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Tax & Legal Weekly Alert

October 4, 2019

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Emergency Ordinance for amending and supplementing Government Ordinance no. 6/2019 regarding the establishment of tax facilities

On September 26, 2019, the Emergency Ordinance amending Government Ordinance no. 6/2019 regarding the establishment of fiscal facilities ("**GO 6/2019**") was published in the Official Gazette no. 784/26.09.2019. This provides for the extension of the deadline for submitting the notification regarding the intention to restructure the budgetary obligations from September 30 to October 31, 2019, and brings a number of further clarifications on some aspects related to GO 6/2019.

The Procedure for the annulment of ancillary payment obligations

On September 27, 2019, the Procedure for the annulment of ancillary payment obligations was published in the Official Gazette no. 786/27.09.2019, in accordance with chapter II of Government Ordinance no. 6/2019 regarding the establishment of tax facilities.

Draft law on decapitalised companies

At the beginning of September, the Romanian Senate was referred to, with a new draft law imposing, inter alia, certain measures on decapitalized companies.

Emergency Ordinance for amending and supplementing Government Ordinance no. 6/2019 regarding the establishment of tax facilities

The main amendments provided by the above-mentioned Emergency Ordinance include the following:

- The deadline for submitting the notification regarding the intention to restructure the budgetary obligations has been extended to October 31, 2019, under the preclusion penalty of the right to benefit from the restructuring of the budgetary obligations. At the same time, the debtor who wants to restructure his budgetary obligations must address an independent expert in order to draw up a restructuring plan and the prudent private creditor test.

- Furthermore, clarifications are brought to art. 15 of GO 6/2019, regarding the budgetary obligations that are subject to restructuring, in the sense that, for the respective obligations, the forced execution does not start or suspend, as the case may be, from the date of submission of the notification regarding the restructuring intention (October 31, 2019). Moreover, clarifications are also provided if the debtor does not submit the request for restructuring within the term provided (6 months after the entry into force of the GO 6/2019) or if the restructuring request is submitted for which a rejection decision is issued - thus, the forced execution begins or continues from the date of the fulfillment of the previously stipulated term (i.e. 6 months) or from the date of communication of the rejection decision.

- Clarifications are introduced, through a new paragraph, regarding the accessories related to major budgetary obligations representing state aid to be recovered or funds that are due to the budget of the European Union. Thus, they will not be deferred to payment and will not be canceled, if the institution or public authority that transmitted to the fiscal body the enforceable title for the recovery must transfer to the budget of the European Union, according to the law, the respective accessories.

- A new paragraph is introduced which provides that, by way of derogation from the provisions of art. 165 para. (1) and (2) of Law no. 98/2016 regarding public procurement and from the provisions of art. 178 para. (1) and (2) of Law no. 99/2016 regarding the sectoral acquisitions, an economic operator is not excluded from the public acquisition procedure if it has submitted the notification regarding the intention to restructure the budgetary obligations within the term stipulated by the GO 6/2019.

The procedure for the annulment of ancillary tax obligations

The Procedure for the annulment of ancillary payment obligations ("**Annulment Procedure**") brings a series of clarifications or additional details on certain issues provided by Government Ordinance no. 6/2019 regarding the establishment of tax facilities ("the **Ordinance**").

Briefly, the most important provisions are related to:

- **The debtors that may benefit from the facilities provided by the Annulment Procedure:**

The Annulment Procedure specifically includes, in the category of the debtors that may benefit from the facilities provided by the Annulment Procedure, the following:

- the debtors declared insolvent, as per the Fiscal Procedure Code;
- the persons in relation to whom one of the following measures was established:
    - joint liability as per the Fiscal Procedure Code;

- liability as per Law no. 85/2014 regarding the insolvency prevention and insolvency procedures or as per Law no. 85/2006 regarding the insolvency procedure, for budget obligations pertaining to the period prior to 31 December 2018 inclusively, irrespective of the issuance date of the decision for holding the debtor liable or of the date when the court decision for holding the debtor liable is final;

- the debtors subject to insolvency proceedings or pending dissolution, as per the legal provisions in force;
- the debtors that as at 31 December 2018 inclusively only have outstanding ancillary payment obligations pertaining to principal budget obligations paid until this date, and the accessories were not paid prior to the entry into force of the Ordinance, namely until 8 August 2019;
- the debtors to whom tax assessment decisions pertaining to principal budget obligations outstanding until 31 December 2019 inclusively were communicated, pursuant to a tax audit ongoing on 8 August 2019, irrespective of the amount of the principal budget obligations and of the date the tax assessment decision was communicated;
- individuals that carry out business activity independently or carry out liberal professions, including within associations;
- the debtors that have secondary headquarters;
- the debtors without tax residence in Romania.

