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The Ministry of Public Finance targets decapitalised companies

On August 14, 2019, the Ministry of Public Finance published a government ordinance project, proposing amendments to Companies Law no. 31/1990 and to Accountancy Law no. 82/1991. These revisions propose drastic measures for the companies that register a decrease of the net asset or losses.

The procedure for applying the measures to restructure the outstanding tax liabilities as at December 31, 2018, in case of taxpayers having debts greater than or equal to RON 1 million

On August 29, 2019, the procedure for applying the measures to restructure the outstanding tax liabilities as at December 31, 2018, in case of taxpayers having debts greater than or equal to RON 1 million was published in the Official Gazette no 711/29.08.2019. The procedure brings a series of clarifications and details over some aspects from the Government Ordinance no. 6/2019 ("**GO 6/2019**").

The Ministry of Public Finance targets decapitalised companies

On August 14, 2019, the Ministry of Public Finance published a government ordinance project, proposing amendments to Companies Law no. 31/1990 and to Accountancy Law no. 82/1991. The project has passed the period of public consultations, which ended without proposals to amend the project. In the upcoming period, the project will be submitted to the Government for adoption.

The financial companies as well as companies under insolvency procedure are excluded from the scope of the project.

The main proposed amendments include:

1. New obligations for decapitalised companies

Article 153[24] of the Companies Law was supplemented by provisions demanding the companies registering a net asset below half of the share capital value to convert their debts towards shareholders, resulting from loans or funding granted by the latter, into shares.

Furthermore, the project brings amendments to the articles regulating the share capital increase, imposing the mandatory increase of the share capital by way of conversion of debts into shares. Such obligation is deemed to be fulfilled if the general meeting of the shareholders passes and submits a decision in this respect with the Trade Registry Office within 90 days from the approval of the annual financial statements.

According to the project, failure to comply with the obligation to increase the share capital is sanctioned with administrative fines ranging from 5% up to 10% of the value of the debts that should have been subject to the conversion into shares.

The project contains potentially contradictory provisions concerning the mandatory conversion of debts into shares, thus rendering unclear whether:

(i) the conversion of debts into shares and the corresponding share capital increase represent in all cases an obligation of the company or just an alternative measure to the decrease of the share capital or the recapitalisation of the company up to the limit of the identified losses, and

(ii) the moment when the conversion must be performed is the end of the financial year when the losses were registered or 90 days from the approval of the annual financial statements.

Irrespective of the remediation measure selected by the company, the project imposes to companies the obligation to notify ANAF (National Authority for Fiscal Administration) with respect to the resolution of the general meeting of shareholders on the recapitalisation or the conversion of debts into share capital. The obligation to notify ANAF must be fulfilled within 30 days from the date of the shareholders' resolution on the recapitalisation or debt conversion.

In addition, the Ministry of Public Finance will issue and publish an annual list of decapitalised companies, based on the financial statements submitted to ANAF by the companies.

Moreover, the project generates a series of misinterpretations concerning the implementation of certain amendments regarding decapitalised companies and raises new legal issues, as the amendments lacks harmonization with the current provisions under Companies Law no. 31/1990. Thus, the following aspects require further clarifications:

- To what extent the conversion of debts towards shareholders into shares and the increase of the share capital are, in all the cases, an obligation of the company or an alternative measure to other remedying measures provided under the Companies Law;

- To what extent the conversion of shareholders' receivables into shares is applicable to all such receivables or only to receivables that are liquid and due at the moment when the conversion is legally required;
- To what extent the conversion of the debts into share capital must be performed until the end of the financial year during which the losses were identified or within 90 days from the approval of the annual financial statements where the decrease of the nets asset was registered;
- The what extent the new provision under Article 210 (respectively para. (2^1)) extends the currently applicable pre-emption right only to shareholders in joint stock companies, in case of share capital increases, to the shareholders of limited liability companies as well.

2. Extension of the Ministry of Public Finance' competences concerning decapitalised companies

The project provides for the right of the Ministry of Public Finance represented by ANAF, as well as of any other interested person, to demand the dissolution of the companies in breach of Article 153^{24}.

Notwithstanding the above-mentioned possibility, the Ministry of Public Finance will have the obligation to demand the dissolution of any company that is registered for more than two consecutive years in the decapitalized companies' list compiled annually by the Ministry of Public Finance.

3. New provisions concerning the determination and distribution of profits

The project proposes several amendments for companies interested in the distribution of their profits. Thus, according to the project:

- Statutory and optional reserves as well as the reported profit may be subject to the distribution as dividends;
- Companies will be obliged to cover the reported loss and set up the legal and statutory reserves from the current registered profit prior to any distribution of dividends to shareholders. Failure to comply with this obligation represents a minor offence, sanctioned with fine ranging from 5% up to 10% of the amount distributed as dividends;
- Companies that distribute dividends on quarterly basis will not be able to grant loans or perform advance payments to shareholders or affiliated parties before settling the distributed dividends. The interdiction is not applicable to advance payments or loans granted in connection with the economic activity of the company. Failure to comply with this interdiction is classified as minor offence sanctioned with administrative fines ranging from 10% up to 20% of the amount distributed as dividends.

