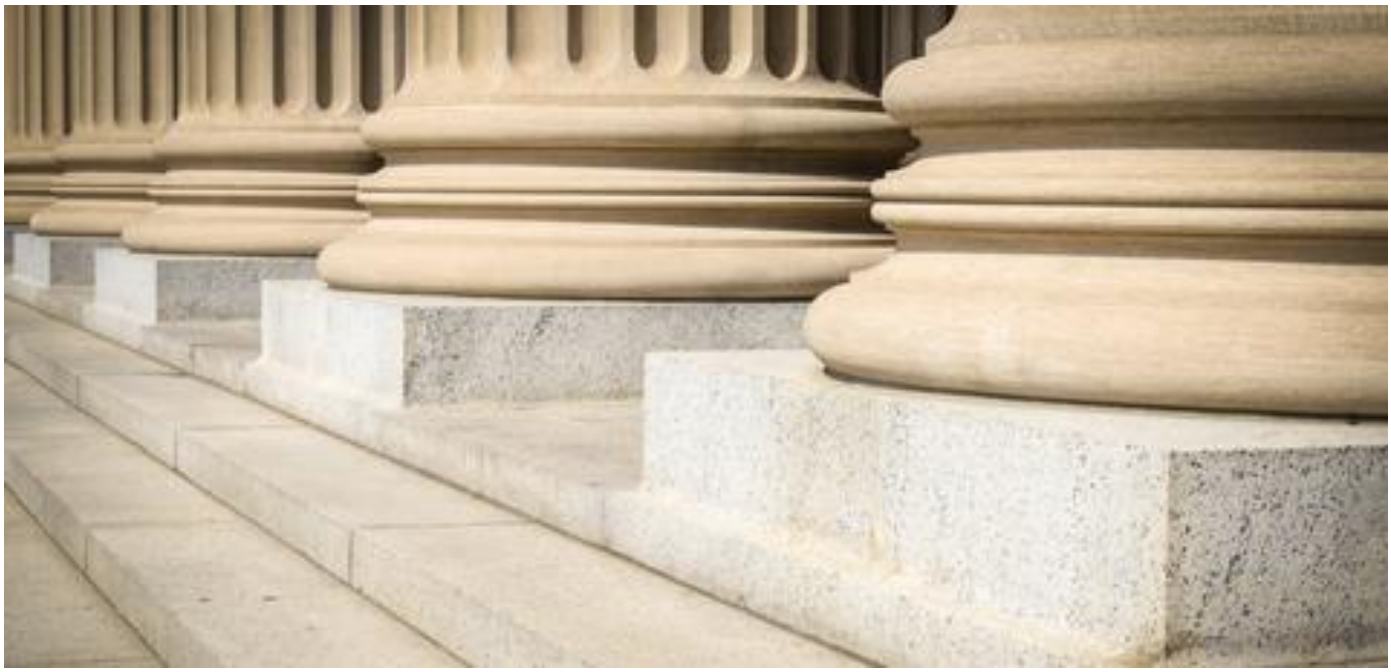

In this number:

New amendments published on Law no. 227/2015 regarding the Fiscal Code and Law no. 207/2015 regarding the Fiscal Procedure Code

On December 21, 2020 the Law no. 295 for the amendment and completion of Law no. 207/2015 on the Fiscal Procedure Code, as well as Law no. 296 for the amendment and completion of Law no. 227/2015 regarding the Fiscal Code were published in the Official Gazette no. 1266 and no. 1269/21.12.2020.

The current form published in the Official Gazette does not bring substantial changes compared to the drafts of the two Laws. Among the most important regulated aspects are the following:

- aspects related to the definition of certain terms, the corporate income tax, the value added tax, excise duties, the microenterprise tax, the tax on the income obtained in Romania by non-residents or local taxes and duties.
- tax procedure aspects, out of which the most important aspect were in legislative procedure for more than 3 years.

News regarding social protection and supporting measures for employees and employers in the context of the epidemiological situation caused by the spread of SARS-CoV-2 coronavirus

On December 7, 2020, the Government Emergency Ordinance no. 211/2020 regarding the extension of the application of some social protection measures adopted in the context of the spread of the SARS-CoV-2 coronavirus, as well as for the amendment of the Government Emergency Ordinance no. 132/2020 on support measures for employees and employers in the context of the epidemiological situation caused by the spread of SARS-CoV-2 coronavirus, as well as to stimulate employment was published in the Official Gazette no. 1189/12.07.2020 ("**GEO no. 211/2020**").

In addition, on December 9, 2020, the Law no. 282/2020 for the approval of the Government Emergency Ordinance no. 132/2020 on support measures for employees and employers in the context of the epidemiological situation caused by the spread of SARS-CoV-2 coronavirus, as well as to stimulate employment growth it was published in the Official Gazette no. 1201/09.12.2020 ("**Law no. 282/2020**").

