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Articles in this issue:

New amendments to the provisions of the Fiscal Code

On 10 September 2015, Law no. 227/2015 regarding the Fiscal Code was published in the Official Gazette. Please find below the main amendments made to the fiscal legislation by the new Tax Code, generally applicable starting with 1 January 2016.

Are the supplies of fuel for ships used for navigation on the high seas exempted from VAT if performed by an intermediary?

On 3 September 2015, the Court of Justice of the European Union ("CJEU") published its judgment in Case C-526/13 Fast Bunkering Klaipėda UAB ("FBK") concerning the VAT treatment of supplies fuel for ships sailing on the high seas.

The European Court of Justice Judgment concerning the VAT treatment in case of subscription contracts for the supply of consulting services

On 3 September 2015, the Court of Justice of the European Union ("CJEU") published its judgment in the Case C-463/14 Asparuhovo Lake Investment Company OOD ("ALIC").

Decision no. 3/2015 of the Central Fiscal Commission regarding the VAT exemptions for vessels used for navigation on the high seas

The Order no. 961/2015 of the Ministry of Public Finance for approving the Decision no. 3/2015 of the Central Fiscal Commission was published in Official Gazette no. 649/27.08.2015.

New amendments to the provisions of the Fiscal Code

General aspects

- New definitions of general terms/concepts have been introduced; among the most important are: transparent fiscal entities, with/without legal personality, the place of effective management, etc.
- The definition of "royalty" has been amended by taking over the provisions mentioned under the withholding tax legislation in relation to the payments that are not included in the royalties' category.
- The definition of "the arm's length principle" has been introduced and is similar to the one issued by the OECD.
- The definition of affiliation between two legal persons has been amended; however, the new definition presents a high degree of ambiguity.
- The definition of the center of vital interests has been introduced for the purpose of determining the tax residency of individuals: the place in which the individual's personal relationships and economic links are close. For analyzing personal relationship criterion, special attention will be paid to the family members who accompany the individual during his/her stay in Romania. When analyzing economic links of an individual who is an employee of a Romanian employer, consideration will be made to whether he is involved in any business in Romania and if he owns real estate or bank accounts in Romania's;
- The definition of dividend will be amended as follows:
  - The tax exemption as dividend income of the supplementary shares issued to shareholders applies irrespective of the new percentage of shares held in the company;
  - Also, shares newly distributed to shareholders are not taxed as dividend income and will be considered taxable income derived from other sources.
- The following types of income will also be taxed as dividends:
  - Gains obtained by individuals from owning shares in mutual funds;
  - Income in cash and in kind distributed by the agricultural legal entities to individuals as a consequence of owning their shares.
- The definition of the Stock option plan has been introduced and which extends the tax exemption provided by the old Law to other types of share plans under which the shares are granted for free or to other individuals than employees – i.e., to those having the title of director or general manager of the company or of any affiliated companies. To be assessed as a stock option plan, the respective program should include a minimum one year period between the grant and exercise moments.
- Clarifications have been made to the provision under which the fiscal authorities may estimate (in case the taxpayer does not provide the necessary data to establish the compliance with the arm's length principle) the amount of income or expense of either related party based on the level of the central market trend.
- Amendments have been made to the list of transfer pricing methods used to establish the arm's length value of the transactions carried out between related parties by the specific inclusion of the net margin method and profit split method.
- Clarifications have been made regarding the use of OECD-issued provisions of transfer pricing guidelines by multinational enterprises and fiscal administrations when applying the provisions on compliance with the arm's length principle.
- A provision has been introduced according to which the transfer pricing requirements provided by the Fiscal Procedure Code are to be considered in establishing the fiscal result obtained by related parties.

