VALUE ADDED TAX ON ARBITRATION FEES

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Abstract

Private alternative jurisdiction (as defined in art. 541 of the Romanian Code of Civil Procedure) arbitration is not free of charge. Those who judge a dispute, being chosen and empowered to do so by the parties by their arbitration agreement, provide a service. In principle, this service can also be free of charge, but as a rule it is a service provided by professionals (in the sense of recognized specialists in law and possibly in the field in which the dispute in question arose) who, although they do it occasionally, do not do it for free, as they are remunerated for their work through a so-called "fee". To this must be added the costs of litigation which relate to administrative matters, administration of evidence, experts' and lawyers' fees, etc. In the case of institutional arbitration, a significant part of the costs is represented by the so-called "administrative fees" which cover the costs of premises, logistics, archives and the payment of staff responsible for the administration of cases. As a supply of services within the meaning of the tax law, it falls within the scope of VAT (art. 268 of the Tax Code). In the case of institutional arbitration, several questions arise in relation to the tax debtor and the tax debt consisting of VAT collected to the budget.

Keywords: *court, arbitration, stamp duty, arbitration fees, value added tax, obligation to pay VAT, obligation to pay VAT collected to the budget.*

1. Introduction. On state court fees and arbitration fees

Justice, whether state justice, to which free access is guaranteed by the Constitution, or private justice, to which access is determined by and through arbitration agreement, *i.e.* by the act of will of the parties, is not free. It never was. Justice, be it public or private, has consumed time and eaten money. The state justice, even twice. Once, because we all pay taxes, and taxes are paid to make it possible for state institutions to function. Including the public service of justice. Secondly, because all those who have "**free access to justice**", as proclaimed by art. 21 of the Constitution, if they want to go to court, must, as a rule, pay a "**judicial stamp duty**"[1] (regulated by GEO no. 80/2013) to benefit from this public service to which "access is free". And the CCR and the anemic and money-, time- and hope-eating ECtHR, which sells vain illusions, have decided, with their "bible" on the table (laws, constitution, convention) that free access to justice does not necessarily mean free of charge. Hence the sad conclusion that freedom can be prized and that it sometimes costs money to have it. But what can be measured and valued in money is not true freedom.

From within the state justice system, court fees seem small in relation to the time spent by judges and staff on the business of trying a case, the workload involved in administering the trial and trying the case. From the outside, legal fees seem huge, and for some, prohibitive. And not infrequently, people who have been 'told the law' find that the fee they pay for the justice services they have used is not at all proportionate to the quantity and quality of the public service provided. And some come to the bitter conclusion that the court fee is not only in the eyes of the state but also of some judges, a punishment. We believe, moreover, that it is not wrong to qualify the judicial tax as a tax of order (*i.e.* to discourage the use of judicial services), even if there are no pure taxes and taxes of order, because even when such taxes or taxes of order are introduced, the state aims, firstly, to obtain revenue, however immoral the process may be, and only secondly, the order it seeks (reducing the consumption of a good, reducing the consumption of a public utility, etc.). Moreover, taxation and morality are, as is well known, in an antagonistic relationship[2].

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[1] "Judicial stamp duty" is improperly so called. Tax stamps have been used and are still used to collect taxes as a simple, efficient and convenient means of payment. They are issued by the executive authority (government) to be "bought" and used, when a tax or duty (usually a small amount) is due, by attaching it to the items being taxed or levied, to the form requesting a service, etc., the presence of the tax stamp being proof that the tax or duty has been paid. They began to be used in 1694, and their use was greatly increased after 1840, when postage stamps were introduced as a means of payment for postal services (tax). With computerization and the use of electronic means of payment, stamps (both postal and tax stamps, which have also been used in place of each other) are increasingly losing their former usefulness. As for court fees, they were not and are not "stamp duty", even though some justice services are still paid for by affixing tax stamps to the application requesting the service.