The above-mentioned documents a establish the extension of the application of certain forms of financial support to employers, employees, as well as to other categories of individuals affected by the

current epidemiological situation, but also some amendments ad completions regarding the method of granting.

OECD Guidance on the transfer pricing implications of the Covid-19 pandemic

On December 18th, on the OECD website it was published a report on the transfer pricing implications of the Covid-19 pandemic (hereinafter referred to as 'OECD Guidance'). The OECD Guidance provides comments on the application of the arm's length principle in the pandemic context in four priority issues: (i) performing the comparability analysis; (ii) losses and allocation of Covid-19 specific costs; (iii) treatment of government assistance programs; and (iv) implications of the Covid-19 pandemic on advance pricing agreements.

The report states that these comments should be treated in close connection with the OECD Guidelines[1], not as a replacement/revision of the latter. Therefore, tax authorities and taxpayers should continue to follow also the provisions of the OECD Guidelines.

Below there is a summary of the main provisions included within the document issued by OECD.

[1]*OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, July 2017*

New amendments published on Law no. 227/2015 regarding the Fiscal Code and Law no. 207/2015 regarding the Fiscal Procedure Code

Amendments on Law no. 227/2015 regarding the Fiscal Code

General provisions

- The amendment of the definition of fiscal residence, of the place of effective management and the introduction of a detailed procedure regarding the establishment of the fiscal residence in Romania of foreign legal entities with the place of effective management in Romania.
- Introduces an update to one of the conditions on the basis of which the affiliation relationship is established. This amendment clarifies the previous definition regarding the existence of the affiliation relationship between two legal entities that are owned / controlled by the same legal entity.
- The amendment of the definitions for *participation titles* and *affiliated persons*.
- In the case of incomes obtained from Romania by non-residents, the phrase *Romanian legal entity* is replaced by the term **resident**.

Individual taxation

Tax residency

- Romanian non-resident individuals whose presence in Romania exceeds 183 days in any twelve month period commencing or ending in the fiscal year concerned is liable to pay income tax in Romania on the worldwide income **starting with the first day he declares his the center of vital interests is in Romania**. The individual is subject to income tax **starting with the first day of arrival in Romania**;
- It is clarified that the **electronic or online** tax residency certificate issued by a foreign tax authority represents the original tax residency certificate for application of the Convention for the avoidance of double taxation, respectively for implementing of the EU legislation.

Salary income and salary assimilated income

- Considering that the individual assigned to Romania has the obligation to declare the income tax due, the obligation to declare the benefits paid by the Romanian host company (e.g., children school fees) will remain the responsibility of the individual;
- The obligation to declare and pay is clearly delimited in case of benefits in cash and/or in kind received from third parties. Thus, the liability to compute, withhold and pay the social security contributions due according to the Romanian legislation stays with the Romanian resident taxpayers, if the benefits in kind and in cash are granted by other entities than employer, except for the situation of individuals who obtain salary income and salary assimilated income in Romania as a result of employment contracts concluded with employers who do not have headquarters, permanent establishment or representation in Romania.

The following shall be added to the list of income which is not taxable from an income tax perspective and is not included in the monthly basis for computation of the social security contributions, in certain conditions:

- Aid for adoption;
- Benefits in kind granted, **during the state of alert**, to the individuals who are occupying positions considered by the employer/ payer essential for carrying out the activity and which are in preventive isolation at work or in specially dedicated areas to which other persons do not have access, for a period set by the employer/ payer;
- Amounts granted to the employees engaged in telework activities to support utility expenses at the place where employees work, such as electricity, heating, water and internet data subscription, and the purchase of office furniture and equipment, within the limits set by the employer under the employment contract or the internal regulation, within the limit of a **monthly basis of RON 400** corresponding to the number of days in the month in which the employees carried out the activity in telework regime;
- Costs with epidemiological testing and/ or vaccination of the employees to prevent the spread of diseases threatening the health of employees and the public;

- Amounts paid by the employer for the early education of employees' children;
- The equivalent value of the tourist and/ or treatment services is established at a non-taxable level equal to the average salary gross income used to substantiate the Romanian social insurance budget for the year in which those were granted;

Special provisions for construction sector

- Incentives granted for the income obtained from construction field and for the mandatory social contributions are extended. Thus, all individuals who obtain income from salaries and assimilated to salaries for the period up to December 31, 2028, including, from employers working in the construction field, **regardless of the legal relationship that are generating their income**, the following tax incentives are granted:
    - reducing the social security contribution rate (pension) by 3.75 percentage points;
    - exemption from paying the health insurance contribution.