Corporate income tax

- The concept of "place of effective management" in Romania has been defined. Non-resident legal entities which have the place of effective management in Romania are included in the category of taxpayers who are required to declare and pay corporate income tax according to Romanian law.
- Clarifications are being made on the definition of taxable period as regards legal persons and permanent establishments.
- Clarifications are being made on the R&D activities qualifying for the tax deduction provided by the Tax Code.
- New categories of non-taxable income have been introduced such as the amounts received as a result of the refund of shareholders' / associates' share contributions due to capital reduction.
- Dividends received from a Romanian legal entity, irrespective of the holding percentage and period, become non-taxable income.
- As of 2017, the tax rate for dividends will be reduced to 5%.
- The special 5% tax rate is no longer applicable for sports betting activities.
- Special provisions have been introduced in relation to the tax regime applicable to received dividends, according to Council Directive 2011/96/EU from November 30th 2011, regarding the common tax regime applicable to parent entities and their subsidiaries in different member states. Specifically, according to the amendments made to the European legislation, specific anti-avoidance rules have been introduced in the Romanian legislation.
- The general deductibility rule has been redefined so that expenses incurred for business purposes are considered deductible for corporate income tax purposes.
- The computation method for the limited deductibility of protocol expenses and legal reserves has been simplified.
- Clarifications have been introduced as regards expenses related to non-taxable income, which are considered non-deductible for corporate income purposes.
- The deductibility limit for social expenses has been raised from 2% to 5% of the salaries' expenses.
- As regards sponsorship expenses, for the purpose of granting a fiscal credit, the limit of 3 per thousand has been raised to 5 per thousand of the turnover.
- New categories of tax deductible provisions have been introduced (e.g., provisions for receivables depreciation, specific provisions relevant for the energy industry).
- The interest rate limitation for foreign currency loans has been reduced from 6% to 4%.
- New computation rules for tax depreciation have been introduced (for example, the depreciation of subsequent expenses, included in the accounting value of an intangible asset).
- The adjustments for the depreciation of fixed assets can be considered deductible if certain conditions are met.
- New categories and conditions of deductible expenses with inventory losses have been introduced (e.g., expired goods, damaged goods, in certain conditions).
- Losses incurred with the write-off of receivables become deductible if insurance agreements have been previously concluded for the respective amounts.
- Interest / late payment penalties, fines and penalties,

owed to the Romanian / foreign authorities arising from contracts concluded with these authorities should be deductible for corporate income tax purposes.
- In order to align with the EU Directive regarding the common tax regime applicable to mergers, spin-offs, asset transfer and exchange of shares between companies in different member states, new regulations have been introduced as regards the tax treatment applicable to such operations performed between Romanian legal entities.
- New amendments have been introduced with respect to the taxation of income from the transfer of real estate in Romania, from the exploitation of natural resources, as well as from the sale / assignment of participation titles held in a Romanian legal entity.
- The tax and accounting treatment in respect of errors (significant or insignificant) have been correlated.
- The due date for the declaration and payment of advance payments relating to the fourth quarter for taxpayers who apply the annual tax system of declaration and payment of corporate income tax, with quarterly advance payments, is set for the 25th December, respectively the 25th of the last month of the amended tax year, as the case may be.

Micro-enterprise tax

- Romanian legal entities that perform activities such as exploration, development, exploitation of oil and natural gas deposits are excluded from the application of the micro-enterprise tax regime.
- The tax rate has been reduced from 3% to 1% for the first 24 months from incorporation for Romanian legal entities that fulfill certain conditions.
- New categories of exempt income have been introduced.
- For the purpose of computing the micro-enterprise tax, reserves (e.g., reevaluation, legal) which were previously deducted and not taxed in the period during which micro-enterprises were corporate income tax payers, should also be considered (added to the taxable base).
- New provisions in regards to submitting the final tax return in the case of liquidation with/without dissolution of a micro-enterprise have been introduced.

Personal Income Tax

- Romanian resident individuals will be liable to declare their worldwide income, derived both from Romania and abroad, starting with the date when they become Romanian tax residents. Initially, this obligation arose only starting with the beginning of the fiscal year following the year when they became Romanian residents.
- Thus, changing the tax residency during a fiscal year is allowed, as follows:
  - A foreign individual who met the tax residency conditions during his stay in Romania will be considered a Romanian tax resident until he leaves Romania for a period or aggregated periods of more than 183 days during any 12 consecutive months;
  - A Romanian resident individual having his domicile in Romania will be considered a Romanian tax resident until the date he proves his tax residency has been changed to another country.

Income from freelancing activities:

- New categories of deductible expenses have been introduced, as follows:
  - Expenses for salary or income assimilated to salary;
  - Expenses for insurance premiums incurred for the assets utilized within a rental or leasing contract;
  - The purchase price or the value established through technical expertise at the moment the non-depreciable assets are acquired. The deductible expenses are registered at the moment of their transfer to a third party.
- Certain provisions regarding the limited deductible expenses have been modified and new ones have been introduced, as follows:
  - The social charges within the limit of up to 5% of the annual value registered with salary expenses;
  - Losses and perishable losses incurred in handling / storage;
  - Contributions made to a voluntary pension fund or voluntary pension schemes, made to authorized entities established in one of the EU countries or EES countries, for the benefit of the taxpayer, no matter if the activity is rendered individually or within an association, up to a limit of 400 euros per year;
  - Voluntary health insurance premiums, according to Law 95/2006 regarding the reform of the health domain, republished, paid for the benefit of the taxpayer, even if the activity is rendered individually or within an association, up to a limit of 400 euros per year;
  - Operating, maintenance and repair expenses incurred for vehicles used by the taxpayer or members of an association, for maximum one per person;
  - Expenses for health and security insurance related to work activities;
  - Mandatory social security expenses – the deduction is calculated by the tax inspector at the moment when the annual net income/ annual net loss is computed;
  - Subscriptions paid to professional associations within the annual limit of 4000 euros.
- The flat rate of deductible expenses used for computing net taxable income obtained from intellectual property rights (including the creation of monumental works of art) has been increased to 40% of the gross income derived.
- The possibility to deduct the social security contributions withheld at source has been eliminated for the income derived from intellectual property rights for which advance income tax pre-payments are due.

Salary income and salary assimilated income:

- Certain provisions related to categories of non-taxable income assimilated to salary have been introduced or amended, as follows:
  - Benefits in kind represented by the use of company cars for which the expenses are 50% deductible at the level of the company;
  - Gift tickets granted to employees are no longer taxable if they are provided for children of the employees on Easter, June 1st and other similar religious holidays or to female employees on 8th of March, within the limit of 150 lei for each individual;
  - Meals provided to employees in cases when introducing food inside the unit is forbidden is considered a non-taxable benefit;
  - The limitation to a monthly subscription has been eliminated for non-taxable travel expenses between the city where the employees reside and the city where they are employed;
  - Voluntary health insurance premiums incurred by the employer for its employees, within the annual limit of 400 euros for each individual will also be exempt from taxation;
  - Allowances and other similar amounts received by directors or general managers when travelling for business purposes within the country or abroad, , within the limit of the non-taxable threshold also established for employees;
  - Amounts or benefits in kind received by employees for activities carried out aboard ON? ships in international waters in situations when they are not paid by Romanian resident employers or by Romanian permanent establishments of their employer;
  - Expenses incurred for touristic and/ or health treatment services, including transport during holiday periods, by employees and their families according to the employment agreement, are not considered taxable income.
- New categories of taxable income assimilated to salary have been introduced, such as:
  - Remuneration obtained by Board members of companies managed under dual system and of the Supervisory board, as well as any amounts paid to managers carrying out activities under management agreements;
  - The gross remuneration received by day laborers.
- Taxable allowances and any other taxable amounts received for periods of secondment in other cities, in Romania and abroad, are considered income paid for the month when the expense request is approved and not for the month when the amounts are paid by the employer to the employee.

Rental income:

- The flat rate of expenses that can be deducted from the gross rental or lease income has been increased to 40%.

Investment income:

- Starting with 1January 2017, income from dividends will be subject to a 5% tax.
- The tax rules for the following new categories of investment income have been introduced:
  - Operations with financial assets, including derivatives;
  - Gains from the transfer of financial gold.
- Clarifications have been brought regarding income obtained from the transfer of shares issued by Romanian residents, which will be considered Romanian source income, irrespective of the market where the shares are traded.
- Various types of income have been (re)introduced or clarified as being non-taxable income, as follows: income derived from owning or transferring financial assets attesting the public debt of the state, including the repo and revers-repo operations with these instruments, irrespective of the market / place of trading where the operation is made; income obtained from the initial trading of the Fondul Proprietatea shares by the successors to the conversion titles or to the shares acquired before the first trading; the conversion of the certificates of deposit into underlying assets or underlying allocation rights or of the shares or allocation rights into certificates of deposit;

- Also, the following clarifications have been added regarding the method of computing the gain/loss for certain types of transactions:
  - Loan of securities;
  - Other operations than those mentioned above and derivatives;
  - Transfer of shares obtained through an exchange (including in the case of restructurings);
  - Operations regulated by the law for the exclusion/withdrawal of individual shareholders.
- For inherited shares the purchase price/fiscal value when the successor performs the following transfer is represented by the purchase price paid by the deceased owner proven with justifying documents together with the costs incurred with drafting the succession documentation. If there are no justifying documents for the purchase price/fiscal value, the fiscal value is considered nil.
- For transferring shares received through a donation to a third party, the fiscal value taken into account for computing the gain is nil.
- Income from liquidation of legal entities also extends from a fiscal perspective to income derived from the decrease of share capital, in accordance with the law, other than the amounts received as reimbursement of contribution quotas. The taxable income is represented by the difference in value of the distributions in cash or in kind exceeding the fiscal value of the shares.