[2] "Political economy is by definition amoral; how would taxation, which is one aspect of it (the distribution of a share of national income), be moral?" Apud D.D. Șaguna, *Drept financiar și fiscal. Tratat*, All Beck Publishing House, Bucharest, 2000, p. 608.

In this context, it must be said that if we look at this obligation to pay (stamp duty) from a purely fiscal point of view, we see that in reality, by paying it, we are faced with a phenomenon of double taxation. In its rush for money (which we know from Vespasian has no smell[3]), the state (not just ours, an American author famous in his own country for his victories in legal battles with the state, for the principles he promoted and the books he wrote, named Lysander Spooner[4], said that "the state is the greatest robber") rips off anything, anytime, anyhow, or anyone. Exceptions, exemptions, facilities (our Ministry of Finance has long and officially had in its structure a "service of the scallywags", but even today the country has many exempted from the duties that should be general and mandatory for all[5]) only confirm the rule. The judicial tax is double taxation because the taxes we pay are intended to ensure the functioning of the state authorities, and therefore also the public service of justice. In other words, when a litigant goes to the courts and asks them to judge his case, the provider of this service has already been paid. The court fee they have to pay to benefit from this service appears to us as a surcharge and a penalty. A tax on order!

But is arbitral justice very different from state justice? Some say yes, some say no. According to some, arbitral justice is too judicialized, in the sense that it is too formalistic and too much like state justice. According to others, who wanted and still want to control the arbitration process with an iron fist, ignoring the fact that this is not what people expect from the judges they elect, arbitral justice is too relaxed, too informal and too contractual. Too close to the parties and too sympathetic to them.

If we look carefully at "**arbitration fees**", then arbitral justice is almost no different from state justice, because in order to be tried in arbitration, payment of arbitration costs in advance is a condition without which the arbitral tribunal cannot be constituted. Moreover, foreign doctrine has noted, and rightly so, that through the fees it charges, arbitral justice tends to become a luxury justice. That is, justice too expensive to be afforded by all those who need it. This is also true for us and is often reproached to us by the judiciary. We are afraid that for the sake of the purse, the woes of the judged are sometimes ignored and they are denied the opportunity to be judged, forgetting the chain of weakness (not infrequently caused by a single weak link in an economic chain that starts with the producer/supplier of raw materials and ends with the final consumer) that pushes entrepreneurs to the brink of bankruptcy and in which the state is largely to blame. Because not infrequently, the weak link is the state itself, which is also a bad payer when it is in debt. The worst of debtors and the only one truly protected. It is forgotten or ignored that justice is done primarily for the sake of justice and people. And we are not aware of any arbitrator (or judge) having done justice just for the sake of justice (nor do we believe that the justiciable expect justice from a judge who is not properly paid for what he does) but that does not mean it does not exist! It is known, however, that since the institution of the judge in the chair, the professional and paid judge, came into being (this happened for the first time in ancient Greece), the number of trials has continually increased, and this also applies to prosecutors and public prosecutors. Or especially for them.

Of course, between quantity and value, on the one hand, and the work of arbitrators, on the other, the right ratio must be found. The ratio that makes arbitration attractive to the parties and for which arbitrators agree to be judges chosen by the parties. We believe that litigants should not feel that arbitration fees are a burden and that if these fees are to be comparable to those of state justice set for disputes that are assessable in money (large as they are, but they can be a benchmark), arbitration has on its side many other arguments for being preferred to state justice.

How much should these fees be? It's hard to say! There are many who have complained about the past as well as the current ones under the word that they are great. But there are also litigants who, having been

[3] Emperor Vespasian, who came to the throne in 70, found the treasury empty after Nero's catastrophic reign. He rebuilt the Empire's finances by broadening the tax base through both economic and political measures. Among the taxes he imposed was that on the use of public toilets, derisively referred to by the Romans as vespasians, and entered the history of taxation for the answer the Emperor gave to his son, who questioned him after they had been placed in the streets of Rome to make money (probably not to the level expected and above all, needed) and not (necessarily) for reasons of public hygiene: ***"pecunia non olet"***, meaning ***"money has no smell"***.

