brought by Law no. 296/2020 was that from point 160 of the Law, which provided that:

In Article 291 (3) (c), point 3 is amended to read as follows:

"3. the delivery of dwellings with a usable area of maximum 120 sqm, excluding household annexes, whose value, including the land on which they are built, does not exceed the amount of 140,000 euros, the equivalent in lei of which is established at the exchange rate notified by National Bank of Romania, valid on January 1st of each year, excluding value added tax, purchased by natural entities. The useful area of the home is the one defined by the Housing Law no. 114/1996, republished, with further completions and amendments. The household annexes are those defined by Law no. 50/1991 on the authorization of the carrying out construction works, republished, with further completions and amendments. The reduced rate applies only in the case of homes which upon sale may be therefore inhabited."

Therefore, by enforcement of the Law no. 296/2020, the legal provisions regarding the application of the value added tax rate (VAT) of 5% on the sale of dwellings were amended by increasing the threshold to the amount of 140,000 euros.

This change has been seen by both natural entities and real estate developers as a breath of fresh air, with many people hoping to buy a new home.

[12] Published in the Official Gazette no. 547 as of 23.07.2015, lately modified by Law no. 295/2020.
[13] Published in the Official Gazette, Part I under no. 1269 as of December 21st, 2020.

However, shortly after the enforcement of the Law no. 296/2020, on December 31st, 2020, the Emergency Ordinance no. 226/2020 on some tax-budgetary measures and for amending and supplementing some normative documents and extending certain deadlines, has also entered into force.[14]

According to Art. XVIII.pct. 2 of the Emergency Ordinance no. 226/2020:

"Paragraph (1) of Article VII of Law no. 296/2020 for the amendment and completion of Law no. 227/2015 on the Tax Code, is amended and completed as follows:

2. After letter e) a new letter is inserted, letter f), with the following content:

f) the provisions of art. I point 13 and 160 shall enter into force on January 1st, 2022."

Therefore, as a result of the entry into force of Ordinance no. 226/2020 increasing the ceiling up to which 5% VAT is applied is postponed until January 1st, 2022. From that date, the threshold will reach, from 450,000 lei, as it is in present, to approximately 680,000 lei (the equivalent in lei of the amount of 140,000 euros).

Therefore, the joy generated by such a measure was of very short and those who had made predictions about the applicability of legal provisions had to postpone them at least until 2022.

4. Conclusions

The situation set out above perfectly illustrates the legislative hurdle in which a taxpayer is faced with solving tax problems. Not infrequently, the solutions of the tax bodies come in contradiction with the solutions of the courts, which makes the tax provisions even more difficult to apply.

Moreover, tax equity should not be pursued only as an impact of an income tax. 100% tax equity (utopian to be achieved) should track all taxes borne by one person.[15]

Further, in times of crisis such as the one we are going through, securing funds is the key to survival, regardless of its source.[16]

Yet, the fiscal predictability, at least in times of crisis, would help both the business community and natural entities and should be considered by the political class when deciding on tax measures concerning the society.

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[14] Published in the Official Gazette, Part I under no. 1332 as of December 31st, 2020.

[15] L. Țâțu, C. Serbănescu, D. Ștefan, D. Cataramă, A. Nica, E. Miricescu, op. cit., p. 1.

[16] Alina Duca, Emilian Duca, *Soluții fiscale pentru perioade de criză,* Universul Juridic press, Bucharest, 2009, p. 60.