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Pension income:

- The monthly non-taxable amount has been increased to 1,050 lei, and will be incremented on a yearly basis by 50 lei, starting with the income for the month of January, until the exempted amount reaches 1,200 lei/month.

Income from prizes and gambling:

- Winnings up to 66,750 lei from casinos, poker clubs, slot-machines and scratch cards will be tax exempt. .
- For income derived by individuals from on-line gambling, slot-machines, scratch cards and poker festivals, the organizers must fulfill the following obligations by the last day of February of the current year for the income derived in the previous year:
- communicate in writing to each tax payer the information concerning the gross income derived during the fiscal year;
- file an informative statement regarding the gross income derived by each tax payer to the competent tax office.

Income from other sources:

- New items have been included in the category of income from other sources and will be taxed accordingly:
- The following categories of income will be taxed as income from other sources and will be excluded from the category of dividend income:
  - Distribution of shares made by a legal entity to one of its shareholders as a consequence of this shareholding in other conditions than those exempted by this law;
  - Goods/services received from a legal entity by a shareholder for his personal use;
  - The value exceeding the market price for goods or services purchased by a legal entity for one of its shareholders.
- Income derived from activities other than production, trade, supply of services, liberal professions and intellectual property rights, as well as those from agriculture, forestry and fisheries will also be taxed as income from other sources (and will be excluded from the category of income from independent activities);
- The tax treatment applicable to income from other sources will also apply to the penalty interest paid for not observing the deadline for paying the dividends distributed to shareholders, as per the provisions of Law no. 31/1990.
- The new legislative changes state that income derived from capitalizing movable goods under the form of waste from the company's patrimony by tax payers whose activity is the collection and capitalization of waste will be considered income from freelancing activities and will be subject to the rules applicable to that category.

Net annual taxable income:

- The carry-forward and off-set period of losses has been modified for tax payers who book annual fiscal losses from freelancing activities, rental income, agricultural activities, forestry and fisheries. Thus, these losses can be off-set and carried-forward on each type of income for the next 7 consecutive years. A similar treatment can be applied to losses derived from abroad for the afore-mentioned types of income, with the off-set being performed on each country.

Final and transitional provisions:

- For income derived in 2015, the fiscal obligations will be those in force when the income was derived.
- If tax payers have to make tax pre-payments for income derived starting from the fiscal year 2016 in account of annual income tax due, these will be computed based on the regulations in force for the previous year.

Mandatory social security contributions

Mandatory social security contributions for individuals deriving salary and salary assimilated income:

- Starting with 1 January 2017, the individual health insurance contribution will be computed based on an income not exceeding 5 times the average gross salary, while for tax year 2016 the contribution will continue to be uncapped.
- The following categories of tax-payers will be obliged to contribute to the mandatory health insurance system:

- Citizens of EU, EEA member states and of Switzerland who do not have an insurance concluded on the other country's territory producing effects in Romania, and who have requested and obtained the right to stay in Romania for a period exceeding 3 months;
- Retired persons from the public pension system who are no longer domiciled in Romania and who establish their residency in another EU, EEA member state or in Switzerland, or in a country with which Romania has concluded a bilateral social security agreement and who are not covered by an insurance that produces effects in Romania;
- Individuals who have the statute of cross-border workers.

Mandatory social security contributions for individuals deriving income from freelancing activities:

- Similarly as in the case of salary income, starting with 1 January 2017, the individual health insurance contribution due for income from independent activities will be computed based on an income not exceeding 5 times the average gross salary.
- The individual pension contribution will become mandatory for all categories of taxpayers deriving income from freelancing activities at a tax rate of 10.5%. Nevertheless, the minimum monthly taxable basis for social security contribution will be 35% of the average gross salary.
- The social security contribution rate due is the individual one. Also, there is the option to choose the full contribution rate for normal working conditions (26.3%), if the taxpayer wishes to contribute more.