[4] Lysander Spooner (January 19, 1808 - May 14, 1887), a philosopher, pamphleteer, abolitionist activist, lawyer and entrepreneur, one of the most important figures in the history of American anarchism because of the concordance between the principles defended in writing and the values manifested in action. He gained fame after he won the repeal of a regulation barring him from the bar because he had not graduated from law school, and after an unequal battle with the US Postal Office, which has a legal monopoly on postal services in the US, succeeding in bankrupting the company he created and in getting the US Congress to lower postal rates several times. He was also noted for his belief in the primacy of natural law over man-made laws, for being an opponent of slavery, and for gratuitously defending runaway slaves, his paper *"The Unconstitutionality of Slavery"* having aroused the admiration of both opponents of slavery and its defenders for the clarity and thoroughness with which he demonstrated that slavery was incompatible with the Constitution of the United States.

[5] For example, the church. And researching history, we find that modern Romania, by exempting the church from taxes, went back in time to somewhere before Cuza secularized the monastery estates which we give back today. It is true that there are two countries in Europe where the church does not pay taxes. The measure was taken by Hitler in Germany to ensure that the church would not get involved in politics. It was later extended to Austria. In the time of Al.I. Cuza, and for a long time after him, the Ministry of Finance had a "*scutelnic* (exempted from tax) servants department" within its structure. The name needs no comment.

judged in arbitrations organized by permanent arbitration institutions in other countries, have found these fees to be low in relation to the time spent, the degree of novelty and complexity of the issues before the arbitrators, and their documentation needs.

Arbitration fees have another problematic component. Here we will discuss only one of those that has to do with the tax authorities, value added tax. At a later stage, we will try to clarify other things related to administrative charges.

2. The sin of tradition and the correct designation of "arbitration fees"

It must first be said that the name "**fees**" for the payment of services in and for the arbitration procedure is badly chosen, as it is potentially confusing as to its very nature. This is because the term **fees**, as is well known, designates in our (fiscal) law[6] payments due (compulsory levies, the law says) for services provided by public authorities or institutions for the benefit of the payers, whereas arbitration, whether institutionalized or ad hoc, is not in the nature of a public service (even if it is in the public interest), as is the public service of state justice and for which the name of fees as the price of the services provided is not wrong.

We believe, therefore, that for legal accuracy we should refer to the amounts paid by litigants in arbitration proceedings as "arbitration expenses" or "arbitration costs", the term "fees", which has the tradition and the advantage of convenience, having the major defect of the risk of perceiving arbitral justice as a real state justice. And it is not! And the tradition regarding the name, fees, is a sinful one, because it is derived from the former state arbitration[7], abolished by Decree no. 81/1985, arbitration in which the payment of "arbitration fees" was justified since that arbitration was state arbitration! But international commercial arbitration, which also operated under the old regime, shares with the former state arbitration only the name and the fact that in both arbitrations had less formal rules than those in common law, the two legal institutions being otherwise distinct, with different powers and competences. In state arbitration, economic disputes between enterprises (all state-owned) were settled; in international commercial arbitration, disputes between foreign entities and state enterprises were judged. International commercial arbitration also functioned then as private justice, and now it is the continuation of that arbitration (which, it must be said, has been appreciated all over the world thanks to the quality, reputation and renown of the arbitrators and the quality of their decisions).

