

Tax & Legal Weekly Alert

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Articles in this issue:

Amendments to Law no. 344/2006 regarding the posting of employees in the framework of the provision of services

GEO no. 28/2015 amended and supplemented Law no. 344/2006 regarding the posting of employees in the framework of the provision of services, in order to: **(i)** regulate cases where undertakings established in Romania post employees to other EU Member States, EEA or Switzerland; **(ii)** determine the applicable legal provisions to employees who perform international transport operations in favor of undertakings established in Romania and do not fall within the scope of Law no. 344/2006.

Recent amendments of the Tax Code and of other regulatory acts

The Tax Code was amended in relation to reclassifying an economic activity and applying the 9% VAT reduced rate for supplies of draft beer. Also, the European Court of Justice issued two decisions on the qualification of individuals as taxable persons for VAT purposes and on the VAT exemption for veterinary services. Last but not least, clarifications were brought on the taxation of tips.

Statistics on transfer pricing audits performed by the Romanian Tax Authorities (RTA) during the first semester of 2015

The National Agency for Fiscal Administration (ANAF) issued a press release with regards to the transfer pricing audits performed by the Romanian Tax Authorities (RTA) during the first semester of 2015. The document points out that amounts assessed during transfer pricing audits in the first half of 2015 are 130% higher than the amounts assessed for the entire fiscal year 2012 and provides other relevant insights into inspectors' activity, to date.



Amendments to Law no. 344/2006 regarding the posting of employees in the framework of the provision of services

The lack of rules governing the posting of employees by undertakings established in Romania to other EU Member States, EEA or Switzerland has led in practice to the inconsistent application of provisions concerning cross-border secondment.

In view of remedying this situation, several amendments were adopted, among which we mention the following:

- It established that Law no. 344/2006 shall apply to undertakings established in Romania which, in the framework of the transnational provision of services, take one of the following measures:
 - Post employees from Romania to the territory of another EU Member State, EEA or Switzerland on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the employee during the period of posting;
 - Post employees from Romania to an establishment or to an undertaking owned by the group in the territory of another EU Member State, EEA or Switzerland, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting;
 - In their capacity of temporary employment agencies or placement agencies, hire out an employee to a user undertaking established or operating in the territory of another EU Member State, EEA or Switzerland, provided there is an employment relationship between the temporary employment agencies or placement agencies and the employee during the period of posting.
- Whatever the law applicable to the employment relationship, posted employees shall benefit from the terms and conditions of employment which, in the Member State where the work is carried out, are laid down by law, regulation or administrative provision and/or by collective agreements or arbitration awards which have been declared universally applicable, with respect to: **(i)** maximum work periods and minimum rest periods; **(ii)** minimum paid annual holidays; **(iii)** the minimum rates of pay, including overtime rates; **(iv)** the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; **(v)** health, safety and hygiene at work; **(vi)** protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; **(vii)** equality of treatment between men and women and other provisions on non-discrimination.
- It established that provisions contained in the Romanian Labor Code regarding the assignment shall apply in respect of employees who perform international transport operations in favor of undertakings established in Romania and do not fall within the scope of Law no. 344/2006.

GEO no. 28/2015 amending and supplementing Law no. 344/2006 regarding the posting of employees in the framework of the provision of services was published in the Official Gazette no. 476 of 06.30.2015 and entered into force on 06.30.2015.

Law approving Emergency Government Ordinance no. 6/2015 amending Law no. 571/2003 approving the Fiscal Code was published.

The changes brought to the Tax Code refer to personal income tax, VAT and excise duties. Please find below the key changes brought by the Law:

Personal income tax

Art. 7, par. (1) has been modified, as points 2.1. and 2.2. have been repealed. The two points were covering the criteria based on which an activity can be reclassified as being dependent. In exchange, point 4 is introduced in the same article covering new criteria that define/characterize an independent activity.

Thus, seven criteria were introduced out of which at least four must be fulfilled in order for an activity to be considered independent, as follows:

- the individual has the autonomy to choose where and how the activities will be performed, as well as to determine the work schedule;
- the individual is free to perform activities for more than one client;
- the individual assumes the risks inherent to the activity performed;
- the activity is performed by using the individuals' own assets;
- the activity is performed by making use of the intellectual and/or physical capacity of the individual, taking into account the specifics of the activity;
- the individual is part of a professional body with attributes in representation, regulation and supervision of the activity performed;
- the individual has the autonomy to perform activities directly with employees or in collaboration with third-parties.

Art. 11, par. (1) regarding the substance over form principle was also changed such that it extends to all kinds of activities (it is no longer limited to "transactions").

Also, the tax authority will be obliged to motivate their tax decision by indicating the relevant elements, as well as all the evidence considered when reassessing or reclassifying a transaction/activity.

Value added tax

Starting with 6 August 2015, the 9% reduced VAT rate will also apply to the beer classified under HS code 22 03 00 10 Beer made from malt in containers holding more than 10 litres (draft beer).

Article 127 from the Tax Code, also lists the public international bodies, along with the public bodies, as not being taxable persons for the activities performed as public authorities. The public international bodies are defined as international intergovernmental organizations, which are governed by public international law and not by the local law of any state.

A new type of activity is introduced for which the public bodies and the public international bodies are taxable persons: operations carried out by agricultural intervention agencies performed on agricultural products and according to regulations regarding the common organization of the market of those products.

Excise duties

New provisions were introduced applicable starting with 6 August 2015, regarding the beer produced by small independent beer factories, for which the production in the previous year did not exceed 200.000 hl/year.