Mandatory social security contributions for individuals deriving investment income:

- Starting with 1 January 2017, both investment income as well as income from other sources will be subject to the health insurance contribution. For the year 2016 these are exempted from the payment of the health insurance contribution, if the beneficiaries also derive income subject to this contribution – i.e. salary, freelancing activities, pensions etc.
- The monthly health insurance contribution basis is equal to the annual income derived divided by the 12 months of the year, but not less than a minimum gross salary. Starting with 1 January 2017, the basis will be capped at 5 times the average gross salary in force for the year in which the contribution is computed. This provision is valid for each of the following types of income:
  - Investment income such as gains from the transfer of shares and any other transactions with financial assets, including derivatives, as well as from the transfer of financial gold;
  - Dividends income;
  - Interest income;
  - Taxable income from the liquidation of a legal entity, including from the share capital reduction;
  - Income from other sources.

Withholding tax

- Starting with 1 January 2017, the tax rate applicable to dividends received from residents has been reduced from 16% to 5%.
- Income from dividends received from non-residents are excluded from taxation at a higher rate of 50%.
- A specific tax regime of associations/fiscal transparent entities that perform activities /obtain income from Romania has been implemented (the tax rules previously applicable to associations and other entities without legal personality have been amended).
- Income from the reduction of share capital, other than that obtained from the restitution of the contribution to share capital, has been included in the category of income from liquidation.
- The definition of the "payment of an income" concept has been amended.
- New clarifications have been introduced with regards to the foreign exchange rate that must be used for the computation of withholding tax.
- New categories of exempt income have been introduced.

VAT

- New categories of exempt income have been introduced.
- From 1 January 2016, the standard VAT rate is reduced from 24% to 20% and to 19% from 1 January 2017.
- The obligation of ANAF and other national authorities to take into account the jurisprudence of the Court of Justice of the European Union has been recognized.
- A provision on abuse of rights from a VAT perspective has been brought. This provision is taken from the jurisprudence of the Court of Justice of the European Union.
- The reverse charge mechanism will apply for the supply of immovable assets (buildings, parts of buildings and land of any kind), gold investments, mobile phones, PC tablets, laptops, game consoles and integrated circuit devices.
- Capital goods will also include fixed assets with a depreciation period of less than 5 years. Thus, the related rules on VAT adjustment will also change.
- The VAT adjustment of the taxable base for bad debts, where the claim of this creditor is modified or eliminated, will be allowed not just following the closing of bankruptcy proceedings, but also when a reorganization plan, acknowledged and confirmed by a court decision, is implemented.
- The reduced VAT rate of 5% will apply to the supply of textbooks, books, newspapers and some magazines as well as services consisting of admission to castles, museums etc., for which the 9% VAT rate was previously applied.
- Sporting events will also be subject to the reduced VAT rate of 5%.
- The threshold for applying the 5% rate to supplies of buildings as part of the social policy will increase from RON 380,000 to RON 450,000.
- The VAT regime applicable to mergers and spin-offs between taxable persons will be simplified, in the sense that these operations will qualify as non-taxable supplies without meeting any other conditions.
- Pro-rata application. A number of cases which may be encountered by the taxable persons who apply pro-rata have been clarified.

- The VAT deduction right must be exercised within 1 year of when the beneficiary receives the correction invoice if the VAT tax authorities assessed output VAT at the level of the suppliers during tax audits.
- A number of provisions on taxable persons in insolvency proceedings have been introduced (e.g. the VAT refundable balance should not be carried forward in the first VAT return submitted after the insolvency procedure is opened and should be requested for refund by correcting the previous VAT return).
- The article on individual and joint liability for payment of VAT has been removed.
- The possibility to cancel the VAT refund request by submitting a notification to the tax authorities has been introduced.
- The beneficiary must issue a self-invoice to adjust the deductible VAT if the supplier did not issue the invoice to adjust the collected VAT (e.g. for commercial discounts).
- The date until when the payment of import VAT in customs is deferred for persons who obtained certificates from the competent bodies has been removed. Also, the provision stating that from 1 January 2017, taxable persons registered for VAT purposes will not effectively pay VAT in customs has been removed.

Excise and other special taxes

Rules of general application:

- The tax authorities and other national authorities must take into account the jurisprudence of the Court of Justice of the European Union in the field of value added tax and excises;
- Taxpayer will be allowed to carry out other manufacturing activities in the warehouse;
- The introduction of a legal basis for establishing special conditions of guarantee for an authorized warehouse which is also a registered consignor.