The term "arbitration fees" used in the Rules of the Court of Arbitration now includes: "**administrative fee and arbitrators' fees**", which together make up the "**arbitration fee**" and "**registration fee**". These would represent, according to art. 1 of the Rules, "remuneration for services rendered by the Court of Arbitration". In reality, however, this is not the case, because these "fees" represent **separate payments for services of a different nature** and which, in the case of institutional arbitration are provided by **different legal entities, namely:**

1. **registration fees** for requests to initiate arbitration proceedings. The registration fees represent the costs necessary for registration, formation of files, correspondence and communication to the parties of the information required for the constitution of the arbitral tribunal, establishment and communication of the costs of the arbitration, etc. This service is provided by the permanent institution (the Chamber of Commerce of Romania, in our case);

2. **administrative fees** which are collected and represent income of the institution organizing the permanent arbitration. The "administrative fee" is intended to cover the expenses of the permanent arbitration institution for the provision of the space necessary for the conduct of the arbitration and the utilities (properly equipped rooms, payment of the staff contributing to the conduct of the arbitration, staff equipment etc.). This "administrative fee" is therefore not the consideration for any service provided by the Court of Arbitration, but by the institution organizing the arbitration, which provides the space and utilities necessary for the arbitration to take place. And in our case, and probably everywhere else in institutional arbitrations, these "administrative fees" represent income of the institution organizing the permanent arbitration.

3. an amount representing the **arbitrators' fees**, the latter also referred to in our Rules as the "arbitration fee" (and for simplicity, we will not distinguish according to whether the arbitral tribunal is collegial or uninominal).

4. To these amounts, which are paid, as a rule, in advance, are added **other costs**, such as those for expert reports, travel, lawyer's fees, which are the responsibility of the parties who make them, but are added to the costs of the arbitration borne by the party

[6] In the bad tradition of our legislator, the word "tax" is defined (as is the tax, by the way) in the Fiscal Procedure Code, and not in the Fiscal Code which "establishes the legal framework on taxes, duties and contributions (...)". The Tax Procedure Code, which deals with the administration of tax claims, defines a tax as "a compulsory levy, by whatever name, imposed by law **on the provision of services by public institutions or authorities, without there being an equivalent between the amount of the tax and the value of the service**".

[7] See Decree no. 259/1949 on the establishment and organization of the State Arbitration, Law no. 5/1954 on the organization and functioning of the State Arbitration and GD no. 466/1968 on some measures for the reorganization of the State Arbitration.

that falls under the claims, costs established by the judgment given on the merits.

For comparison, the ICC Arbitration Rules speak of "**arbitration expenses**" which include "the fees and expenses of the arbitrators", "*the fees and costs of experts appointed by the tribunal, and the reasonable expenses incurred by the parties for their defence*" (see art. 2 and 36 of the Rules of Arbitration of the International Chamber of Commerce).

3. On what basis were arbitration costs determined and paid?

The applicable legal texts for the proposal by the College of the Court of Arbitration and the approval of arbitration costs by the Governing Board of the National Chamber and for their payment, to us, are as follows:

Art. 616 of the Code of Civil Procedure ("Notion") which provides:

(1) Institutionalized arbitration is that form of arbitral jurisdiction which is constituted and functions on a permanent basis ***within a domestic or international organization or institution or as a public interest non-governmental organization in its own right****, under the terms of the law, on the basis of its own rules applicable to all disputes submitted to it for settlement under an arbitration agreement.* ***The activity of institutional arbitration is not economic and does not aim to make a profit.***

(2) In the regulation and conduct of jurisdictional activity, ***institutional arbitration shall be autonomous from the institution that established it.*** *It will establish the necessary measures to guarantee autonomy.*

Art. 29 (1) and art. 30 of Law no. 335/2007 on Chambers of Commerce in Romania, which provide:

Art. 29 - (1) The Court of International Commercial Arbitration is a permanent arbitration institution ***without legal personality*** *and operates under the National Chamber.*

……

Art. 30 - (1) ***The rules on arbitration fees and arbitrators' fees are approved by the Governing Board of the National Chamber, on the proposal of the College of the Court of International Commercial Arbitration.***

(2) ***Arbitral fees are intended to cover expenses related to the dispute resolution activity, the payment of arbitrators' fees and their documentation, secretarial and other expenses necessary for the functioning of the Court of International Commercial Arbitration.***