Income arising from transfer of securities

- Clarifications are provided regarding the definition of the income from Romania from the transfer of securities. Respectively, these are considered to be obtained from Romania, regardless of whether the income from operations with derivative financial instruments, realized through an **intermediary, Romanian tax resident** to which the individual has opened an account and are received in Romania or abroad;
- The deadline by which the intermediaries, investment management companies or self-managed investment companies (including non-resident individuals who obtain income from the transfer of securities issued by Romanian tax residents) are liable to:
    - submit annually to the competent tax authority a statement on the total gains / losses, for each taxpayer and, at the same time
    - to submit in writing to each taxpayer, the information on the total gains / losses for the transactions carried out during the previous fiscal year is amended.

The deadline of January 31 changes in **the last day of February**, inclusively.

- The same deadline is amended and is applied by the income taxpayers with withholding tax (with certain exceptions) who are liable to submit a tax return regarding the calculation and the income tax withholding for each beneficiary of income to the competent tax authority.

Rental income

- The method of determining the annual net income when the rent is equivalent in RON of a currency is simplified. Thus, the **actual** annual gross income is determined on the basis of the monthly rent assessed at the **average annual exchange rate** of the foreign exchange market communicated by the National Bank of Romania, from the year of income was obtained;
- For contracts in which the rent represents the equivalent in RON of an amount in foreign currency, the determination of the **estimated** annual net income is made on the basis of **the exchange rate of the foreign exchange market**, communicated by the National Bank of Romania, **during the day before the annual tax return is submitted**;
- It is considered rental income the income obtained from tourism which was obtained by the owner from renting purposes of rooms located in private housing, regardless of the number of homes in which they are situated;
- For taxpayers who derive income from rental for tourism purposes of more than 5 rooms there is no liability to notify the competent tax authority event or exceeding the number of five rooms for rent. The individuals are liable to submit an annual tax return and pay income tax and social security contributions until May 25 of the following year the income is obtained.

Other tax provisions that bring clarifications / amendments regarding the following aspects:

- The deadline for submitting the annual tax return and paying the income tax and social security contributions due changes to **25th of May of the following year**, inclusive, the initial deadline was established on 15th of March;
- Non-taxable income from awards also includes commercial **price reductions** granted to individuals, in certain conditions;

- For the purpose of computing the health insurance contribution base, clarifications are provided regarding the inclusion of investment income in the annual threshold of 12 minimum gross salaries, in force at the date of the annual tax return submission: the net income from investments (not the gross one) will be considered.

Corporate income tax

- Clarifications regarding the applicability of the corporate income tax exemption related to the investments made by a taxpayer will be granted within the limit of the corporate income tax computed cumulatively from the beginning of the year until the quarter when the assets are put into function or until the end of the respective year in the case of taxpayers who apply the annual tax declaration and payment system.
- Specific mentions regarding the correlation of the provisions regarding reinvested profit facility and tax credit for the acquisition of cash registers: the tax facility regarding the reinvested profit cannot be applied for the cash registers for which the provisions of Law 153/2020 apply.
- For the taxpayers who already applied the reinvested profit facility in the past, the exempt profit will be added back to the taxable profit of year 2020.
- The amount of the profit for which the taxpayer benefited from tax exemption as per the reinvested profit facility, less the part related to the legal reserve, could be distributed at reserves also during the following year, not only until the end of the financial year.
- Also in relation to cash registers, depreciation expenses for the cash registers for which the provisions of art. 25, para. 4, letter t) introduced through Law 153/2020, are non-deductible expenses for the computation of the corporate tax result.
- New deductible expenses are introduced. Specifically, expenses incurred by the employer in relation to the teleworking activity of the employees who carry out the activity in this regime, according to the law represent deductible expenses when determining the taxable result.
- New non-deductible expenses are introduced as well. Expenses incurred as a result of transactions with an individual situated in a state which, at the date of registration of the expenses, is included in the EU List of non-cooperating jurisdictions for tax purposes, published in the Official Journal of the European Union are treated as non-deductible expenses.
- The treatment of expenses with benefits granted to employees in equity instruments with settlement in shares is clarified: these are non-deductible expenses and they represent elements similar to expenses at the time of the actual granting of the benefits, without requiring that they should be taxed according to the income tax provisions.
- The 30% deductibility limit is eliminated in the case of adjustments for the depreciation of receivables, whereas the other conditions for deducting provisions stay in place. Note that this provision does not refer to assignments of receivables, for which the same limitation stays in place regarding the non-deductibility of 70% of the difference between the sale price and nominal value.
- Special provisions are introduced in connection with the tax treatment for leasing contracts for taxpayers who apply accounting regulations in accordance with *International Financial Reporting Standards (IFRS 16)*. These provisions are applicable only for contracts concluded starting with the date of entry into force of this law, which means that for on-going contracts the current provisions will be applicable (differences between tax and accounting treatments).
- New categories of taxpayers who can benefit from the provisions regarding the recovery of *tax losses* as a result of a spin-off, merger or separation operation are introduced.
- New rules are introduced regarding the fiscal consolidation in the field of the corporate income tax, regulating the taxation of the fiscal group. The fiscal consolidation does not exempt each member from the periodical computation of the corporate tax result. Once the option to enter in a tax group is exercised, it should be maintained for 5 years. Introduces an update to one of the conditions on the basis of which the affiliation relationship is established. Also, provisions related to the transfer pricing regime of the intra-group transactions carried out within the fiscal group are introduced, maintaining the obligation to prepare the transfer pricing file by each of its members also for the transactions carried out between members of the fiscal group.
- The amendments also mention that the provisions regarding the reporting, withholding and payment of the dividend tax are not applicable in the case of dividends paid by a Romanian legal

entity towards an undertaking for collective investment in transferable securities (UCITS) without legal personality.