Excise duties:

- Excise duties will be reduced starting 2017 for the main energy products (gas oil, unleaded petrol, leaded petrol);
- The changes in excise duties starting 2016 are the following:
- Beer: decrease from 3,9 lei/hl/1grad Plato to 3,3 lei/hl/1grad Plato;
- Sparkling wines: decrease from 161,33 lei/hl of product to 47,38 lei/hl of product;
- Sparkling fermented beverages: decrease from 213,21 lei/hl of product to 47,38 lei/hl of product;
- Still fermented beverages: increase from 47,38 lei/hl of product to 396,84 lei/hl of product;
- Intermediate products: decrease from 781,77 lei/hl to 396,84 lei/hl;
- Ethyl alcohol: decrease from 4.738,01lei/hl pure alcohol to 3.306,98 lei/hl pure alcohol;
- Cigarettes: increase from 412,02 lei/1000 cigarettes to 430,71 lei /1000 cigarettes;
- Both crude oil from domestic production and products that are currently found in Chapter II “Other excisable goods” under Title VII, like coffee, jewelry, hunting weapons, ammunition, vehicles with an engine capacity of more than 3000 cc yachts, boat engines, will be excluded from the taxation range;
- Substances used in electronic cigarettes and tobacco heated products have been included in the category of non-harmonized excise duties.

The excise refund:

- Refunds of excise duties for excisable goods reintroduced in the tax warehouse can also be done in other situations than the ones currently mentioned (i.e. destruction, restoration);
- Excise duties can be refunded for the products that are not produced in a tax warehouse (coal, coke, lignite) and are exported or shipped to another Member State.

Alcohol and alcoholic beverages:

- The additional condition that the share of the absolute alcohol content in the final product cannot be at a minimum rate of 50% of the base still fermented has been eliminated from the definition of intermediate products;
- The possibility of the retail sale of beer within a tax warehouse authorized exclusively for the production of beer has been excluded;
- The obligation has been introduced that the identification data of the manufacturer must be mentioned on the individual packaging of alcoholic beverages.

Irregularities and misconduct:

- The differences found between the amounts registered at the shipment / reception of the products under suspension of excise duties, which can be attributed to the tolerances of the measurement devices and are within the limits of the classes of precision of the measurement devices, are not considered irregularities

Local taxes

- The local tax on accommodation in hotel units has been removed.
- The local public authorities can increase the applicable local tax rates. However, the additional percentages cannot exceed 50% of the maximum standard tax rates applicable (as compared to 20% until 2016).

Tax on buildings*:*

Starting from 1 January 2016, the tax on buildings will be established depending on their purpose (residential, non-residential, mixt) and not only based on the owner’s statute, as it is currently established (individual or legal person).

- In this respect, the new Tax Code establishes new definitions of the following concepts: residential building, non-residential building and building with a mixed destination.
- In order to implement the new taxation regime, individuals who own non-residential buildings or buildings with a mixed destination, as well as legal entities that own buildings (irrespective of their type/destination), should submit a statement to the relevant local tax authorities by 29 February 2016, notifying the type of the building and its destination.
- The new tax rates that will be used starting from 1 January 2016, both by individuals as well as legal entities, will be established within the 0.08%-2% range, depending on the building’s purpose.

- The increased tax rate applicable for buildings owned by legal entities that were not re-evaluated during the past three years has been reduced to 5% (as compared with the currently applicable rates of 10-20% in the case of buildings not re-evaluated during the past 3 years, respectively 30 – 40% in the case of buildings not re-evaluated during the past 5 years).
- Another amendment related to the declaration and payment of local taxes on buildings is that starting with the year 2016, the local tax on buildings will be owed for the entire tax year by the person who owned the building as of 31 December of the previous tax year.
- New types of buildings exempt from tax have been introduced.
- The provision according to which increased taxes on buildings are applicable to individuals who own more than one building has been removed.

Tax on land:

- The tax exemption applicable for land covered by a building has been removed.
- The compliance liabilities (declaration and payment) have been amended similar to the tax on buildings – i.e. , the tax on land will be owed for the entire tax year, and not only for the ownership period.
- The local authorities may increase the tax on agricultural land that has not been used for 2 consecutive years by up to 500%, starting with the third year in which the land is not in use.

Construction tax

As of 1 January 2017, the construction tax will not be applicable in Romania.

Are the supplies of fuel for ships used for navigation on the high seas exempted from VAT if performed by an intermediary?

FBK (A) supplied fuel, within Lithuanian waters, to vessels used for navigation on high seas. The fuel came from outside of the European Union and was stored in Lithuania under customs warehousing procedures, so that import VAT was not due yet. When FBK received an order, the fuel was taken from the customs warehouse and was sold „free on board" (FOB). FBK loaded itself the fuel into vessels' fuel tanks.