Art. 1(1) of the Schedules of arbitral fees and expenses of the Court of International Commercial Arbitration by the CCIR, which provides that: ***"in order to remunerate the arbitration services rendered by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, (...) there will be charged a registration fee of Euros 150 (...), as well as an arbitration fee (our emphasis) consisting of an administrative fee and arbitrators' fee".***

We have neither to comment nor to criticize the legal provisions mentioned above, even if they suffer from a certain lack of clarity, because as they stand they allow the Court of Arbitration and the Chamber to name them correctly and to fix them in the amount necessary to cover the expenses of the institution organizing the permanent arbitration, without being able to pursue profit-making, and within limits that make arbitration attractive for both litigants and arbitrators. But they must also be determined and collected in accordance with the provisions of the tax laws, and when arbitrators decide on final costs, they must also apply the tax laws correctly.

4. Arbitration fees and value added tax in arbitration

As taxation is in everything[8], it could not miss the arbitration. Taxation is the soul of the state, which is why it is omnipresent. In the country that in the 13th century created the first coherent tax system (we called it England), one of the authors who wrote a textbook by which law is still taught today, Henry of Bracton[9], said that the taxman was like God and that taxation was a strange combination of the divine and the earthly. And yes, tax is as much a part of our lives as day and night, light and dark, cold and heat, good and evil. The authorities would, of course, want it written into our genes, and they would if they could. Taxation is long gone and more than the idea of property part of our education. A person without property or income is not and cannot be punished for not having property, for not

[8] The tax department does have a *scutelnic* (exempted from tax) servant in our system: the church. And looking at history, we find that modern Romania, by exempting the church from taxes, has gone back in time to somewhere before Cuza who secularized the monastery estates that we give back today. It is true that there are two countries in Europe where the church does not pay taxes. The measure was taken by Hitler in Germany to ensure that the church would not get involved in politics. It was later extended to Austria. In the time of Al.I. Cuza, and for a long time after him, the Ministry of Finance had a "*scutelnic* (exempted from tax) servants department" within its structure. The name needs no comment.

[9] Henry of Bracton (1210-1268), English theologian and jurist, author of a famous work: "*De Legibus et Consuetudinibus Angliae*" ("On the Law and Customs of England"), used for the study of English law (common law).

working or for not earning income unless he/she obtains it through theft. But there is no escape for those who do not pay their taxes: he/she will be pursued by the tax department beyond death. Taxes were repealed by the French revolutionaries because they emanated from the king (who was also of divine essence, and the French revolutionaries, and among them Danton in particular, were also enemies of the church[10], not just of the God's anointed). But these same revolutionaries not only quickly reintroduced taxes and described them as an "honorable obligation", they also multiplied them. And since then, even atheists no longer dispute them. Nor could they, because without them there can be no state. Since then, taxes have regained their value in the eyes of everyone as a symbol of state power and of the relationship of allegiance between taxpayers and the state to which they belong.

Since then, no taxable matter escapes taxation. Not even arbitration. Interestingly, the value-added tax is also the invention of a Frenchman named Maurice Lauré, and the French, proud of their new tax, its efficiency and especially the fact that it is quasi-generalized, say that while Elvis Presley was recording his famous song That`s All Right in 1954, they were giving the state a money-making machine. They say that the VAT is "a French invention copied everywhere"[11]. The truth is that Maurice Lauré, who was a famous polytechnical and inventor of a turbine model, but ended up as head of taxation in the French Ministry of Finance, half-heartedly supported his bill for the new tax which he considered burdensome for businesses and it passed through Parliament in a political barter, with great difficulty, after being rejected several times. Maurice Lauré passed away in 2001, a year before his death, in one of his rare interviews saying that he hated to be reminded of his invention.