Value added tax

- It is rewriting the express mention of the fact that the transfer of ownership of immovable property by a taxable person to a public institution for the purpose of extinguishing a tax obligation **does not represent a supply of goods**.
- It is **increased the turnover threshold** in which the companies that want to apply the **VAT accounting system** must fit. If until now it was 2,25 million RON, as a result of the change, it will be **4,5 million RON**.
- In order to align with the case-law of the European Union Court of Justice, it is introduced the **adjustment of the VAT base** for the **bad debts from individuals** within 12 months from the payment deadline set by the parties or, in its absence, from the date of the invoice. Adjustment will be permitted if it is provided the proof that the commercial measures have been taken to recover claims up to 1,000 RON or legal proceedings have been taken to recover claims in a higher amount than 1,000 RON. Not applicable if the supplier and the beneficiary are related parties.
- In addition to the recent amendment on the **application of the 5% VAT rate on the tax base for the supply of homes with a useful area of 120 m^2**, the amount of which does not exceed EUR 140,000 (VAT exclusive), it is introduced the specification of the **currency exchange rate** to be used for determining the equivalent amount in RON, respectively the one communicated by the National Bank of Romania, **valid on 1 January of each year**.
- It is introduced to grant the **VAT deduction right** for purchases of **alcoholic beverages and tobacco products** which are **offered free of charge for advertising purposes or to stimulate sales**.
- It is clarified the fact that **VAT deduction is allowed** within the limitation period for purchase invoices received with delay, even if the period covered by those invoices has already been subject to a tax audit. Moreover, if the supplier issues correction invoices on its own initiative (and not only as a result of a tax inspection), the right to deduct may be exercised by the beneficiary, even if it the limitation period has expired.
- They are amended the rules for determining the VAT position by VAT return, whereby those VAT payment decisions communicated by tax authorities which are suspended and no longer fall as constituting outstanding tax obligations, **to not be included in the VAT return anymore.**
- One measure that will result in encouraging non-EU companies to import goods into the EU through Romania, with the potential to increase the customs activity in the port of Constanța, is the introduction of the possibility **to appoint a tax representative for the importers not established in Romania,** if they perform an import, followed by an intra-Community supply (e.g. application of the Custom Procedure 42).
- Will be allowed the **application of the reverse charge mechanism** directly on the basis of the certificate of Authorized Economic Operator (AEO) and the local clearance certificate, without the need to obtain the certificate of deferment of VAT payment due for imported goods anymore.

  Thus, the certificate of deferment of VAT payment due for imported goods will remain necessary to be obtained for situations where the payment of VAT is requested as a result of exceeding a certain threshold of imports, which was reduced to 50 million RON for the last 6 months preceding the month in which the certificate is requested.
- In order to ensure a free competitive environment, it was introduced the measure of VAT payment through the **reverse charge mechanism** in the case of **imports of goods** carried out by persons importing certain goods subject to national simplification measures (waste, wood, cereals, as well as mobile phones, consoles, integrated circuit devices).
- It was **extended the application of national reverse charge mechanism** for all energy purchases made by taxable persons who have licenses permitting the sale of electricity. Moreover, the declaration of liability concerning negligible own energy consumption may also be filed for periods prior to the year of submission.
- It was **extended the national reverse charge simplification measure** for the **supplies of gas** made to a taxable person who has a negligible own consumption of maximum 1 %. This measure is approved to be applied until 30 June 2022.

Microenterprise tax

- Dividends received from a Romanian legal entity are deducted from the taxable base of the microenterprise tax.

Taxation of the income obtained in Romania by non-residents

- The transfers of ownership over the securities at the time of the transfer as an effect of the loan of securities and the transfers of ownership over the securities at the time of the establishment of the guarantees *do not generate taxable income in Romania*.
- The informative withholding tax statement shall be submitted by the Romanian income payers by the last working day of February of the current year for the previous year.

Local taxes and duties

- The deadline for updating the valuation report for determining the taxable value of buildings owned by legal entities is extended up to **5 years** (up until now, the Fiscal Code provided for its updating every 3 years). Moreover, if the valuation report is submitted after the first tax payment deadline, it will only be taken into account from the year following the submission.
- For the advance payment of the tax / duty on land / buildings, due for the whole year by the taxpayers, until March 31st of the respective year, a **bonification of up to 10% inclusive** is granted, established by a decision of the local council.