(!) If after the assessment performed for benefitting from measures for the restructuring of budget obligations it results that in the tax ascertaining certificate issued by the tax authority for the debtor - legal entity - the amount of principal budget obligations outstanding on 31 December 2018 is under the RON 1 million target on the date of its issuance, the debtor may benefit from the tax facilities provided by the Annulment Procedure.

➢ **Scope of the tax facilities:**

Under the scope of the tax facilities may fall the ancillary payment obligations pertaining to:

- principal budget obligations outstanding on 31 December 2018 inclusively, as defined by art. 23 par. (3) of the Ordinance;
- principal budget obligations additionally declared by the debtor by way of the rectifying tax return for the correction of principal budget obligations outstanding prior to 31 December 2018 inclusively;
- principal budget obligations with payment terms prior to 31 December 2018 inclusively and cleared until such date;
- principal budget obligations outstanding prior to 31 December 2018 inclusively, included in tax assessment decisions issued in case of tax audits ongoing on 8 August 2019.

The following tax facilities may be granted:

- payment deferral of ancillary payment obligations not cleared on the date the tax ascertaining certificate is issued until the date the request for the annulment of accessories or until 16 December 2019 inclusively, in case such request is not submitted, for the debtors that notify the tax authority with respect to the intent to benefit from the annulment of ancillary payment obligations;
- annulment of ancillary payment obligations.

- **Steps to be followed and terms to be observed within the procedure for granting payment deferral**, which include**:**

- Submission by the taxpayer of the notice regarding the intent to benefit from the annulment of ancillary payment obligations at the latest on 15 December 2019:
    - The notice is not compulsory;
    - The notice is aimed at obtaining the following effects:
        - non-initiation/suspension of enforcement proceedings;
        - non-performance of the clearance until the date the request for the annulment of accessories is solved or until 16 December 2019 inclusively, as the case may be;
    - The notice will include the scope of the notice, respectively the intent to benefit from the annulment of ancillary payment obligations, with the precise mention of the legal provisions to which the debtors considers it is subject.
- The debtors having payment obligations established by way of administrative acts whose execution is suspended in accordance with the law on 31 December inclusively, whose effects did not cease and that intent to benefit from the annulment of ancillary payment obligations will include in the notice mentions regarding the waiving of the effects of the suspension of the tax administrative act;
- The verification by the tax authority of the observance by the taxpayer of the information obligations according to the taxpayer file, followed by a corresponding notice to the debtor in case of non-fulfillment of the information obligations, in view of the active role of the tax authority;
- The performance of administrative operations by the tax authority (i.e. clearances, compensations, computation of accessories) for exactly establishing the budget obligations that represent a condition for benefitting from the tax facility;
- Issuance and communication of the decision regarding ancillary payment obligations and of the tax ascertaining certificate within 5 business days from the registration of the notice.

- **Additional details regarding the procedure for the release of the tax ascertaining certificate** to be issued, following the submission of the notice regarding the intent to benefit from the annulment of ancillary payment obligations by the taxpayer.

The tax ascertaining certificate ("**TAC**") is issued based on the data available in the tax receivable records of the tax authority.

In case there are discrepancies between the amounts included in the TAC and the debtor's accounting records, the debtor may require the conciliation thereof within maximum 3 business days as of the date of the communication of the TAC. After the discrepancies are clarified, the tax authority will prepare:

- a reconciliation minutes;
- the decision regarding ancillary tax obligations;
- the new TAC.

- **Additional details regarding payment deferral**

After the conciliation minutes is prepared/in case the debtor does not request the clarification of the discrepancies, the tax authority will issue:

- the decision regarding payment deferral of ancillary payment obligations; and
- the notice regarding the temporary cessation, either in full or partially, of enforcement proceedings, to be addressed to credit institutions where the debtors has its bank accounts and/or to garnished third parties that own/owe money to the debtor;

  or

- the notice regarding the dismissal of the notice, if the debtor does not fall under any of the categories provided by the Ordinance for benefitting from this facility.

As of the date when the decision regarding payment deferral of ancillary payment obligations is issued, for the ancillary payment obligations that are subject to payment deferral:

- enforcement proceedings will not commence or will be suspended, as the case may be;
- settlement is not performed until the date the request for the annulment of accessories is solved or until 16 December 2019 inclusively, as the case may be.