VAT exists and is widespread in EU countries. It is for non-member aspirants a condition of membership. This indirect tax was harmonized by Directive 2006/112/EC on the common system of value added tax (former Directive 77/388/EC of 17 May 1977) and implemented in Romanian law. It is the only truly harmonized tax at the level of EU Member States, the harmonization achieved allowing the internal market to function without serious distortions. We will also have to harmonize it in the arbitral practice of our Court, which is why we need to see its shortcomings in application now.

First of all, however, we must say that we do not have and do not propose solutions. We are just inviting a debate on this issue in order to find together a solution to a problem that does not have, at this moment, we believe, a correct solution. And we believe that it is not correctly resolved either with reference to lawyers' fees, when VAT is added to them.

5. First question: is VAT due for dispute resolution activity in arbitration? If yes, who is the service provider?

Let's take a simple example to make the demonstration easier. We have a plaintiff and a defendant sued in arbitration who agree that the tribunal shall consist of a single arbitrator, the plaintiff being the one who bears the arbitration fees in advance. He will pay:

- 150 euros plus 20% registration fee. Let's admit, for the sake of simplicity, that he paid 675 lei registration fee and 135 lei VAT.
- 50,000 lei administrative fee;
- 50,000 lei the arbitrator’s fee.
- If the two are added together (administrative fee and arbitrator's fee), the result is an arbitration fee of 100,000 lei plus 20,000 lei VAT. The same amount is arrived at if VAT is calculated separately (for administrative fee and arbitrator's fee).
- The plaintiff will also pay the lawyer's fees which, in the hypothetical case presented, we admit is 100,000 lei plus VAT of 20,000 lei.

The answer to the question of whether VAT is due must be sought in the legal texts governing the activity of institutional arbitration (art. 616 of the Code of Civil Procedure, art. 28-30 of Law no. 335/2007 on Chambers of Commerce) and in art. 266 and art. 269 of the Tax Code. We have mentioned the former above and recall that according to art. 616 of the Code of Civil Procedure "***The activity of institutional arbitration is not economic in nature and does not aim to make a profit"*.**

Those in the Tax Code are listed here. Thus:

1. In accordance with art. 266 (meaning of certain terms), item 21 of the Tax Code: "**taxable person**" has the meaning of art. 269 para. (1) and means the natural person, group of persons, public institution, legal person and **any entity capable of carrying out an economic activity**;"

2. According to art. 269 of the Tax Code, which defines the **taxable person and the economic activity**, "(1) **A taxable person is considered** any person who carries out, independently and regardless of location, **economic activities** of the nature referred to in para. (2), **whatever the purpose or result of such activity**.

3. According to art. 269(2), for the purposes of the (...CF), **economic activities** comprise **the activities**

[10] Hostility to the church was the most baffling and incomprehensible phenomenon of the Great Terror. In 1793, when the Great Terror began, all Christian cults were banned in France. During the Revolution there were at least 3,000 priests and they died.

[11] M. Cozian, *Précis de fiscalité des entreprises*, Lexis Nexis, Paris, 2007, p. 277.

of producers, traders or providers of services, including mining and quarrying, agricultural activities and activities of **the liberal professions or activities treated as such.** The exploitation of tangible or intangible property for the purpose of obtaining income on a continuing basis also constitutes an economic activity".

We recall here that arbitration activity is qualified in contract law as the provision of services and that the Tax Code only refers to arbitration activity as income "from other sources" declared taxable (art. 114(2)(d) of the Tax Code).

There is no doubt that the legal provisions are insufficiently clear: some (art. 616 of the Code of Civil Procedure) which exclude from the scope of taxation the activity of institutional arbitration, others, which say nothing about it, but from which it is understood, however, that the activity of arbitration is an activity of supply of services for which VAT is due.

In order to answer the question posed, however, we need to establish **which provisions should be applied as a matter of priority.** And for this we need to identify, or establish, which provisions are special and which are common law.

It is undisputed that **both the Code of Civil Procedure and the Tax Code are common law in the matters they regulate.** However, arbitration is exceptional and has a **special regulation**, even if it is contained in a law which is the common law of court.