However, the orders were not placed directly by the owners or ships' operators (C), but by intermediaries (B) established in various EU Member States. Thus, FBK (A) invoiced the sales to the intermediaries (B) rather than to the owners or vessels' operators (C).

The intermediaries (B) acted in their own name both with regard to FBK (A) and to the owners or operators (C) – buying from A and selling to C – but they never performed the actual delivery of any of the fuel.

FBK applied the VAT exemption on the invoices issued to the intermediaries.

Relying mainly on the decisions of the CJEU in Velker and Elmeka cases, the Lithuanian tax authorities took the view that the A-B supplies, being made to intermediaries, were "performed at a previous stage in the commercial chain" and therefore could not benefit from the VAT exemption

In this context, the CJEU was asked to determine if the VAT exemption for supplies of fuel to vessels used for navigation on the high seas is applicable to the final supply to the operators of vessels or can be extended to prior supplies (in the commercial chain) to intermediaries acting in their own names

CJEU arguments

Starting from the Case C-185/89 Velker International Oil Company (Velker), the CJEU reiterated that the supplies of fuel to vessels used for navigation on high seas are VAT exempted because they are equated to exports. Therefore, similar to the exemption for export transactions, the exemption for supplies of fuel for vessels sailing on high seas is applicable on the last supply in the commercial chain (i.e., the supply to the operator of the vessel). The supply of goods to an intermediary acting in its own name cannot benefit from this exemption. This is because it is not made at the last stage of the commercial chain, since it is intended that the intermediary will acquire the goods not to use them, but to resell them to a third party.

Further, the CJEU mentions the Case C-33/11 A and confirms the supply of an aircraft to an intermediary benefits from a VAT exemption if the acquisition is made with a view of its exclusive use by an airline that operates primarily on international routes. The two exemption schemes are similar in the sense that their application depends on the future use of the goods concerned. However, unlike the naval domain, in the case of aviation there are widely accepted norms for all Member States, based on which the tax authorities can track the destination of the goods. Therefore, the CJEU concludes that analogy between the two exemption regimes cannot be made.

The key point in the CJEU judgment is the moment of the transfer of the right to dispose of the fuel as owner. The Court observes that FBK transfers the legal ownership right of the fuel only when the vessel operator may dispose of the fuel loaded in the tank vessel. Therefore, although the intermediary obtained the legal ownership of the goods, it never has the right to dispose of the goods as an owner (prerequisite for considering that there is a supply of goods from a VAT perspective).

Based on this reasoning, the CJEU concludes that the operations carried out by FBK cannot be classified as supplies made to intermediaries acting in their own name, but they should be regarded as being supplies made directly to the operators of vessels, which may, on that basis, benefit from the VAT exemption.

Conclusion

The Court concluded that exemption for fuel supplies for vessels used for navigation on the high seas does not apply in principle to supplies made to intermediaries acting in their own name, even if at the date on which the supply is made the ultimate use of goods is known and duly established. However, the exemption may apply if the transfer of the ownership of the fuel to intermediaries took place at the earliest at the same time when the operators of vessels used for navigation on the high seas were actually entitled to dispose of those goods as if they were the owners.

Practical aspects

In Romania, the existing practice is that the VAT exemption applies only on the last supply in the commercial chain (to the operator of vessel). In this respect, the decision in this case brings a significant change in the treatment. We also expect the decision to have an impact not only for the fuel used for navigation, but also for fuel used for aviation, and for exports (where the VAT exemption applies only to the last supply of the commercial chain).

However, we believe that the decision does not fully clarify the issue of the VAT treatment in such situations.

The reasoning leads to the conclusion that despite of the contractual provisions, there is only one supply of goods from a VAT perspective. The question is, if in these conditions, we can consider that there is a transaction from a VAT perspective between the intermediary and the operator of the vessel. If so, the applicability of the exemption for this transaction is also unclear.

The CJEU arguments could create commercial issues because, if we consider that the first supplier (A) performs a supply of goods directly to the operator of the vessel (C), the invoicing should reflect this reasoning, although no direct commercial relations exist between the two parties.

Moreover, we believe that the decision could have much wider implications beyond the applicability of the exemption for fuel for vessels. CJEU's interpretation generates multiple open questions on the chain transactions and the applicability of commissionaire structure.

We look forward to the tax authorities' position on the application in practice of the CJEU decision.