If the debtor does not submit the request for the annulment of accessories until 16 December 2019 inclusively, the tax authority will issue and communicate the decision regarding the expiry of the payment deferral of ancillary payment obligations.

➢ **Steps to be followed and terms to be observed within the procedure for granting annulment of ancillary payment obligations**, which include**:**

- Submission by the taxpayer of the request for the annulment of accessories:
  - after the observance of the conditions for granting annulment, but no later than 16 December 2019 inclusively;
  - in case of accessories pertaining to budget obligations with payment terms until 31 December 2018 included in tax assessment decisions issued as a result of ongoing tax audits, after the payment of the principal tax obligations included in the tax assessment decisions, but no later than 90 days as of the date the tax assessment decision is communicated;
- For benefitting from the annulment of ancillary payment obligations, the debtor may submit either a single request for all categories of ancillary payment obligations that may be subject to tax facilities, or a separate request corresponding to each such category.
- The verification by the tax authority, within a maximum of 5 business days from the registration of the annulment request, of the following operations:
  - Assessment regarding the observance of the conditions provided under chapter II of the Ordinance;
  - issuance and communication, if the case, of the decision regarding ancillary payment obligations, in view of updating ancillary payment obligations that may be subject to annulment;
  - amendment of the tax records in case ancillary payment obligations that may be subject to annulment were already settled;
  - issuance of the decision for the annulment of accessory payment obligations, or of the decision for the dismissal of the request for the annulment of accessories, as the case may be.

Prior to the issuance of the decision for the dismissal of the request for the annulment of accessories, the tax authority will hear the debtor, context in which it will mention the conditions that were not fulfilled.

- **Withdrawal of the notice/request for the annulment of the accessories**

- The notice regarding the intent to benefit from the annulment of ancillary payment obligations may be withdrawn any time by the debtor;
- The request for the annulment of the accessories may be withdrawn any time by the debtor, however withdrawal of the request does not preclude the debtor's right to submit a new request for the annulment of the accessories, with the observance of the conditions provided by the Ordinance to this end.

- Additionally to the above, the Annulment Procedure also regulates a series of aspects regarding the debtor's refund right, the effects of a potential re-performance of the tax audit, pursuant to a tax settlement decision on the request for the annulment of accessories etc.

- At the same time, the templates of the forms necessary for grating the facilities provided by the Procedure are attached, whereas certain templates of the forms necessary for the application of the measures for the restructuring of budget obligations outstanding on 31 December 2018, in case of debtors with outstanding principal obligations higher or equal to RON 1 million, are amended.

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Draft law on decapitalised companies

At the beginning of September, the Romanian Senate was referred to, with a new draft law imposing, inter alia, certain measures on decapitalized companies. The draft law is currently with the permanent committees of the Senate in order to obtain the necessary approvals, and should be adopted by the Senate, at the latest, at the end of October.

The amendments proposed by the draft law refer to the Companies Law no. 31/1990 and Accountancy Law no. 82/1991 and are focused on the companies that register a net asset diminished below the limit of half of the share capital.

The draft law continues the former initiative of the Ministry of Public Finance on establishing strict measures for decapitalized companies, promoted via a Government ordinance project published in August 2019. More information regarding the former project can be found **in this alert.**

Although the draft law currently in the Senate seems to have discarded some of the implementation difficulties raised by the Ministry of Public Finance project, certain issues will continue to generate discussions on their interpretation and applicability.

The main amendments proposed by the draft law include:

1. Alternatives and obligations of decapitalised companies

The draft law introduces a possibility for decapitalised companies to redress the status of their net assets diminished below the statutory threshold by increasing the share capital via conversion into shares of the company's debts towards shareholders, resulting from loans or funding granted by the latter. The share capital increase by conversion of debts into shares will be subject to the observance of the pre-emption right regulated under Article 216 of the Companies Law; to this end, the draft law provides for the amendment of Article 210 by stipulating also exemptions with respect to the companies in which the state is a shareholder.

According to the amendments brought to Article 153^{24} of the Companies Law, the possibility to increase the share capital by way of the above-mentioned conversion becomes an obligation to the extent the companies fail to restore their net assets by the end of the financial year following the one in which the losses were registered. The draft law stipulates that such conversion obligation arises at the expiry of the term set forth by Article 153^{24} paragraph 4, which refers to the end of the financial year subsequent to the one in which losses were registered.