Excise duties:

- Between January 1, 2021 - March 31, 2021, **the specific excise duty for cigarettes** is increased to 418.76 RON / 1,000 cigarettes.
- It is clarified the obligation of the economic operators authorized in the field of carrying out activities with **natural gas, coal, lignite, coke and electricity** to register within the competent authority for excise duties purposes, before carrying out these activities.

Amendments on Law no. 207/2015 on the Fiscal Procedure Code

Several changes were made to the tax procedure, including: the establishment of new situations that generate the annulment of administrative acts, changes of general or limitation periods, issues regarding the tax audit activity, as well as the establishment of a specialized structure within the Ministry of Public Finance mandated to solve tax appeals.

- The taxpayer/payer without fiscal domicile in Romania who communicates with the fiscal bodies by electronic means of remote transmission will **no longer have the obligation to appoint a representative, having a fiscal domicile in Romania** in order to submit the declarations to the fiscal body.
- The fiscal administrative act becomes null in the following situations:
  - the fiscal body does not present the arguments for not taking into consideration the previous opinion issued in writing or the solution adopted by the fiscal body or the court for similar situations concerning the same taxpayer/payer, if the taxpayer/payer has presented the respective opinion/solution to the fiscal body prior to the issuance of the fiscal administrative act.
  - the fiscal body does not comply with the considerations of the appeal solution in case of issuing a new fiscal administrative act;
  - the issuance of the tax audit report and the taxation decision or the decision not to modify the tax base by the tax audit body after the termination of the tax audit by fulfilling its maximum duration, without it being resumed, according to law;
  - the fiscal body issues a tax appeal report/verification of the personal fiscal situation and taxation decision/decision to modify the tax bases/decision not to modify the tax bases/ decision to regularize the situation or decision to terminate the verification procedure personal tax, in the situation where findings are made in connection with certain acts provided by the criminal law.

  These provisions are applicable to tax administrative decisions communicated after this law enters into force.

- The competence to conduct on site analysis by the central fiscal body may be delegated to another central fiscal body within the N.A.F.T.A., with the obligation that the central fiscal body to which the competence has been delegated notifies the taxpayer/payer in writing.
- The terms provided by the fiscal law aiming at the fulfillment by the taxpayers/payers of certain obligations, may be extended/modified, for justified reasons related to the activity of administration of tax receivables, by order of the Minister of Public Finance.
- The tax registration code can also be used by taxpayers to fulfill tax obligations prior to the tax registration date.
- The statute of limitations for the right to establish tax receivables is suspended for the period between the date of communication of the report of the criminal investigation bodies or of the report drawn up following the request of the criminal investigation bodies addressed to the tax authorities to make findings on the facts which constitute breaches of the provisions and obligations that fall under their control and the date on which the solution to the criminal case becomes final.
- If the tax audit is not completed within a period representing twice the period provided by law, the tax audit shall cease, without issuing a tax audit report and a tax decision or a decision not to change the tax base. The tax audit body may resume the audit only once for the same period and the same fiscal obligations, with the approval of the hierarchical body superior to the one that approved the initial fiscal audit.
- If the legal entity ceases to exist after the start of the tax audit, it will continue with the successors of that entity. Thus, the tax claim is established in the name of the successors. If there are no successors, the tax audit ceases.
- The leader of the tax audit may order its suspension:
  - to perform checks upon the other members of the tax group/the single tax group;
  - in the event that the tax audit body is notified that a legal proceeding is pending against the taxpayer / payer in relation to evidence regarding the tax base which is the subject of the tax audit or where the financial-accounting documents of the taxpayer were collected by the criminal investigation body.
- The taxpayer/payer may submit an appeal against the decision on suspending the tax audit.
- The leader of the tax audit body may decide to re-verify certain types of tax obligations at the proposal of the tax audit body designated to carry out the audit or at the request of the taxpayer, if the following cumulative conditions are met
  - after the end of the tax audit, additional data appear that was unknown at the time of the tax audit;
  - the additional data has an influence on the results of the tax audit.
- The owners that sell means of transport do not have to present the fiscal clearance certificate in case they use the alienation-acquisition contract form for sale.
- No auxiliary tax liabilities are due for the amount paid on account of the principal tax liability if, prior to the establishment of the tax liabilities, the debtor has made a payment and the amount paid has not extinguished other obligations, established by
  - tax returns submitted after payment;
  - amending tax returns or tax decisions.

This treatment is also applicable in the event of extinguishing the principal tax liability by other means provided by the law.

- The penalty for non-reporting shall be reduced by 75% in the event of the default being extinguished within the legal deadline, without the need for the taxpayer to submit a request.
- The right of the taxpayer / payer to claim the interest related to the amounts to be refunded or reimbursed is subject to statute of limitation of 5 years, which starts from the date of 1 January of the year following to the moment when:
  - the amounts to be refunded/reimbursed to the taxpayer have been extinguished;

- the cancellation of the tax decision has become final;
- the reimbursement has been admitted by the appeal body or by the court and the decision is final and binding.