4. Amendments to the dissolution procedure

The project mentions the obligation of ANAF to demand the dissolution of the companies that fail to submit annual financial statements to ANAF for two consecutive years, within 6 months from the deadline to submit the financial statements for the second financial year.

The project specifies that the National Trade Registry Office, without the involvement of the competent tribunal, should decide the dissolution of companies, irrespective of the dissolution reason.

5. Amendments to the sanctions stipulated by Companies Law no. 31/1990

According to the project, the directors/legal representatives or any other person responsible for committing the minor offences mentioned under the project and

highlighted above will be charged directly with the administrative fines stipulated for such minor offences.

6. Amendments to Accountancy Law no. 82/1991

The project introduces the obligation of foreign legal entities with tax residence in Romania to organize and manage their bookkeeping according to the provisions of the Accounting Law no. 82/1991.

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The procedure for applying the measures to restructure the outstanding tax liabilities as at December 31, 2018 in case of taxpayers having debts greater than or equal to RON 1 million

In short, the most important provisions are:

- **Steps to be followed and deadlines that must be taken into account in the restructuring procedure, of which we mention:**
  - The submission by the taxpayer of the notification regarding the intention of restructuring the tax liabilities until September 30, 2019;
  - The check done by the tax authority regarding the compliance of the declarative obligations of the taxpayer according to the tax vector, followed by the notification and the guidance of the debtor in order to fulfill them within a time limit of maximum 10 working days. Should this not be the case, an ex officio tax assessment decision will be issued;
  - Administrative operations conducted by the tax authority (i.e. settlements, compensations, computation of late payment tax liabilities) in order to determine the tax obligations that can be the object of restructuring;
  - The issuing of the tax clearance certificate within a period of maximum 5 days from the submission of the intention to restructure tax liabilities, respectively from the expiry of the 10-day period granted towards the taxpayer for the fulfilling of the tax obligations;
  - The submission by the taxpayer of the request for restructuring the tax liabilities, together with the restructuring plan and the prudent private creditor test within 6 months from the entry into force of GO 6/2019;
  - The issuing of an approval decision or rejection of the restructuring within 30 days from the submission of the request.

- **Additional information regarding the independent expert that has to issue the restructuring plan and the prudent private creditor test**

  To this end, it is mentioned that it can be any legal or natural person that fulfills the legal conditions for the developing of the expertise.

  Moreover, it is allowed to have a group of experts, out of which one will be designated, subject to the approval of the debtor, to supervise the debtor and make the periodic/intermediate report regarding the stage of the restructuring.

- **Additional information regarding the procedure of issuing the tax clearance certificate** following the submission by the taxpayer of the notice regarding the intention to restructure tax liabilities

  For example, it is mentioned that, together with the tax clearance certificate (''**CAF''**), the tax authority will communicate towards the debtor an annex that mentions the conditions that must be fulfilled by the debtor for the approval of the restructuring. This annex would mention the conditions provided in the GO 6/2019, as well the application procedure.

  At the same time, it is mentioned that the tax authority has the obligation to clarify, within five working days from the issuing of the tax clearance certificate, the possible inconsistencies between the amounts mentioned in the CAF and the accounting records of the debtor. Subsequent to the clarification of the inconsistencies, the tax authority will issue an agreement report and a new CAF that will include the tax liabilities that are the object of the restructuring.

  Together with the issuing of the CAF, the obligations that can make the object of the restructuring are signaled in the taxpayer factsheet in order to not be settled (until the date of the submitting of the restructuring of the tax liabilities).

- **Additional information regarding the settlement of the request to restructure tax liabilities**

  After receiving the restructuring request, the tax authority prepares a document through which it verifies the fulfillment of the conditions for granting the restructuring of tax liabilities, respectively:

  - If the debtor fulfills the conditions provided by art. 186 of the Tax Procedural Code in order to benefit of the rescheduling of tax payments;

    The condition provided by art. 186 (1) letter a) of the Tax procedural code (i.e. regarding the difficulty caused by the temporary lack of cash availability and financial ability to pay during the rescheduling of tax payments) is analyzed by reference to cash availability of the debtor as shown in the restructuring plan for the entire proposed period, in relation to the type of rescheduling where the debtor would fall within, as well as the possible graphic rescheduling of tax payments. More precisely, it is considered that the debtor cannot access the rescheduling of tax payments as regulated in the Tax procedural code, if its cash availability as presented in the restructuring plan for the chosen time frame do not allow the financial support of the rescheduling of tax payments according to the Tax Procedural code.