The European Court of Justice Judgment concerning the VAT treatment in case of subscription contracts for the supply of consulting services

ALIC is a company whose business is mainly concerned with agriculture, horticulture, livestock rearing and related activities. ALIC entered into subscription contracts for consulting services with four other companies, (hereinafter, together the „service providers"), in the areas of corporate finance, commercial development, legal advice and information security, respectively.

Under those contracts, the service providers undertook to:

- Make themselves available to ALIC for consultation, meetings and commitments, on each working day from 9 a.m. to 6 p.m. and, when needed, outside office hours, including on Sundays and public holidays;
- Where appropriate, ensure, during such time as necessary, the presence of a competent person at ALIC's offices and/or those of a third party associated with ALIC, including outside office hours and on Sundays and public holidays;
- Obtain documents and necessary information and exchange them between the parties in order to guarantee the fullest and most efficient protection possible of ALIC's interests, and
- Transmit, in good time, to the customer, for consultation, negotiation and signature, all the necessary documents relating to the protection of the customer's interests.

The service providers stated that they will not enter into similar contracts with third parties whose interests were contrary to those of ALIC and/or which were competing directly with ALIC.

In accordance with contractual terms, ALIC owed a weekly remuneration, disbursed every Monday following the week for which it was due. ALIC deducted the VAT stated on the invoices issued by the service providers.

The Bulgarian tax authorities challenged ALIC's right of deduction on these services due to the fact that no proof had been provided as to the type, quantity and nature of the services actually provided.

The question in this case was whether the term „supply of services" includes subscription contracts for the supply of consulting services, in particular those of a legal, commercial or financial nature, under which a supplier has agreed to be available to the customer during the term of the contract. If so, the Court was asked to decide when the chargeable event and the chargeability of VAT for these services would occur.

CJEU judgments and conclusions

The CJEU restates that a service is taxable only if a legal relationship exists between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient.

Referring to the Court's previous case-law, CJEU reaffirmed that where the supply of services which is characterized by the permanent availability of the service provider in order to supply, at the appropriate time, the services required by the customer, it is not necessary, in order to find that there is a direct link between that service and the consideration received, to establish that a payment relates to a personalized supply of services at a specific time carried out at the request of a customer.

The Court concluded that in the case of the subscription paid by ALIC there is a supply of service which consists in the fact that the provider is available to the recipient to provide assistance during the period specified in the subscription agreement, independent of the volume and nature of consulting services actually provided in period the remuneration is referred.

Regarding the chargeable event and the chargeability of VAT, the Court considered that the subscription represents a supply of services that implies successive payments. As a result, the chargeable event occurs upon the expiry of the period in respect of which the payment has been agreed, irrespective of whether and how often the customer has actually made use of the supplier's services.

Practical aspects

In practice, the tax authorities request for supporting documentation (e.g., activity reports, minutes, etc.) which will enable companies to prove that the services were actually provided, including in case of such subscription services. The CJEU decision comes to contradict such an approach, considering that there is a supply of services from a VAT perspective even if in a certain period the beneficiary did not required consulting services.

Decision no. 3/2015 of the Central Fiscal Commission regarding the VAT exemptions for vessels used for navigation on the high seas

The Central Fiscal Commission's Decision is targeting the unitary application of art. 143 para. (1) letter h) of the Fiscal Code on VAT exemptions for seagoing vessels (as foreseen in the period 1 January 2007 - 31 December 2013) / vessels used for navigation on the high seas (as foreseen from 1 January 2014).

In this regard, the Central Fiscal Commission defines the concepts of navigation "on seas" (with applications in the period 1 January 2007 - 31 December 2013) and navigation "on high seas" (applicable since 1 January 2014) in a similar manner. Both cover any part of the sea outside the territorial waters of any country, which is beyond 12 nautical miles, measured from baselines, determined in accordance with the UN Convention on the Law of the Sea, signed at Montego Bay on 10 December 1982.

The Decision brings clarifications about the fact that VAT exemptions apply only if the vessel is effective and mostly used for navigation on seas / high seas. In order to determine whether a vessel meets this condition, the objective criteria cannot only be taken into account (such as the length or tonnage of the ship). These criteria could however be used to exclude from the scope of VAT exemptions vessels which would not, in any event, be capable of sailing on seas / high seas.

In order to determine whether a vessel that meets the objective criteria was effectively and mostly used for navigation on seas / high seas, any means of proof required by the law can be used.

In addition, the Central Fiscal Commission clarifies that for the application of the VAT exemption (as in force from 1 January 2014) in the case of vessels used for rescue or assistance at sea or for inshore fishing, the requirement for navigation on the high seas does not apply.

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

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