- A new paragraph is introduced regarding the procedure for the avoidance of the double taxation between Romanian affiliated entities, members of the same fiscal group, applicable when adjusting / estimating the income or expenses of a member of the corporate income tax fiscal group, during a fiscal inspection.
- **MPF becomes the competent authority for resolving the tax appeal. A specialized structure will function for solving the appeals on fiscal administrative** acts issued by the central fiscal body, within the Ministry of Public Finance. These provisions are applicable in 6 months from the publication in the Official Gazette.
- The decision issued by the tax authority to solve the tax appeal may be reviewed by the competent body at the request of the taxpayer/payer, in certain restrictive situations, including the non-application of the provisions which would have fundamentally changed the solution, the issuance of a decision by the Central Tax Commission, the issuance of a interpretative decision by the Supreme Court or the issuance of a EUCJ ruling contrary to the tax authority decision.

For further questions regarding the aspects mentioned in this alert, please contact us.

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News regarding social protection and supporting measures for employees and employers in the context of the epidemiological situation caused by the spread of SARS-CoV-2 coronavirus

The period of application of support measures for employers, employees and other categories of individuals is extended

In the context of the epidemiological situation determined by the spread of the SARS-CoV-2 coronavirus, the Government adopted GEO no. 211/2020, through which:

- The period for granting the indemnities provided by GEO 30/2020 for employees whose individual employment contract has been suspended at the initiative of the employer during the state of emergency due to the reduction or temporary interruption of activity, as an effect of SARS-CoV-2 coronavirus, as well as for other professionals, lawyers, athletes, individuals who obtain income exclusively from copy right and individuals who have concluded individual employment agreements **is extended until June 30, 2021**;
- Until the same date (**June 30, 2021**), the provisions and normative acts regarding the Government Emergency Ordinance no. 30/2020, are still applicable;
- Employees whose activity has been suspended as a result of the epidemiological investigation carried out by the public health department benefit from the unemployment allowance for the entire period in which the activity is suspended, but not later than **June 30, 2021**.

Also, the support measure regarding the granting of allowances for the reduction of working time provided by GEO no. 132/2020 was extended until June 30, 2021 by Government Decision no. 1046/2020, published in the Official Gazette no. 1199 / 9.12.2020.

Amendments and completion on the Government Emergency Ordinance no. 132/2020

The Law no. 282/2020 establish amendments regarding the following support measures provided by GEO no. 132/2020:

- By way of derogation from certain provisions of the Labour Code[2], in case of temporary reduction of the activity determined by the establishment of the state of emergency/alert/siege, employers have the possibility to reduce the working time of employees for this period, **as well as for up to 3 months from the date of the end of the last emergency/alert/siege period**;

[2] From the provisions of art. 112 para. (1) of Law no. 53/2003 - Labour Code

- The reduction of working time is applied for **at least 5 working days**/monthly, with the clarification that **these do not have to be consecutive**;
- Employers have the possibility to reduce the working time of employees **by no more than 50% of the daily, weekly, monthly** duration provided in the individual employment contract. This provision amends GEO 211/2020 which allowed the reduction of working time by no more than 80%;
- The obligation to submit the employer's decision in the General Register of Employees regarding the reduction of working time is abrogated;
- The allowance is borne from the chapter related to personnel expenses from the employer's revenues and expenses budget and will be settled within maximum 5 days from the issuance of the decision by Territorial Employment Agency attesting that the employer complies with the imposed conditions;
- The procedure for settling the amounts requested by the employer is introduced, as well as the list of documents required to be submitted were introduced;
- The **prohibition of cumulating the allowances** for the reduction of working time with other active support measures is clarified, this being applicable only **if the periods for granting support measures overlap**;
- It returns to the provision repealed by GEO no. 211/2020 according to which the prohibition on hiring or subcontracting staff for the performance of activities identical or similar to those provided by employees whose working time has been reduced applies at the level of subsidiary, branch or other secondary offices;
- The limitation on granting **other amounts** to the basic salary for the employer's management structure only after the end of the period of application of the measure to reduce working time is removed;
- The financial support granted to employers in the amount of RON 2,500 was also extended to employees who worked in telework regime, for at least 15 working days, **during the alert state**.

For further questions regarding the aspects mentioned in this alert, please contact us.

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OECD Guidance on the transfer pricing implications of the Covid-19 pandemic

I. Comparability analysis

The OECD Guidance mentions that the most reliable data that can be used for comparability analysis is contemporaneous information, as it best reflects the behavior of independent entities in comparable circumstances. Such an approach may be difficult to apply, in particular when applying the transactional net margin method, as FY 2020 information will typically not be available until mid FY 2021 at the earliest within the commercial databases used for such purposes. Therefore, the OECD Guidance acknowledges that, in such situations, taxpayers will have to prepare analyses based on available prior year financial information and, depending on the facts and circumstances of the case, utilizing whatever current year information is available to support their transfer prices.