Irrespective of the remediation measure selected by the company with respect to its diminished net asset, the companies are required to submit a notification to ANAF, informing ANAF on the resolution to restore the net asset, passed by the general meeting of the shareholders, or if the case, on the fact that the general meeting did not gather or was unable to validly deliberate after the second convening notice. Such notification should be sent within 30 days after the resolution of the general meeting, or after the date when the general meeting should have been held and should have deliberated.

Furthermore, the draft law establishes that the Ministry of Public Finance will prepare and publish annually the list of decapitalised companies, based on the financial statements filed by companies with ANAF and the content of the notifications previously mentioned.

The provisions on decapitalisation are not applicable to companies under insolvency procedures nor to the companies regulated by the following legal enactments: GEO no. 99/2006 on Credit Institutions and Capital Adequacy, Law no. 24/2017 on financial instruments and market operations, Law no. 236/2018 on the distribution of insurances, Law no. 411/2014 on privately administered pension funds, Law no. 204/2006 on voluntary pensions.

The amendment of Companies Law in the form proposed by the draft law triggers a series of interpretation difficulties, as well as impediments related to the manner of implementation of the proposed amendments; thus, it is difficult to determine:

- To what extent the decrease of the share capital remains an alternative for redressing the status of the net assets below the limit of half of the share capital, in case there are debts of shareholders resulted from loans or other funding;
- The deadline for the implementation of the conversion of the company's debts towards shareholders into shares, considering that the draft law refers to the expiry of the end of the financial year subsequent to the financial year during which the losses were registered. In this respect, it is unclear if such deadline will imply that the conversion should take place by the end of the financial year subsequent to the one during which the losses were registered, or if companies will be solely required to ensure the convening of the GMS in order to decide upon the conversion.
- To what extent the conversion of shareholders' receivables from loans granted to the company, 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 share capital increase by conversion of the shareholders' receivables into shares can be rejected by the shareholders, considering such conversion comes from a legal obligation.
- To what extent the new provision under Article 210 (respectively paragraph (2^1)) extends the currently applicable pre-emption right exclusively dedicated to shareholders of 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 stipulates that both the Ministry of Public Finance, through ANAF, as well as any other interested party, will have the right to file actions for the dissolution of the decapitalised companies in the following situations:

- When the decapitalised companies were not able to validly deliberate within the GMS convened mandatorily and immediately by the governing bodies of the companies, following the acknowledgement of the decrease of the net asset below the limit of half the share capital value; or
- When the GMS convened according to the previous point did not gathered following the second convening.

In the situation where the companies have failed to observe the provisions under Article 153^{24} para. (4) and (4^1), ANAF has the obligation to file for the dissolution of the respective companies, within 60 days from the submission of the financial statements related to the financial year subsequent to the one during which the losses were registered.

Additionally, the Ministry of Public Finance, trough ANAF will file for the dissolution of the decapitalized companies registered for two years in a row on the list of decapitalized companies compiled by the Ministry of Public Finance.

3. New provisions concerning the determination and distribution of profits

The project proposes several amendments of interest for companies, which envisage the distribution of profits. Thus, according to the project:

- Statutory and optional reserves as well as the reported profit may be subject to the distribution as dividends;
- The 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;
- The companies that distribute dividends on quarterly basis will not be able to grant loans or perform advance payments to shareholders or affiliated parties, not even for commercial purposes, before settling the distributed dividends. Failure to comply with this obligation represents a minor offence, if the circumstances do not qualify the act as a criminal offence and is sanctioned with a fine ranging from 10% up to 20% of the amount distributed as advance payment or loan.

4. Amendments to the dissolution procedure

With respect to the dissolution of the companies, the draft law provides, in addition to the traditional dissolution procedure carried out before the courts of law, a dissolution procedure carried out entirely in front of the Trade Registry Office, without the involvement of the court.

Thus, the Trade Registry Office will ascertain the conditions for the dissolution of companies whenever those:

(i) have not registered the financial statements to ANAF within the legal term;

(ii) have not filed to ANAF the statement of inactivity at the time of incorporation;

(iii) no longer fulfil the conditions concerning the registered office;

(iv) the companies have ceased their activity or have not resumed such activity after a period of temporary inactivity in accordance to the law.

Under the last two situations, the Trade Registry Office will be able initiate ex officio the dissolution procedure.

ANAF is required to notify the companies in relation to which a dissolution action will be filled as per the above and to publish on ANAF's website the list of companies subject to dissolution claims, along with the additional term of minimum 15 days as of the upload, during which the companies are required to register documents ascertaining that the conditions for dissolution are not met.

5. 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 Accountancy Law no. 82/1991.

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