The arguments to the effect that **arbitration is governed by special rules**, derogating from ordinary law, are manifold and so obvious that we do not believe they need to be developed here. Nor do we believe that there is any controversy about the fact that in the Code of Civil Procedure we have both general (predominant) rules and special rules. However, the HCCJ has also ruled in decisions in appeals in the interest of the law that the law of civil procedure contains general rules and special rules, the latter applying only to matters specifically provided for by law (see Decision no. 13 of 12 November 2012 and Decision no. 11 of 18 April 2016, the latter concerning the law applicable in the case of contestation of claims with which ANAF is registered in insolvency proceedings).

In conclusion, we believe that we must admit that the provisions of art. 616 of the Code of Civil Procedure are a special rule, and it expressly provides that "***The activity of institutional arbitration is not of an economic nature and does not seek to make a profit***."

For its part, **the Tax Code is the common law** on taxes, duties and contributions **(but it also contains numerous special provisions)** and where a law provides otherwise than a special law, even if the law providing otherwise is earlier, that special law must be applied with priority, in accordance with the principles of ***specialia generalibus derogant*** *and* ***generalia specialibus non derogant.***

It is true that art. 502, para. 16 of the Tax Code adopted in 2015 provides that **any other provisions contrary to the Tax Code are repealed**, inter alia, and that even under the previous regulation **the Chamber charged VAT on arbitration fees**. But it has long been well established in case law that **a special rule can only be expressly repealed.** Whenever the legislator wishes to repeal a piece of legislation, the repeal must be express. The requirement is even greater in the case of special rules derogating from the ordinary law. It requires the express repeal of art. 17 of Law no. 24/2000 on the rules of legislative technique for the drafting of normative acts, a text which, under the marginal heading 'cleaning up legislation', stipulates that '*in order to clean up active legislation, in the process of drafting normative acts, the express repeal of legal provisions which have entered desuetude or which are contradictory to the planned regulation shall be sought*'.

Admitting that a doubt might exist regarding the law (although, in our opinion, things are clear), the doubt, the unclearness of the law, cannot benefit the tax authorities, the principle of interpretation enshrined in the case law of the ECtHR, the CJEU and after them also of the Romanian legislator being "***in dubio pro libertate civium***" or "***in dubio contra fiscum***". The HCCJ - Administrative and Tax Litigation Division, by Decision no. 4349/2011, ruled that the principle of interpretation ***in dubio contra fiscum*** applies in tax law, according to which uncertain legal provisions are interpreted against the tax authorities".

However, does the Tax Code provide otherwise than the Code of Civil Procedure in art. 616? The answer seems obvious, no! This is because art. 266, para. 21 of the Tax Code states that: *"**taxable person**" has the meaning of art. 269 para. (1) and means the natural person, group of persons, public institution, legal person and **any entity capable of carrying out an economic activity**".* In other words, in order to be a taxable person with VAT **you must have the capacity to carry out an economic activity**, or the special law, according to which the institutional arbitration is carried out, expressly declares it in art. 616: ***The activity of institutional arbitration is not economic and does not aim to make a profit.***

In another vein, it should be noted that the "***domestic or international organization or institution or as a non-governmental organization of public interest in its own right***" on which the Court of Arbitration operates (this is the Chamber of Commerce and Industry of Romania) is defined by Law no. 335/2007 (art. 1 and 24) *as an autonomous, non-governmental,* ***without a patrimonial purpose (non-profit in the case of CCIR), of public utility*** *(....).* It is

a provision which supplements that of art. 616 of the Code of Civil Procedure. In fact, the purpose of the County Chambers and the National Chamber is also to defend, represent and support the interests of their members and business communities. So not lucrative!