Moreover, the OECD Guidance provides answers to a number of questions that have arisen recently such as:

What sources of information can be used? – The OECD Guidance states that, in principle, any public sources on the Covid-19 pandemic impact on business, industry and intra-group transactions can be used to test the arm`s length nature of the transfer pricing policies applied in 2020.

In estimating the Covid-19 pandemic impact on the comparability analysis, the OECD Guidance provides some examples of sources of information that could be used:

- Analyses of the changes in sales volumes during the pandemic;
- Analyses of the change in capacity utilization during the pandemic;
- Specific information on the exceptional costs incurred by the parties of an intra-group transaction;
- Quantifications of government assistance received by companies;
- Information on government interventions that could affect the pricing or the conduct of intra-group transactions;
- Information from the interim financial statements;
- Macroeconomic data (e.g. GDP or other macroeconomic indicators published by specific institutions);
- Statistical methods (e.g. regression analyses);
- Comparative analysis of certain forecasted versus actually recorded financial indicators;
- Analyses of the profitability/behavior of independent entities from previous or current recession periods.

Can forecast/budgeted financial data be used to support the setting of arm's length prices? – A potential approach mentioned in the OECD Guidance in this regard is to compare the budgeted financial results with the actual results of the taxpayer for the periods affected by the pandemic, in order to approximate the pandemic effects on revenues, costs and profitability margins. Such approach must be supported by detailed analysis and relevant evidence.

Can data from previous crises be used to support price setting? – The OECD Guidance states that an analysis based strictly on such data may not be relevant, given the specific nature of the Covid-19 crisis.

What practical approaches may be available to address information deficiencies? – The approaches proposed by the OECD Guidance include:

- allowing taxpayers to rely on a reasonable commercial judgment, supported by contemporaneous data in order to estimate arm's length prices;
- encouraging tax authorities in jurisdictions where an ex-ante pricing approach is used to allow taxpayers to use information that will become available after the end of the fiscal year;
- use of more than one transfer pricing method in performing comparability studies – in correlation with the OECD Guidelines.

The OECD Guidance points out that the proposed approaches should be used by taxpayers in good faith and not for profit shifting purposes.

Other important issues mentioned in the OECD Guidance:

- In selecting the comparability period, a number of circumstances needs to be assessed, such as the effects of the government interventions during the pandemic.
- Certain comparability criteria can be relaxed in order to identify relevant comparable companies.
- Loss-making entities may still be included in the comparability sample, but in accordance with the provisions of the OECD Guidelines.

II. Losses and allocation of Covid-19 specific costs

In general, the OECD Guidance states that the allocation of risks between affiliated entities is very important and an analysis in this regard is particularly relevant when allocating losses between affiliated entities. Based on this, the OECD Guidance provides answers to the following questions:

Can entities operating under limited risk arrangements incur losses? – The OECD Guidance acknowledges that a general rule cannot be established in this regard and that even the OECD Guidelines holds open the possibility that simple or low risk functions may incur losses in the short-run. In the case of such an entity, a detailed risk analysis must be considered. The OECD Guidance also emphasizes that in general, consideration should be given to whether a taxpayer is taking inconsistent positions pre- and post-pandemic and, if so, whether either position is consistent with the accurate delineation of the transaction.

How should operational or exceptional costs arising from COVID-19 be allocated between related parties? - e.g. costs with protective equipment, costs with the reorganization of spaces in order to comply with physical distancing measures, IT infrastructure required to implement teleworking arrangements

The OECD Guidance specifies that in order to allocate these costs between the transaction parties, the behavior of independent entities operating in similar circumstances must be considered. Furthermore, the OECD Guidance states that an in-depth analysis must be carried out to determine whether certain costs are exceptional or not (e.g. implementing telework after the pandemic). At arm's length, exceptional costs may or may not be passed on to customers or suppliers depending on who has the responsibility to bear such costs and (including in cases in which such responsibility is not expressly provided for) the consequences of the accurate delineation of the controlled transaction (including risk assumption) and the comparability analysis.

How should exceptional costs arising from COVID-19 be taken into account in a comparability analysis? - In general, exceptional costs may be excluded from the calculation of the net profitability indicator, unless they are related to the intra-group transaction. The exclusion must be carried out consistently at the level of comparable entities as well, taking also into consideration the accounting rules of each jurisdiction (e.g. the classification of such costs as operating or non-operating items).

Under what circumstances may arrangements be modified to address the consequences of Covid-19 pandemic? – In this respect, it is necessary to analyze the behavior of independent parties in similar circumstances. The OECD Guidance recalls as a general rule that can be observed in the case of agreements concluded between independent parties that contractual changes are made in the interest of both parties to the agreement.