    Regarding the debtors that have benefited from the rescheduling of tax payments of the tax liabilities as per the Tax procedural code, that has lost its validity and for which a new rescheduling of tax payments option cannot be granted anymore according to the conditions provided in the Tax procedural code, it is not necessary to verify the condition mentioned above (the debtor will be able to benefit from the facility provided in the Government Ordinance no. 6/2019 in the case in which the rest of the conditions are fulfilled);

- If the debtor has presented a restructuring plan and a prudent private creditor test, made by an independent expert;
- If the debtor is not in the insolvency procedure as per law no. 85/2014 regarding insolvency prevention procedures and insolvency.

If the competent fiscal body ascertains, by means of a report, the fulfillment of the conditions to benefit from the restructuring of the tax liabilities, it issues a decision approving the restructuring of the tax liabilities.

In the situation in which the competent fiscal body ascertains the non-fulfillment of the conditions stipulated by art. 5 paragraph (3) point b) or c) of the GO 6/2019, the authority asks the debtor to make the appropriate corrections. If these corrections are not made within 30 days from the requested date, the competent fiscal body issues, within three days from the date of this deadline, the decision to reject the restructuring request. The issuance of a rejection decision does not affect the right of the debtor to submit a new restructuring request within six months from the entry into force of the GO 6/2019.

- **Additional details on the option of restructuring by conversion into shares or by giving in payment, respectively the conditions for their application**

Conditions for carrying out the restructuring of the tax liabilities by converting them into shares:

- It applies to companies in which the state is either the sole or the majority shareholder;
- The main tax obligations that may be subject to conversion into shares are the one administered by the central fiscal body representing taxes, social contributions and other amounts due to the general consolidated budget, including fines of any kind that come to the state budget, due and unpaid;
- Except the main tax obligations withholding tax and the tax obligations to the risk fund as a result of the internal and external loans guaranteed by the state and of the sub-loans granted as a result of the contracting of internal and external loans by the state;
- Compliance with state aid procedures;
- Compliance with the right to preference of the existing shareholders, according to the law and according to the provisions of the constitutive acts;
- The conversion is made at the nominal value of the shares, and the date of settlement of the obligations is the date of conversion;
- Termination of obligations is done by Government decision

Conditions for the realization of the restructuring of the tax liabilities by giving in payment the real estate of the debtor:

- The immovable property owned by the debtor (construction and related land, respectively land without construction) can be given in payment, even if they are subject to forced execution;
- The buildings owned by the debtor must not be subject to requests regarding the relocation of the property or other disputes;
- Existence of requests to take over the administration of these goods, from which it will be shown that they will be destined for the public use

and interest, provided they are maintained for a period of five years after taking over the administration;

- The tax receivables administered by the central fiscal body can be given in payment;
- Exceptions are receivables from the withholding of customs duties and other tax claims that do not constitute income to the state budget;
- The settlement of the budgetary receivables by giving in payment is made on the date of the minutes of passing on public property of the immovable property.

In both cases, it is stipulated that the two measures must be completed within a maximum of one year from the date of communication of the decision to approve the restructuring.

- **Additional details regarding the monitoring of the debtor during the restructuring by the independent expert**

  Specifically, it is mentioned that the independent expert must carry out permanent monitoring, formalized by issuing a quarterly report on the status of the implementation of the measures in the restructuring plan (which must be communicated to both the debtor and the competent tax authority). Even more, the elements to be included in this report are also specified.

  In addition, the tax authority may request clarifications based on these reports, respectively the preparation of intermediate reports (if it finds deviations from the measures taken by the debtor).

  The procedure also provides the option of replacing the independent expert, should it no longer be able to monitor the debtor or if it does not fulfill his obligations mentioned above. In the second case, the replacement is made at the proposal of the tax authority.

- **Additional details regarding the supervision of the debtor during the restructuring period by the persons designated within the fiscal authority**

  In addition to the monitoring of the debtor by the independent expert, a series of details regarding the supervision of the debtor performed by the fiscal body is introduced. The supervision will consider checking the compliance of the debtor with the provisions of the restructuring plan and measures.

  In this regard, it is foreseen that the fiscal body will designate one or more individuals within the compulsory enforcement compartments to carry out the supervision. Those persons have the competence to establish, as the case may be, both the failure and the completion of the restructuring plan.

- In addition to the above-mentioned facts, a series of articles from the Ordinance (e.g. regarding the scope, conditions etc.) are resumed in the procedure, that we described in the Tax Alert on GO 6/2019). Moreover, the specimens necessary for restructuring are attached in the procedure (i.e. the CAF model, the model report of the agreement process, the referenced model regarding the analysis of the restructuring request, the approval decision model, the rejection decision, the decision to ease the payment of the main tax liabilities, the decision deferral of payment of the main tax liabilities, decision of finding the loss of validity, decision facilitating payment, decision to finalize payment facilitation, decision to finalize the restructuring plan).

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