On 9 July 2015, the European Court of Justice issued the case C-183/14 Radu Florin Salomie, Nicolae Vasile Oltean and the case C-144/14 Cabinet Medical Veterinar Dr. Tomoiaga Andrei

The case C-183/14 Radu Florin Salomie, Nicolae Vasile Oltean questions the quality of a natural person or of a partnership of natural persons, who build and sell immovable properties, to be taxable persons and the possibility for them to deduct the input VAT, though they were not registered for VAT purposes at the moment the described operations were performed.

The case debates the situation of Mr Salomie and Oltean, who entered in a partnership with other natural persons, in order to build and sell immovable properties. The partnership did not have legal personality and was not registered for VAT purposes.

Further to these operations, the tax authorities initially assessed tax on income from the transfer of properties from personal assets. After two years, the tax authorities considered that the respective natural persons were taxable persons for the operations described above, and thus assessed VAT at the moment when the turnover obtained from these operations exceeded the threshold applicable for the margin scheme for small enterprises.

The Court is requested to answer the following:

- to clarify the possibility of these natural persons to be considered taxable persons for the operations performed;
- the compliance with the European VAT principles of the tax authorities' practice to reconsider their position and reclassify the operations at case, without any major legislative change;
- the possibility to refuse the VAT deduction right further to the fact that the taxable person was not registered for VAT purposes at the moment the acquisitions were performed.

The Court concludes that EU VAT principles do not preclude the tax authorities' practice to charge VAT on certain operations, if this decision is based on clear and precise rules and if a reasonable expectation that VAT would not be applied was not created in the mind of a prudent economic operator.

Also, the Court concludes that the VAT deductibility right cannot be denied on the ground that the taxable person was not registered for VAT purposes at the moment the acquisitions were performed.

Case C-144/14 Cabinet Medical Veterinar Dr. Tomoiaga Andrei questions the quality of veterinary services to be VAT exempt

Starting with 1 January 2007, the VAT exemption for veterinary services was removed from the Romanian VAT legislation. However, the Romanian tax authorities continued to consider these services as VAT exempt.

Since the Regulation no. 1620/2009 was issued, clarifications were brought regarding the fact that veterinary services are not included in the VAT exempt medical services. As a consequence, the Romanian tax authorities' practice has changed.

Thus, in May 2011, the Romanian tax authorities assessed VAT for the services performed by Cabinet Medical Veterinar Dr. Tomoiaga Andrei VAT during October 2007 – December 2010.

In this context, the following questions are addressed to the Court:

- Must the VAT Directive be interpreted in the sense that the national tax authority is required to register for VAT purposes by default a taxable person, at the moment it exceeded the threshold for the margin scheme for small enterprises, if this information can be obtained when submitting other tax returns?
- Does the principle of legal certainty preclude the tax authority to interpret the national VAT law in the sense of including in the area of VAT exempt operations the veterinary services and further changing this approach, as per the issuance of a Regulation?

The Court concludes that the Member States are required to check taxable persons' returns, accounts etc. and to calculate and collect the taxes due. However, this does not imply that they are required to register for VAT purposes by default a taxable person, at the moment it is established that it exceeded the threshold for the margin scheme for small enterprises, further to submitting other tax returns (than VAT statements).

Also, it is concluded that the European VAT principles do not preclude a tax authority to decide to reclassify certain operations, if this decision is based on clear rules and the practice of the respective tax authority does not create in the mind of a reasonably prudent economic operator a reasonable expectation that VAT would not be applied.

New amendments brought to Government Emergency Ordinance no. 8/2015 on amounts cashed as tips (Law no. 186/6.07.2015)

Among others, the law also regulates the amounts cashed as tips, as follows:

- it removes the definition of the term *tip*;
- booking of the amounts representing tips is no longer compulsory;
- the declaration of the cash by the personnel and keeping the personal cash register are no longer compulsory; the internal regulation regarding the destination of the amounts cashed as tips is no longer compulsory.

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

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Statistics on transfer pricing audits performed by the Romanian Tax Authorities (RTA) during the first semester of 2015

According to this document, the RTA established the following transfer pricing adjustments by testing the compliance with the arm's length principle:

- approximately RON 136 million (EUR 31 million) representing additional tax liabilities;
- approximately RON 207 million (EUR 47 million) representing the reduction of the fiscal loss allowed to carry forward;
- approximately RON 614 million (EUR 138 million) representing additional taxable base.

The document points out that amounts assessed during transfer pricing audits in the first half of 2015 are 130% higher than the amounts assessed for the entire fiscal year 2012.

The RTA mentioned that the highest transfer pricing adjustments assessed in 2015 for a single taxpayer were RON 27 million (EUR 6 million) additional tax liabilities and a reduction of the fiscal loss of RON 21 million (EUR 4.7 million). The taxpayer is involved in manufacturing activities and sells most of its goods to related parties.

The regions where the tax inspectors assessed the highest transfer pricing adjustments are Cluj-Napoca, Timisoara and Prahova. For large taxpayers, the total transfer pricing assessments during the first half of 2015 totaled RON 59,7 million (EUR 13,4 million).

In an ongoing effort to provide more relevant data to tax inspectors involved in transfer pricing audits, methodologies and guides that ensure a uniform approach were put in place, transfer pricing risk assessment procedures are utilized and a special application that allow real-time monitoring of tax inspections that required the preparation and submissions of the transfer pricing file.

The press release also mentions that 261 fiscal inspectors that benefitted from specialized training in order to perform transfer pricing audits to date. The trainings were provided by experts from the World Bank and through dedicated collaboration with UK's tax and customs authority on transfer pricing matters.

Please find the complete press release in Romanian language [here](#).

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

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