How may force majeure affect the allocation of losses derived from the Covid-19 pandemic? – In the case where one of the parties to an intra-group transaction invokes a contractual force majeure clause, this should be the starting point of the transfer pricing analysis. However, the mere existence of a force majeure clause within the contractual framework does not automatically imply that such clause must be invoked as a result of Covid-19. It also does not mean that the absence of such a clause does not allow the renegotiation of an agreement. Therefore, an analysis of the economic circumstances and the pandemic impact should be carried out at the level of the entity that invokes a force majeure clause or wishes to renegotiate the agreement in the absence of such a clause.

III. Government assistance programmes

The OECD Guidance admits that the availability, substance, duration of government assistance programmes may have transfer pricing implications, whether government assistance is provided directly to a member of a multinational group or is made available to independent entities operating in the same market as the multinational group (thus having the potential to influence the behavior of entities engaged in potentially comparable transactions). Considering this aspect, the OECD Guidance provides answers to a number of questions, including:

Does the receipt of government assistance affect the price of controlled transactions? – The OECD Guidance emphasizes that it is contrary to the arm's length principle to state that the mere existence of government assistance would affect the price of an intra-group transaction. The extent to which the price of intra-group transactions can be influenced by government assistance programs depends on the specific characteristics of intra-group transactions.

Does the receipt of government assistance modify the allocation of risk in a controlled transaction? - Receiving government assistance by a taxpayer can reduce the negative quantitative impact of a risk. However, the OECD Guidance states that this aspect (i.e. reducing the negative impact of risk) must be distinguished from risk allocation in accordance with the provisions of the OECD Guidelines. Therefore, the allocation of risks in a transaction should not be changed as a result of the receipt of government assistance by one of the affiliated entities, party to an intra-group transaction.

Does the receipt of government assistance affect the comparability analysis? – The OECD Guidance admits that the comparability analysis may be affected by such government assistance programmes. Therefore, when conducting a comparability analysis, it may be necessary to consider the government assistance received by potential comparable entities.

Finally, when applying a one-sided transfer pricing method, such as the resale price method, the cost-plus method or the transactional net margin method, the OECD Guidance states that it may be necessary to specifically identify the accounting treatment of government assistance both at the tested party and comparable entities level, especially when the tested party and the comparable entities apply different accounting standards.

IV. Advance pricing arrangements (APA)

The OECD Guidance recognizes that the Covid-19 pandemic has led to material changes in economic conditions that were not anticipated when many APAs covering FY2020 and potentially future financial years affected by COVID-19 were agreed. Taxpayers who face challenges applying agreed APAs are encouraged to take a transparent, collaborative approach by raising these issues to the tax authorities in a timely manner in order to identify solutions. Based on these considerations, the OECD Guidance provides answers to the following questions:

Are taxpayers and tax administrations still bound by existing APAs considering the changes in economic conditions? – Existing APAs and the terms governing them should be respected during the pandemic, unless a condition leading to the cancellation or revision of the APA (e.g. breach of critical assumptions) occurred. In general, APAs explicitly mention the situations of non-compliance or non-fulfillment of a critical assumption and what the consequences are.

Does the change in economic conditions constitute a breach of a critical assumption? – The OECD Guidance states that the Covid-19 pandemic and the government's response have dramatically affected economic and market conditions and are likely to qualify as a breach of critical assumptions. However, it is noted that a mere change in business results during the pandemic period would not, however, lead to a breach of a critical assumption (unless the particular APA had a critical assumption regarding changes in business results). Thus, the change in economic conditions could constitute a breach of a critical assumption, but the impact that the pandemic has had on the taxpayer in question and on the industry and the market in which he operates must be analyzed.

The existing APAs must be respected and maintained until the specific case is assessed and it is established that the critical assumptions of an APA have been breached.

How should tax administrations respond to non-fulfillment of critical assumptions? - The OECD Guidance states that in the absence of other rules and procedures under national law and when applying the provision of the OECD Guidelines, failure to meet a critical assumption of an APA could have three potential outcomes, as follows:

- *Revision* – the taxpayer and tax administrations still have the benefit of the APA for the whole of the proposed period, albeit that different terms apply before and after the revision date.
- *Cancellation* - the APA is treated as being effective and in force but only up to the cancellation date and not for the whole of the proposed period.
- Revocation - the taxpayer is treated as if the APA had never been entered into.

The recently issued OECD Guidance also provides some examples of situations where the above cases are applicable in the context of the Covid-19 pandemic. Examples of ways in which a taxpayer can document situations in which a critical assumption of an APA is breached are also provided.

The document issued by the OECD also recognizes the role of the APA in ensuring tax certainty for taxpayers and tax administrations, but also in preventing future tax disputes and offers a series of recommendations on the APA currently under negotiation and the forthcoming negotiations for APAs covering periods on which the Covid-19 pandemic has an impact.

For more details, please feel free to contact us.

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