Regardless of these provisions of Law no. 335/2007 and art. 616 of the Code of Civil Procedure, it should be noted that even in light of the Tax Code, **the Chamber is not a "*taxable person*"** within the meaning of art. 269 para. (1), **because it does not have the capacity to carry out "an economic activity."**

As a hypothesis to be analyzed only, can we still admit that **the Chamber of Commerce and Industry of Romania would carry out economic activity?** The answer seems to us to be no, and the facts prove it: **The Chamber has companies, or shareholdings, but cannot itself carry out economic activities.**

The National Chamber could, however, be a taxable person, but only exceptionally, under art. 269 para. (7) and if we assimilate it to public institutions which are liable to pay VAT for several activities, including trade fairs and exhibitions. We do not know if the fairs are organized by the Chamber or Romexpo, but we don't see how the Chamber could carry out "an economic activity" within the meaning of art. 269 of the Tax Code, making it a "taxable person", **since the law does not allow it.**

Irrespective of the answer to this question which concerns the Chamber, it is worth noting the argument which derives from the law: **the arbitration activity is not economic!** It is therefore not a supply of services taxable with VAT within the meaning of art. 271 of the Fiscal Code, which considers as "supply of services any transaction which does not constitute a supply of goods as defined in art. 270" (of the Fiscal Code). On the other hand, it should be noted that **the Chamber does not carry out the arbitration activity!**

If, however, the National Chamber **is a VAT payer**, then we believe that **it can be a VAT payer at most for the registration fee and the administrative fee, and not for the arbitrators' fees.** It, the Chamber, does not take part in the provision of services by arbitrators and cannot be considered to have provided the service itself in order to fall within the hypothesis covered by art. 271 para. (2) of the Fiscal Code ("*Where a taxable person acting in his own name but on behalf of another person takes part in the provision of a service, he shall be deemed to have received and provided the service himself*").

However, the actual arbitration activity is carried out by the arbitrators, not by the Chamber, the arbitrators do not have a contractual relationship with the Chamber, **and the withholding rule does not apply to VAT anyway.** This means that the Chamber cannot pay VAT for the service provided by persons who have no contractual relationship with the Chamber.

As far as foreign arbitrators are concerned, we remind you that since it is qualified as supply of services, the activity of EU or EEA arbitrators is not subject to VAT, just as our services for beneficiaries in EU countries are not subject to VAT.

6. Conclusions: what is the VAT regime in the settlement of the dispute in terms of expenses?

If we accept that VAT is due, then what is the fate of the VAT paid by the parties in determining the costs of the arbitration to be borne by the losing party and ordered to be paid? Who is the end consumer who has to pay in the end and how does the payer recover the VAT paid for the services provided by arbitration?

The Chamber of Commerce, admitting that it is a taxable person with VAT within the meaning of art. 266 of the Fiscal Code, can only be a VAT collector for its services. That is for the registration fee and the administrative fee.

Arbitrators constituted in arbitral tribunals for each individual case do not provide services on behalf of the Chamber or even the Court of Arbitration. The relationship between them and the litigants is one mediated by the Chamber through the Court of Arbitration (*sui-generis* entity, which can sit in court, according to art. 56 para. 2 Civil Procedure Code, but which is not a taxable person), but the relationship is established between the arbitrators and the parties in dispute. In adjudicating a dispute, arbitrators perform a service for the benefit of the parties, and this service is provided by them, not by the Chamber or the Court.

It is true, the beneficiary of arbitration services is not interested in the person who, for this service, collects VAT to pay it to the budget. But can this VAT payer recover VAT paid other than by exercising the right to deduct VAT? Can the VAT payer for the arbitration service recover VAT by way of legal costs?

Such a recovery seems to us impossible because if the arbitration costs (court costs) awarded include VAT paid, this means that the payer can recover VAT paid other than by exercising the right to deduct VAT. It means that he does not pay VAT for the service rendered or that he can recover VAT both by exercising the right to deduct and by way of court costs.

It seems to us not unimportant that in the Rules of Arbitration of the International Court of Arbitration the issue of VAT is considered to be of exclusive interest to litigants and arbitrators (see art. 36-37 of the Rules and Annex III).

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